

1 EXPEDITE
2 No Hearing Set
3 Hearing is set:
4 Date:
5 Time:
6 Judge/Calendar:

7
8 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

9 NORTHWEST AQUACULTURE
10 ALLIANCE, a Washington nonprofit
11 corporation,

11 Petitioner,

12 v.

13 WASHINGTON STATE
14 DEPARTMENT OF NATURAL
15 RESOURCES,

15 Respondent.

Case No. _____

PETITION FOR JUDICIAL REVIEW OF
AGENCY RULE, PETITION FOR
DECLARATORY JUDGMENT, AND
ASSOCIATED ENVIRONMENTAL REVIEW
UNDER STATE ENVIRONMENTAL POLICY
ACT, RCW CH. 43.21C

16 1. This Petition for Judicial Review, Petition for Declaratory Judgment, and
17 Associated Environmental Review Under State Environmental Policy Act, RCW Ch. 43.21C
18 (“Petition”) challenges Respondent Washington State Department of Natural Resources’
19 (“DNR”) predetermined and inadequate rulemaking process that resulted in invalid
20 administrative rules that ban commercial finfish net pen aquaculture on state-owned aquatic
21 lands in Washington (“Net Pen Ban Rules”).

22 2. In 2018, through the passage of Engrossed House Bill 2957, Laws of 2018, ch.
23 179 §§ 1-12, the Washington State Legislature set forth a phase-out of the production of
24 nonnative finfish species (such as Atlantic salmon) in commercial net pens. In doing so, the
25 legislature crafted a compromise that stopped short of banning commercial finfish net pen
26 aquaculture altogether and allowed farming of native species (such as steelhead) to continue in

1 commercial net pens.

2 3. On November 17, 2022, DNR began its predetermined process to accomplish
3 what the legislature declined to do. Then-Commissioner of Public Lands Hilary Franz issued
4 Commissioner’s Order No. 202211 (the “Order”), directing DNR leadership to take the
5 necessary actions to prohibit all commercial finfish net pen aquaculture on state-owned aquatic
6 lands. Publicly, then-Commissioner Franz announced that Washington was ending the practice
7 of net pens in its waters. The Northwest Aquaculture Alliance (“Alliance”) challenged the Order.
8 However, following DNR’s representation that the Order had no effect and was not a
9 predetermined decision of forthcoming rulemaking, the Thurston County Superior Court
10 dismissed the challenge.

11 4. The Alliance now comes before the Court with DNR’s predetermined rulemaking
12 process complete and the matter ripe for challenge. In banning commercial finfish net pen
13 aquaculture, DNR failed to satisfy Administrative Procedure Act (“APA”) procedures; stepped
14 beyond its statutory authority; promulgated arbitrary and capricious rules; and violated State
15 Environmental Policy Act (“SEPA”) requirements.

16 **I. NAME AND MAILING ADDRESS OF PETITIONER**

17 5. The Petitioner is:

18 Northwest Aquaculture Alliance
19 P.O. Box 8562
Covington, WA 98042

20 **II. NAME AND MAILING ADDRESS OF PETITIONER’S ATTORNEYS**

21 6. Petitioner is represented by:

22 Douglas J. Steding, WSBA #37020
23 Merryn B. DeBenedetti, WSBA #35777
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III. NAME AND MAILING ADDRESS OF THE AGENCY WHOSE ACTION IS AT ISSUE

7. Respondent Washington State Department of Natural Resources (“DNR”) is an administrative agency of the State of Washington. DNR’s address is:

Washington State Department of Natural Resources
Natural Resources Building
MS 47000
1111 Washington St. SE
Olympia, WA 98504
360.902.1000

IV. IDENTIFICATION OF AGENCY ACTIONS AT ISSUE

8. The Petition challenges DNR’s adoption of agency rules amending WAC 332-30-106 and adopting WAC 332-30-138—the Net Pen Ban Rules—as approved by the Board of Natural Resources (“BNR”) and provided by DNR’s permanent rulemaking order, filed on January 29, 2025 (attached as **Exhibit A**).

9. In addition to challenging that underlying action, the Alliance challenges DNR’s associated review under SEPA, including DNR’s Notice of Final Determination (attached as **Exhibit B**) retaining its Determination of Nonsignificance (attached as **Exhibit C**).

V. IDENTIFICATION OF PERSONS WHO WERE PARTIES IN ANY PRIOR ADJUDICATIVE PROCEEDINGS

10. There have been no prior adjudicative proceedings.

VI. FACTS TO DEMONSTRATE THAT THE PETITIONER IS ENTITLED TO OBTAIN JUDICIAL REVIEW

A. Jurisdiction and Venue.

11. This Court has jurisdiction over this Petition pursuant to RCW 34.05.570(2), RCW 34.05.573, RCW 34.05.542, and RCW 43.21C.075.

12. Venue for this Petition challenging the validity of the Net Pen Ban Rules is appropriate in Thurston County Superior Court pursuant to RCW 34.05.514 and RCW

1 34.05.570(2).

2 **B. Standing.**

3 13. The Alliance has standing to challenge the Net Pen Ban Rules because the
4 Alliance has been prejudiced by the rules, the Alliance's interests were among those that the
5 agency was required to consider during rulemaking, and a judgment invalidating the Net Pen
6 Ban Rules would substantially eliminate or redress the prejudice to the Alliance.

7 14. The Alliance has standing for its SEPA claims because the Alliance is an
8 aggrieved party that has endangered interests that fall within the zone of interests protected by
9 SEPA and has suffered injuries in fact.

10 15. The Alliance is a nonprofit corporation that (along with its predecessor, the
11 Washington Fish Growers Association) has represented the leading aquaculture producers and
12 support-related businesses in Washington for over 40 years. In addition to net pen operators, the
13 Alliance's membership includes suppliers of goods and services to the production sector,
14 including breeding and genetics companies; aquatic animal health service providers; aquatic
15 ecosystem monitoring solutions such as sonar, robots, and underwater cameras; and aqua
16 feed/animal nutrition companies. The Alliance's members have a specific interest in the ongoing
17 sustainable production of farmed fish in Washington because this state offers both the right
18 environment to produce a variety of seafood through aquaculture and an educated, skilled
19 workforce that, in many cases, "grew up" on fish farms in this state.

20 16. The Alliance's members share a vision of feeding Washington (and the world)
21 with high-quality, sustainably and responsibly produced fish, shellfish, and sea vegetables in
22 local, regional, and global markets. The Alliance's mission is to develop a sustainable and
23 modern aquaculture industry in Washington and throughout the Pacific region while promoting
24 awareness of the importance of aquaculture in the production of healthy seafoods, and the need
25 for farmed, local seafood production systems. As the demand for seafood continues to rise and
26 wild fisheries are unable to meet that demand, net pen aquaculture is a crucial component of the

1 vision shared by the Alliance and its members.

2 17. The need to foster aquaculture in Washington is more acute than ever. Currently,
3 the United States imports more than 80 percent of the seafood we consume, more than half of
4 which is farmed. According to the National Oceanic and Atmospheric Administration
5 (“NOAA”), despite being a global economic force, the United States currently ranks only 17th in
6 the world as a producer of farmed fish and shellfish. The Pacific region holds great potential for
7 the production of sustainably produced seafood—particularly in rural areas, where living-wage
8 jobs are scarce and local economies are primarily resource-based. A vibrant aquatic farming
9 production sector encourages innovation and numerous supporting services. And this, in turn,
10 leads to healthier working waterfronts, businesses, employment opportunity, and the ability to
11 supply fresh, locally sourced seafood in retail supermarkets and local restaurants. As population
12 growth only continues to increase, so too does the need for a “blue economy” to sustainably and
13 responsibly feed future generations.

14 18. The Alliance prioritizes aquaculture as a way of production to meet the increased
15 demand for protein that accompanies population increase because, unlike other forms of
16 terrestrial animal protein production, aquaculture is a climate-friendly source of protein.
17 Aquaculture has the lowest carbon footprint of any kind of animal protein production. The Net
18 Pen Ban Rules will not decrease the demand for seafood but will require that the increasing
19 demand be met by sources from outside of the country. Indeed, some stores are already sourcing
20 steelhead—the same steelhead that was briefly farmed in Washington waters—from over 4,600
21 miles away in Norway. This increase in seafood imports threatens adverse impacts on the
22 environment, impacts that will only get worse as we experience climate change.

23 19. The Alliance and its members had a vision to grow an aquaculture industry in
24 Washington that would serve as a model for other regions of the United States. At the time that
25 DNR promulgated the Net Pen Ban Rules, a joint venture—which consists of members of the
26 Alliance—had an outstanding permit application for a net pen operation that DNR had not yet

1 acted upon. The Net Pen Ban Rules prejudice the Alliance and its members because the
2 opportunities to conduct their businesses and serve their mission have been reduced, if not
3 eliminated.

4 20. One of the Alliance’s roles is to advocate for a fair and transparent regulatory
5 environment that is based in science. The Alliance maintains a Science Advisory Board to assist
6 in that advocacy. The Alliance participated in DNR’s rulemaking and SEPA processes by
7 submitting public comments, through its board and its members, for DNR’s consideration during
8 both processes.

9 **C. The Legislature Has Established a Multi-Agency Regulatory Scheme for Net Pen**
10 **Aquaculture.**

11 21. Washington has long encouraged the fostering of aquaculture in state waters.
12 Notably, this year is the fortieth anniversary of the Aquatic Farming Act, where the legislature
13 declared aquaculture—including fish farming—to be an activity of state-wide interest that should
14 be encouraged. Codified at RCW 15.85.010, the legislature provided that it is “the policy of this
15 state to encourage the development and expansion of aquaculture within the state” and “that
16 aquatic farming provides a consistent source of quality food, offers opportunities of new jobs,
17 increased farm income stability, and improves balance of trade.”

18 22. Aquaculture is governed by multiple agencies in Washington. The Washington
19 State Department of Agriculture (“Agriculture” or the “Department of Agriculture”), the
20 Washington State Department of Fish and Wildlife and the Fish and Wildlife Commission
21 (collectively, “Fish and Wildlife”), the Washington State Department of Ecology (“Ecology”),
22 and DNR all share responsibilities in regulating fish farming in Washington.

23 23. In addition, aquaculture is like other agricultural sectors that form the backbone of
24 Washington’s economy. In fact, the legislature has recognized that aquaculture “should be
25 considered a branch of the agricultural industry of the state for purposes of any laws that apply to
26 or provide for the advancement, benefit, or protection of the agriculture industry within the

1 state.” RCW 15.85.010. The Department of Agriculture is charged with promulgating rules and
2 “develop[ing] a program for assisting the state’s aquaculture industry.” RCW 15.85.050; *see also*
3 RCW 15.85.040.

4 24. DNR does not have unfettered authority to regulate aquaculture. Through RCW
5 15.85.010, the legislature placed the responsibilities for wild and farmed fish health in the hands
6 of Fish and Wildlife, directing that agency to “provide diagnostic services” to “ensure the
7 maximum yield and quality of cultured aquatic products.” The legislature recognized that
8 farming activities may have impacts on wild fish populations and that it was necessary for
9 Agriculture and Fish and Wildlife to coordinate on aquaculture regulation so that Fish and
10 Wildlife can “administer and enforce Title 77 RCW effectively.” RCW 15.85.060. Title 77 RCW
11 governs the protection and management of fish and wildlife in Washington. Under its various
12 Title 77 RCW authorities, Fish and Wildlife has issued rules governing commercial aquaculture.
13 *See* WAC 220-370-010 (“It shall be unlawful for any person, firm, or corporation to cultivate
14 food fish, shellfish, or other aquatic animals for commercial purposes except as follows in
15 chapter 220-370 WAC.”). The rules were developed jointly with Agriculture with the intent “to
16 establish rules that promote the health, productivity and well-being of aquaculture products and
17 the wild stock fisheries.” WAC 220-370-020. Among other requirements, Fish and Wildlife
18 requires annual aquatic farm registrations (WAC 220-370-060) and a permit for finfish
19 aquaculture in net pens (WAC 220-370-100). As recently as 2022, the Washington Supreme
20 Court upheld Fish and Wildlife’s granting of permits to commercial net pen finfish aquaculture
21 of native species on state-owned lands, finding that those permits would not pose a risk to wild
22 fish and the environment. *See generally Wild Fish Conservancy v. Washington Dep’t of Fish &*
23 *Wildlife*, 198 Wn.2d 846, 502 P.3d 359 (2022).

24 25. DNR does not even possess the primary authority for management of shoreline
25 development. Instead, under the Shoreline Management Act (“SMA”), Ecology has been given
26 that authority through its regulation of shoreline development in Washington. Ecology is

1 responsible for assisting local jurisdictions to ensure their compliance with the SMA. *See* RCW
2 90.58.050. Aquaculture is one of the shoreline uses regulated under the SMA. *See* WAC 173-26-
3 241(3)(b). According to Attorney General’s Opinion 1988 No. 24, Ecology is vested with “final
4 policy-making authority on shoreline management issues.” The legislature also vested in
5 Ecology the authority to regulate water quality impacts of fish farms. Ecology regulates water
6 quality associated with marine finfish rearing facilities such as net pens to establish “allowable
7 sediment impacts from organic enrichment due to marine finfish rearing facilities” and standards
8 for waste discharges from such facilities. *See* RCW 90.48.220(2)–(3). Ecology established such
9 standards in WAC 173-204-412 and WAC 173-221-110, respectively.

10 26. DNR is the landlord for Washington’s state-owned lands. That is all. DNR must
11 manage state-owned aquatic lands “in conformance with constitutional and statutory
12 requirements” and “strive to provide a balance of public benefits for all citizens of the state.”
13 RCW 79.105.030. The benefits that DNR must strive to balance include “encouraging direct
14 public use and access, fostering water-dependent uses, ensuring environmental protection, and
15 utilizing renewable resources.” *Id.* DNR possesses no express delegated authority to ban
16 commercial finfish net pen aquaculture on state-owned lands.

17 27. In 2018, in response to an accidental escape of Atlantic salmon in 2017 from a
18 commercial net pen operation and the resulting concerns by tribes and stakeholders about
19 possible impacts from that escape, the Washington State legislature took action. Central to those
20 stakeholders’ concerns was the concept of Atlantic salmon colonizing Washington’s rivers—
21 despite scientific evidence that showed such an outcome has never been recorded and was
22 extremely unlikely. The legislature declined stakeholder requests to take extreme measures such
23 as the outright prohibition of all commercial net pens but also declined more lenient measures
24 such as allowing sterile Atlantic salmon to be grown in commercial net pens. Instead, the
25 legislature enacted Engrossed House Bill 2957, Laws of 2018, ch. 179 §§ 1-12—codified at
26 RCW 77.125.050 and RCW 79.105.170—which phased out commercial net pen operations for

1 nonnative species like Atlantic salmon. Under that legislative action, it remained lawful for
2 commercial net pen operations to grow native fish on state-owned aquatic lands, such as
3 steelhead, sablefish, and Pacific salmon.

4 28. In response to that legislation, commercial aquatic farm operators applied for the
5 necessary regulatory permits and approvals that would allow them to transition from growing
6 Atlantic salmon in their marine net pens to raising a native species of sterile steelhead.

7 29. In restricting commercial finfish net pen aquaculture to native fish species in
8 2018, the legislature explicitly invoked the existing multi-agency framework. The legislature
9 called for “[t]he departments of ecology, agriculture, and fish and wildlife, as well as the
10 department of natural resources” to “continue the existing effort to update guidance and
11 informational resources to industry and governments for planning and permitting commercial
12 marine net pen aquaculture.” Laws of 2018, ch. 179 § 5 (emphasis added). The legislature
13 provided that “[t]he guidance must be designed to eliminate commercial marine net pen
14 escapement and to eliminate negative impacts to water quality and native fish, shellfish, and
15 wildlife.” *Id.* The legislature has not taken any additional action to further restrict or ban
16 commercial finfish net pen aquaculture on state-owned aquatic lands, nor has the legislature
17 commanded agencies to enact a ban on commercial finfish net pen aquaculture in Washington.

18 30. DNR, however, has taken the extraordinary step of bypassing this entire
19 regulatory scheme that is established by statute. DNR has enacted its own regulation to ban
20 commercial finfish net pen aquaculture on all state-owned aquatic lands through rushed and
21 politically predetermined rulemaking and environmental review processes.

22 **D. Science Supports Responsible Commercial Finfish Net Pen Aquaculture.**

23 31. The possible impacts of fish farming have been thoroughly examined in
24 Washington and beyond and are well understood. In 1990, the Washington Department of
25 Fisheries (now Fish and Wildlife) completed a programmatic environmental impact statement for
26 fish farms in Washington. That environmental impact statement found that all significant adverse

1 environmental impacts to the environment associated with fish farming could be avoided through
2 imposition of appropriate mitigation measures.

3 32. The first water quality permits for fish farms, issued by Ecology in 1996, were the
4 subject of extensive litigation. The Washington State Pollution Control Hearings Board upheld
5 those permits, finding no significant adverse environmental impacts to be associated with fish
6 farming. *Marine Environmental Consortium v. Dep't of Ecology*, PCHB Nos. 96-257 through
7 96-266 & 97-110, 1998 WL 933353 (November 30, 1998).

8 33. In 2001, the National Marine Fisheries Service (“NMFS”) published NOAA’s
9 Technical Memorandum NMFS-NWFSC-49, titled “The Net-pen Salmon Farming Industry in
10 the Pacific Northwest.” This technical memorandum reviewed the state of the science and found
11 three areas of potential impacts to the environment: (1) deposition of bio-deposits; (2) impacts of
12 heavy metals to sediments; and (3) impacts from the use of therapeutic compounds for control of
13 sea lice at farms. For the first two areas of risk, NMFS concluded that well-sited farms and
14 monitoring could address the risk. The third risk—sea lice and treatments for sea lice—was
15 recognized to not be present in Washington because of low abundances of sea lice. NMFS noted
16 that eight other issues “appear to carry a low risk,” including the risk of low dissolved oxygen,
17 toxic effects from bio-deposits under fish pens, toxic effects from algal blooms enhanced by fish
18 pens, changes in the benthic communities located under fish farms, and the spread of pathogens
19 from fish farms. NMFS explained that there was “little to no risk” from fish escapes. This
20 technical memorandum also recommended steps to manage the risks identified, through site
21 selection, permits, and other measures.

22 34. From 2019 through 2020, Fish and Wildlife studied the possible environmental
23 impacts associated with the farming of sterile rainbow trout in Washington. That study involved
24 consultation with western Washington tribes and fisheries biologists, the review of over 300
25 scientific studies, and the application of Fish and Wildlife’s own significant in-house scientific
26 expertise. Fish and Wildlife concluded that, when appropriately permitted and managed, the

1 farming of all-female, sterile native rainbow trout in Washington’s marine waters would not have
2 a significant adverse impact on the environment or wildlife such as native Pacific salmon and
3 steelhead species. This conclusion was subsequently appealed by anti-fish farming groups, and
4 the Washington State Supreme Court unanimously affirmed WDFW’s determination. *Wild Fish*
5 *Conservancy*, 198 Wn.2d at 887.

6 35. In 2022, NMFS published a 210-page Biological Opinion (the “BiOp”) that
7 concluded fish farming at or below historic maximums in Washington—when appropriately
8 regulated—would not jeopardize endangered species or habitat that supports those species. That
9 BiOp was a comprehensive evaluation of the possible impacts of fish farming on federally listed
10 endangered species, including wild steelhead, Chinook salmon, chum salmon, rockfish, green
11 sturgeon, eulachon, humpback whales, and Southern Resident Killer Whales. The conclusions of
12 the BiOp were supported by an extensive scientific analysis and were consistent with more than
13 30 years of scientific consensus regarding potential impacts from fish farming in Washington.

14 36. Finally, in April 2022, two months after NMFS issued the BiOp, Agriculture,
15 Ecology, Fish and Wildlife, and DNR issued guidance for local and state governments to use in
16 assessing new or existing net pen operations under Washington’s SMA (the “2022 Net Pen
17 Aquaculture Guidance”). The 2022 Net Pen Aquaculture Guidance explicitly recognizes that
18 “[c]ommercial marine finfish net pens are part of Washington’s aquaculture industry,” and was
19 authored to help “permitting authorities understand some key management issues to be aware of
20 and consider when making decisions about net pen projects.”

21 37. The 2022 Net Pen Aquaculture Guidance recognized that “[c]areful site analysis
22 and selection can significantly reduce negative effects on water quality, sensitive habitats and
23 native species and more,” and also outlined the strong regulatory environment that governs those
24 operations in Washington, including the roles of tribes, local governments, Fish and Wildlife,
25 Ecology, DNR, and federal agencies. Importantly, it outlines the role DNR has taken in
26 coordinating with other agencies to understand possible impacts from existing net pen

1 operations, noting that DNR, Fish and Wildlife, and Ecology “meet regularly to discuss ways to
2 improve interagency coordination with respect to inspections and enforcement, and permitting,”
3 and that by “working together closely, the three agencies work in coordination to manage net pen
4 aquaculture in Washington.”

5 38. The relevant science establishes that, when properly sited, commercial net pen
6 finfish aquaculture can be done sustainably and responsibly in Washington’s waters.

7 **E. DNR’s Predetermined Rulemaking Process.**

8 39. DNR purported to promulgate the Net Pen Ban Rules pursuant to the APA—
9 chapter 34.05 RCW. DNR rushed its rulemaking process to meet its political deadline of
10 promulgating the Net Pen Ban Rules before then-Commissioner of Public Lands Hilary Franz
11 left office in January 2025.

12 40. On November 17, 2022, then-Commissioner Franz issued the Order. While the
13 Order itself directed DNR leadership to “develop necessary changes to agency rules, policies,
14 and procedures to prohibit commercial finfish net pen aquaculture on state-owned aquatic lands,”
15 DNR and then-Commissioner Franz were much more transparent about the meaning of the
16 Order. Flanked by political opponents to net pen aquaculture, then-Commissioner Franz
17 unequivocally announced: “Today, I’m announcing an end to the practice” of commercial finfish
18 net pen aquaculture on state-owned aquatic lands because “there is no way to safely farm finfish
19 in open sea net pens.”¹

20 41. In December 2022, the Jamestown S’Klallam Tribe challenged the Order, and the
21 Alliance intervened and joined the challenge. Despite the public statements from then-
22 Commissioner Franz and her staff dictating the predetermined outcome of the rulemaking, DNR
23 defended the Order as nothing more than an internal directive that had no legal effect. In October
24 2023, the Court agreed, ruling that DNR had the authority to begin rulemaking with an internal

25 _____
26 ¹ Attached as **Exhibit D** is DNR’s online press release regarding the Order. The release appears to no longer be
available on DNR’s website.

1 directive that had no legal effect, but declined to rule on whether DNR had the authority to issue
2 the ban via rule.

3 42. DNR filed its Preproposal Statement of Inquiry pursuant to RCW 34.05.310
4 (“CR-101”) on April 17, 2023. DNR identified multiple agencies that regulate the subject matter
5 of aquaculture that it would cooperate with in developing the regulations—Fish and Wildlife,
6 Ecology, Agriculture, the United States Army Corps of Engineers, and NOAA. DNR committed
7 to hold separate inter-agency meetings with those agencies.

8 43. Those inter-agency meetings did not occur. DNR relied on its own staff to inform
9 its analysis.

10 44. On October 2, 2024, DNR filed its Proposed Rule Making Statement pursuant to
11 RCW 34.05.320 (“CR-102”). That filing set a public hearing on November 7, 2024, which also
12 doubled as the closing date for public comments.

13 45. In the CR-102, DNR identified that the purpose of the proposal was “to add a new
14 section to 332-30 WAC and amend 332-30-106 WAC to better achieve the department’s
15 management guidelines with respect to commercial finfish net pen aquaculture.” The CR-102 did
16 not identify or evaluate alternative versions of the rule that could achieve that purpose.

17 46. The CR-102 provided the draft rules proposed to amend the definitions provided
18 in WAC 332-30-106 and adopt a new rule in WAC 332-30-138. WAC 332-30-106 would define
19 “[c]ommercial finfish net pen aquaculture” while excluding “operations and containment
20 systems used to raise finfish for open-water release or used to raise finfish solely for tribal
21 ceremonial and subsistence uses.” WAC 332-30-138 would provide that “[c]ommercial finfish
22 net pen aquaculture shall not be authorized on state-owned aquatic lands.”

23 47. In the CR-102, DNR identified that the Net Pen Ban Rules were subject to the
24 requirements of RCW 34.05.328—a statute that imposes procedural requirements for “significant
25 legislative rules.”

26 48. In the final days of then-Commissioner Franz’s term, DNR made a motion before

1 the BNR on January 7, 2025, to approve the rulemaking. The motion passed with two
2 abstentions. One of the BNR members that abstained explained that she, as a scientist, needed
3 more time to review the relevant scientific documents.

4 49. On January 29, 2025, DNR filed its Rule-Making Order (“CR-103P”) pursuant to
5 RCW 34.05.360. The final rules did not vary from the proposed rules.

6 **F. DNR’s Insufficient SEPA Process.**

7 50. SEPA has “the clear aim of injecting environmental awareness into all levels of
8 governmental decision-making.” *Wild Fish Conservancy*, 198 Wn.2d at 855 (internal quotation
9 marks omitted). To accomplish this, SEPA establishes procedural requirements to ensure that
10 environmental factors are considered to the “fullest extent possible.” *Eastlake Cmty. Council v.*
11 *Roanoke Assocs., Inc.*, 82 Wn.2d 475, 490, 513 P.2d 36 (1973). Required analyses must occur at
12 the “earliest possible stage,” to ensure that considerations can meaningfully influence
13 decisionmakers. *King Cnty. v. Friends of Sammamish Valley*, 26 Wn. App. 2d 906, 941, 530 P.3d
14 1023 (2023).

15 51. One of SEPA’s policies is to “[a]ttain the widest range of beneficial uses of the
16 environment without degradation, risk to health or safety, or other undesirable and unintended
17 consequences.” RCW 43.21C.020(2)(c).

18 52. When SEPA is triggered, the lead agency must make a “‘threshold determination’
19 of whether the action will result in ‘probable significant adverse environmental’ impacts.” *Wild*
20 *Fish Conservancy*, 198 Wn.2d at 856 (quoting WAC 197-11-330(1)(b); RCW 43.21C.031). If it
21 determines the proposal is not likely to have significant adverse impacts on the environment, “it
22 will issue a determination of nonsignificance (DNS), and no further environmental review is
23 required.” *Id.* (citing WAC 197-11-340).

24 53. The timeline of DNR’s SEPA process loosely followed its rulemaking process.
25 On October 15, 2024, DNR issued its SEPA checklist. The checklist identified no increase in
26 emissions from the Net Pen Ban Rules. In response to a prompt in the checklist to provide

1 environmental information that DNR knew had been prepared directly related to the Net Pen Ban
2 Rules, DNR only referenced a synthesis analysis generated by DNR.

3 54. On October 16, 2024, DNR identified itself as the lead agency and issued its DNS
4 and notified the public of the hearing and comment deadline on November 7, 2024. DNR
5 expedited the comment process and allowed less time than DNR originally communicated would
6 be available.

7 55. The Alliance submitted comments on an array of issues with the Net Pen Ban
8 Rules, including DNR’s lack of authority for the ban; DNR’s flawed and predetermined
9 rulemaking and SEPA processes; DNR’s incomplete SEPA checklist; DNR’s disregard of
10 applicable science; and the hypocrisy in allowing delayed open-water release net pen operations
11 to continue. The Jamestown S’Klallam Tribe, a member of the Alliance, made similar comments
12 but also highlighted that the commenting process, particularly the tribal input process, was
13 rushed compared to the initial plans communicated by DNR.

14 56. Even Fish and Wildlife submitted a public comment questioning DNR’s disregard
15 of the 2022 guidance developed by Agriculture, Ecology, Fish and Wildlife, and DNR pursuant
16 to the legislature’s 2018 directive. Fish and Wildlife identified that, “[u]nfortunately, it appears
17 that the [guidance] document was at best minimally used by DNR in development of their SEPA
18 Checklist.”² Fish and Wildlife admonished DNR for alleging that DNR used the “best available
19 science” when it failed to consult with the appropriate agencies that have expertise on
20 commercial finfish net pen aquaculture. Fish and Wildlife concluded that “DNR’s analysis
21 should be considered, simply, DNR’s opinion rather than ‘best available science.’”³

22 57. On January 22, 2025, DNR issued its Notice of Final Determination retaining its
23 DNS and provided summary responses to public comments.

24
25 ² An excerpt of DNR’s summary of comments and responses containing Fish and Wildlife’s comments is attached as
Exhibit E.

26 ³ *Id.*

1 58. Despite the direction from the legislature, the multi-agency research effort, and
2 DNR’s expressed intention to consult other agencies in its CR-101, DNR explained that
3 consultation with other agencies was not necessary because DNR also has expertise on the
4 subject matter. DNR concluded that it was not willing to accept any impacts from commercial
5 finfish net pen aquaculture and, therefore, it believed the ban was necessary.

6 **VII. REASONS THAT RELIEF SHOULD BE GRANTED**

7 **A. The Alliance Is Entitled to Relief Under the APA.**

8 59. The Alliance is entitled to relief under the APA, which provides that a court “shall
9 declare the rule[s] invalid” if the rule: (1) violates constitutional provisions; (2) exceeds the
10 statutory authority of the agency; (3) was adopted without compliance with statutory rulemaking
11 procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c).

12 60. DNR’s Net Pen Ban Rules are not reasonably consistent with the statutes they
13 purport to implement.

14 61. DNR’s Net Pen Ban Rules are not authorized, expressly or necessarily by
15 implication, by any statute.

16 62. DNR’s Net Pen Ban Rules conflict with RCW 77.125.050 and RCW 79.105.170.

17 63. DNR’s Net Pen Ban Rules amend or render meaningless the regulatory program
18 for commercial finfish net pen aquaculture that was established by legislation.

19 64. DNR did not adequately analyze alternatives to rulemaking.

20 65. DNR did not adequately determine that the probable benefits of the rule are
21 greater than its probable costs—qualitatively or quantitatively.

22 66. DNR did not adequately determine that the rules are the least burdensome
23 alternative to comply with the stated goals and objectives of the rulemaking.

24 67. DNR developed an inadequate cost-benefit analysis and small business economic
25 impact statement, in addition to other inadequacies in DNR’s rulemaking file.

1 68. DNR’s Net Pen Ban Rules are willful and unreasoning because they were
2 predetermined by a political motive rather than driven and informed by the relevant science.

3 69. DNR’s Net Pen Ban Rules were taken without regard to the attending factors or
4 circumstances—including input from other agencies, the 2022 Net Pen Aquaculture Guidance,
5 and other relevant scientific information.

6 70. DNR’s Net Pen Ban Rules are willful and unreasoning because they allow net pen
7 operations that result in delayed open-water release to continue even though those operations
8 present the same type of alleged risks—and potentially to a more extreme degree—as those that
9 DNR reasoned were not mitigatable from commercial net pen finfish operations.

10 71. DNR’s Net Pen Ban Rules are willful and unreasoning because DNR limited, did
11 not adequately consider, and did not adequately respond to public comment on the rules.

12 **B. The Alliance Is Entitled to Relief Under SEPA.**

13 72. SEPA commands that agencies “[u]tilize a systematic, interdisciplinary approach
14 which will insure the integrated use of the natural and social sciences and the environmental
15 design arts in planning and in decision making which may have an impact on the environment.”
16 RCW 43.21C.030(a).

17 73. SEPA is a “procedural” statute “that ensures state agencies, among others,
18 consider environmental impacts and alternatives before taking certain actions.” *Cornelius v.*
19 *Wash. Dep’t of Ecology*, 182 Wn.2d 574, 598, 344 P.3d 199 (2015). A threshold determination,
20 such as a DNS, must be “based on upon information reasonably sufficient to evaluate the
21 environmental impact of a proposal.”

22 74. “Agencies are encouraged to describe public or nonproject proposals in terms of
23 objectives rather than preferred solutions” and should describe proposals “in ways that encourage
24 considering and comparing alternatives.” WAC 197-11-060(3)(a)(iii). DNR’s Net Pen Ban Rules
25 began as a predetermined political goal with the single contemplated outcome of banning
26 commercial finfish net pen aquaculture. Rather than let the science dictate the appropriate

1 outcome, DNR rushed to meet a political deadline before then-Commissioner Franz left office.
2 The result was an approach driven by the preferred solution of a ban and a refusal to consider
3 and compare alternatives.

4 75. DNR’s predetermined process also disavowed SEPA’s command to utilize an
5 interdisciplinary approach and failed to adequately consider the relevant and available scientific
6 information to evaluate the impacts of commercial finfish net pen aquaculture.

7 76. “Until the responsible official issues a final determination of nonsignificance or
8 final environmental impact statement, no action concerning the proposal shall be taken by a
9 governmental agency that would... [l]imit the choice of reasonable alternatives.” WAC 197-11-
10 070(1)(b). DNR’s predetermined process began with the direction to ban commercial finfish net
11 pen aquaculture and DNR never allowed for the consideration or choice of reasonable
12 alternatives.

13 77. DNR’s threshold determination, its DNS, is clearly erroneous because the
14 environmental checklist and the information underlying the Net Pen Ban Rules was not
15 reasonably sufficient to evaluate the environmental impact of the rules.

16 78. DNR failed to adequately consider the available guidance and scientific
17 information informing the interaction between commercial finfish net pen aquaculture and the
18 natural environment—including failing to adequately consider the expertise of other agencies
19 such as Fish and Wildlife and NOAA.

20 79. DNR limited and failed to adequately consider or respond to input from members
21 of the regulated industry and other members of the public.

22 80. DNR failed to evaluate the carbon emission impacts of the Net Pen Ban rules in
23 light of the resulting need to increase the importation of seafood to meet the ever-increasing
24 demand for seafood.

1 81. Due to the increase in emissions from the Net Pen Ban Rules to meet seafood
2 demand, DNR was required to issue a determination of significance and complete and
3 environmental impact statement.

4 **VIII. REQUEST FOR RELIEF**

5 The Alliance respectfully requests that the Court grant the following relief:

- 6 1. A declaratory judgment that DNR violated SEPA in its environmental review and
- 7 issuance of its DNS;
- 8 2. A declaratory judgment that DNR’s final rule-making order and the
- 9 accompanying rules are invalid; and
- 10 3. Grant such further relief as the Court deems just.
- 11

12 DATED this 27th day of February, 2025.

13 NORTHWEST RESOURCE LAW PLLC

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24 *Attorneys for Petitioner Northwest Aquaculture Alliance*

Exhibit A



RULE-MAKING ORDER PERMANENT RULE ONLY

CR-103P (December 2017) (Implements RCW 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: January 29, 2025

TIME: 11:36 AM

WSR 25-04-045

Agency: Department of Natural Resources

Effective date of rule:

Permanent Rules

31 days after filing.

Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose: DNR is adding a new section to 332-30 WAC and amending 332-30-106 WAC to better achieve the department's management guidelines with respect to commercial finfish net pen aquaculture. The new rule language would prohibit any future commercial finfish net pen aquaculture uses on DNR managed, state-owned aquatic lands.

Citation of rules affected by this order:

New: 332-30-138

Repealed:

Amended: 332-30-106

Suspended:

Statutory authority for adoption: The management philosophy the department follows regarding state-owned aquatic lands is described generally in RCW 79.105.010, where the legislative intent of the Aquatic Lands Act is outlined. In RCW 79.105.030, specific management guidelines for providing a balance of public benefits for all citizens of the state are giving including: Encouraging direct public use and access; fostering water-dependent uses; ensuring environmental protection; utilizing renewable resources; and generating revenue consistent with the above. Pursuant to RCW 79.105.360, DNR shall adopt rules as are necessary to carry out the purposes of RCW 79.105.010, 79.105.030, and other certain aquatic land statutes. In addition, to effectively carry out these management directives, RCW 43.30.540 specifically authorizes the Board of Natural Resources to make and enforce rules and regulations to carry out the provisions of chapters 79.105 through 79.140 RCW.

Other authority:

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 24-20-146 on October 2, 2024 (date).

Describe any changes other than editing from proposed to adopted version:

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: Noel Sharp

Address: 1111 Washington St SE, MS: 47027, Olympia, WA 98504

Phone: 360-902-1081

Fax:

TTY:

Email: netpens@dnr.wa.gov

Web site: www.dnr.wa.gov/NetPenRulemaking

Other:

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	___	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

The number of sections adopted at the request of a nongovernmental entity:

New	___	Amended	___	Repealed	___
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The number of sections adopted on the agency's own initiative:

New	<u>1</u>	Amended	<u>1</u>	Repealed	___
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	___	Amended	___	Repealed	___
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	___	Amended	___	Repealed	___

Date Adopted: January 22, 2025

Name: Katie R. Allen

Title: Deputy Supervisor, Forest Resilience, Regulation and Aquatic Resources

Signature:

Katie R. Allen

WAC 332-30-106 Definitions. All definitions in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). For the purpose of this chapter:

(1) "Accretion" means the natural buildup of shoreline through the gradual deposit of alluvium. The general principle of common law applicable is that a riparian or littoral owner gains by accretion and reliction, and loses by erosion. Boundary lines generally will change with accretion.

(2) "Alluvium" means material deposited by water on the bed or shores.

(3) "Anniversary date" means the month and day of the start date of an authorization instrument unless otherwise specified in the instrument.

(4) "Aquaculture" means the culture and/or farming of food fish, shellfish, and other aquatic plants and animals in fresh water, brackish water or salt water areas. Aquaculture practices may include, but are not limited to, hatching, seeding or planting, cultivating, feeding, raising, harvesting of planted crops or of natural crops so as to maintain an optimum yield, and processing of aquatic plants or animals.

(5) "Aquatic lands" means all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters (RCW 79.105.060(1)). Aquatic lands are part of the public lands of the state of Washington (see subsection ~~((+51+))~~ (52) of this section). Included in aquatic lands are public places subsection ~~((+53+))~~ (54) of this section, waterways subsection ~~((+78+))~~ (79) of this section, bar islands, avulsively abandoned beds and channels of navigable bodies of water, managed by the department of natural resources directly, or indirectly through management agreements with other governmental entities.

(6) "Aquatic land use classes" means classes of uses of tideland, shorelands and beds of navigable waters that display varying degrees of water dependency. (~~See WAC 332-30-121.~~)

(7) "Authorization instrument" means a lease, material purchase, easement, permit, or other document authorizing use of state-owned aquatic lands and/or materials.

(8) "Avulsion" means a sudden and perceptible change in the shoreline of a body of water. Generally no change in boundary lines occurs.

(9) "Beds of navigable waters" means those submerged lands lying waterward of the line of extreme low tide in navigable tidal waters and waterward of the line of navigability in navigable lakes, rivers and streams. The term, "bedlands" means beds of navigable waters.

(10) "Commerce" means the exchange or buying and selling of goods and services. As it applies to aquatic land, commerce usually involves transport and a land/water interface.

(11) "Commercial finfish net pen aquaculture" means a system of nets, cages, or other containment systems in open water used to cultivate, feed, and raise "finfish" (as defined in WAC 220-370-050(3)) to marketable size for the purpose of harvesting and selling the same as a crop. Commercial finfish net pen aquaculture does not include operations and containment systems used to raise finfish for open-water re-

lease or used to raise finfish solely for tribal ceremonial and subsistence uses.

~~((12))~~ (12) "Covered moorage" means slips and mooring floats that are covered by a single roof with no dividing walls.

~~((12))~~ (13) "Department" means the department of natural resources.

~~((13))~~ (14) "Dredging" means enlarging or cleaning out a river channel, harbor, etc.

~~((14))~~ (15) "Educational reserves" means accessible areas of aquatic lands typical of selected habitat types which are suitable for educational projects.

~~((15))~~ (16) "Enclosed moorage" means moorage that has completely enclosed roof, side and end walls similar to a car garage i.e., boathouse.

~~((16))~~ (17) "Environmental reserves" means areas of environmental importance, sites established for the continuance of environmental baseline monitoring, and/or areas of historical, geological or biological interest requiring special protective management.

~~((17))~~ (18) "Erosion" means the gradual cutting away of a shore by natural processes. Title is generally lost by erosion, just as it is gained by accretion.

~~((18))~~ (19) "Extreme low tide" means the line as estimated by the federal government below which it might reasonably be expected that the tide would not ebb. In Puget Sound area generally, this point is estimated by the federal government to be a point in elevation 4.50 feet below the datum plane of mean lower low water, (0.0). Along the Pacific Ocean and in the bays fronting thereon and the Strait of Juan due Fuca, the elevation ranges down to a minus 3.5 feet in several locations.

~~((19))~~ (20) "Fair market value" means the amount of money which a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied (*Donaldson v. Greenwood*, 40 Wn.2d 238, 1952). Such uses must be consistent with applicable federal, state and local laws and regulations affecting the property as of the date of valuation.

~~((20))~~ (21) "First class shorelands" means the shores of a navigable lake or river belonging to the state not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or the inner harbor line where established and within or in front of the corporate limits of any city, or within two miles thereof upon either side (RCW 79.105.060(3)). These boundary descriptions represent the general rule; however exceptions do exist. To determine if the shorelands are within two miles of the corporate limits of a city, the distance is measured along the shoreline from the intersection of the corporate limit with the shoreline.

~~((21))~~ (22) "First class tidelands" means the shores of navigable tidal waters belonging to the state lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line; and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide (RCW 79.105.060(4)). In general, the line of ordinary high tide is the landward boundary. The line of extreme low tide, or the inner harbor line where established, is the waterward boundary. To determine if the tidelands are within two miles of the corporate lim-

its of a city, the distance is measured along the shoreline from the intersection of the corporate limit with the shoreline.

~~((22))~~ (23) "Fiscal year" means a period of time commencing on the first day of July and ending on the ~~((thirtieth))~~ 30th day of June of the succeeding year. A fiscal year is identified by the year in which it ends, e.g., fiscal year 1985 is the period July 1, 1984, through June 30, 1985.

~~((23))~~ (24) "Floating house" means any floating structure that is designed, or has been substantially and structurally remodeled or redesigned, to serve primarily as a residence. "Floating houses" include house boats, house barges, or any floating structures that serve primarily as a residence and do not qualify as a vessel as provided in subsection ~~((74))~~ (75) of this section. A floating structure that is used as a residence and is capable of navigation, but is not designed primarily for navigation, nor normally is capable of self propulsion and use as a means of transportation is a floating house, not a vessel.

~~((24))~~ (25) "Governmental entity" means the federal government, the state, county, city, port district, or other municipal corporation or political subdivision thereof.

~~((25))~~ (26) "Harbor area" means the area of navigable waters determined as provided in section 1 of Article XV of the state Constitution which shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce (RCW 79.105.060(5)). Harbor areas exist between the inner and outer harbor lines as established by the state harbor line commission.

~~((26))~~ (27) "Harbor area use classes" means classes of uses of harbor areas that display varying degrees of conformance to the purpose for which harbor areas were established under the Constitution.

~~((27))~~ (28) "Harbor line" means either or both:

(a) A line (outer harbor line) located and established in navigable waters as provided for in section 1 of Article XV of the state Constitution beyond which the state shall never sell or lease any rights whatever to private persons (RCW 79.105.060(12)).

(b) A line (inner harbor line) located and established in navigable waters between the line of ordinary high tide and the outer harbor line, constituting the inner boundary of the harbor area (RCW 79.105.060(8)).

~~((28))~~ (29) "Inflation rate" means, for a given year, the percentage rate of change in the previous calendar year's all commodity producer price index of the Bureau of Labor Statistics of the United States department of commerce (RCW 79.105.060(7)). The rate published by the bureau during May of each year for the previous calendar year shall be the rate for the previous calendar year.

~~((29))~~ (30) "Interest rate" shall be ~~((twelve))~~ 12 percent per annum (RCW 43.17.240).

~~((30))~~ (31) "Interim uses" means certain uses which may, under special circumstances, be allowed to locate in harbor areas (see WAC 332-30-115(5)).

~~((31))~~ (32) "Inventory" means both a compilation of existing data on man's uses, and the biology and geology of aquatic lands as well as the gathering of new information on aquatic lands through field and laboratory analysis. Such data is usually presented in map form such as the *Washington Marine Atlas*.

~~((32))~~ (33) "Island" means a body of land entirely and customarily surrounded by water. Land in navigable waters which is only surrounded by water in times of high water, is not an island within the

rule that the state takes title to newly formed islands in navigable waters.

~~((33))~~ (34) "Line of navigability" means a measured line at that depth sufficient for ordinary navigation as determined by the board of natural resources for the body of water in question.

~~((34))~~ (35) "Log booming" means placing logs into and taking them out of the water, assembling and disassembling log rafts before or after their movement in water-borne commerce, related handling and sorting activities taking place in the water, and the temporary holding of logs to be taken directly into a processing facility (RCW 79.105.060(9)).

~~((35))~~ (36) "Log storage" means the water storage of logs in rafts or otherwise prepared for shipment in water-borne commerce, but does not include the temporary holding of logs to be taken directly into a vessel or processing facility (RCW 79.105.060(10)).

~~((36))~~ (37) "Marine land" means those lands from the mean high tide mark waterward in marine and estuarine waters, including intertidal and submerged lands. Marine lands represents a portion of aquatic lands.

~~((37))~~ (38) "Meander line" means fixed determinable lines run by the federal government along the banks of all navigable bodies of water and other important rivers and lakes for the purpose of defining the sinuosities of the shore or bank and as a means of ascertaining the areas of fractional subdivisions of the public lands bordering thereon.

~~((38))~~ (39) "Moorage facility" means a marina, open water moorage and anchorage area, pier, dock, mooring buoy, or any other similar fixed moorage site.

~~((39))~~ (40) "Motorized vehicular travel" means movement by any type of motorized equipment over land surfaces.

~~((40))~~ (41) "Multiple use management" means a management philosophy which seeks to insure that several uses or activities can occur at the same place at the same time. The mechanism involves identification of the primary use of the land with provisions such as performance standards to permit compatible secondary uses to occur.

~~((41))~~ (42) "Navigability or navigable" means that a body of water is capable or susceptible of having been or being used for the transport of useful commerce. The state of Washington considers all bodies of water meandered by government surveyors as navigable unless otherwise declared by a court.

~~((42))~~ (43) "Navigation" means the movement of vessels to and from piers and wharves.

~~((43))~~ (44) "Nonwater-dependent use" means a use that can operate in a location other than on the waterfront. Examples include, but are not limited to, hotels, condominiums, apartments, restaurants, retail stores, and warehouses not part of a marine terminal or transfer facility (RCW 79.105.060(11)).

~~((44))~~ (45) "Open moorage" means moorage slips and mooring floats that have completely open sides and tops.

~~((45))~~ (46) "Open water moorage and anchorage areas" are areas of state-owned aquatic lands leased for moorage and anchorage that do not abut uplands and do not include a built connection to the uplands. They are generally in the center of a waterbody, to provide moorage in addition to any marinas and docks along the edge of the waterbody. They may contain mooring buoys, floating moorage docks, other moorage facilities not connected to the shoreline, and/or anchorage areas, as determined by the lessee and approved by the department. These areas

are leased in accordance with WAC 332-30-139(5) and subject to the restrictions therein.

~~((46))~~ (47) "Optimum yield" means the yield which provides the greatest benefit to the state with particular reference to food production and is prescribed on the basis of the maximum sustainable yield over the statewide resource base as modified by any relevant economic, social or ecological factor.

~~((47))~~ (48) "Ordinary high tide" means the same as mean high tide or the average height of high tide. In Puget Sound, the mean high tide line varies from 10 to 13 feet above the datum plane of mean lower low water (0.0).

~~((48))~~ (49) "Ordinary high water" means, for the purpose of asserting state ownership, the line of permanent upland vegetation along the shores of nontidal navigable waters. In the absence of vegetation, it is the line of mean high water.

~~((49))~~ (50) "Port district" means a port district created under Title 53 RCW (RCW 79.105.060(14)).

~~((50))~~ (51) "Public benefit" means that all of the citizens of the state may derive a direct benefit from departmental actions in the form of environmental protection; energy and mineral production; utilization of renewable resources; promotion of navigation and commerce by fostering water-dependent uses; and encouraging direct public use and access; and generating revenue in a manner consistent with RCW 79.105.030.

~~((51))~~ (52) "Public lands" means lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law, and include state lands, tidelands, shorelands and harbor areas as herein defined, and the beds of navigable waters belonging to the state (RCW 79.02.010).

~~((52))~~ (53) "Public interest" means....(reserved).

~~((53))~~ (54) "Public place" means a part of aquatic lands set aside for public access through platted tidelands, shorelands, and/or harbor areas to the beds of navigable waters.

~~((54))~~ (55) "Public tidelands" means tidelands belonging to and held in public trust by the state for the citizens of the state, which are not devoted to or reserved for a particular use by law.

~~((55))~~ (56) "Public trust" means that certain state-owned tidelands, shorelands and all beds of navigable waters are held in trust by the state for all citizens with each citizen having an equal and undivided interest in the land. The department has the responsibility to manage these lands in the best interest of the general public.

~~((56))~~ (57) "Public use" means to be made available daily to the general public on a first-come, first-served basis, and may not be leased to private parties on any more than a day use basis.

~~((57))~~ (58) "Public use beach" means a state-owned beach available for free public use but which may be leased for other compatible uses.

~~((58))~~ (59) "Public utility line" means pipes, conduits, and similar facilities for distribution of water, electricity, natural gas, telephone, other electronic communication, and sewers, including sewer outfall lines (RCW 79.105.060(15)).

~~((59))~~ (60) "Real rate of return" means the average for the most recent ~~((ten))~~ 10 calendar years of the average rate of return on conventional real property mortgages as reported by the Federal Home Loan Bank Board or any successor agency, minus the average inflation rate for the most recent ~~((ten))~~ 10 calendar years (RCW 79.105.060(16)).

~~((+60))~~ (61) "Reliction" means the gradual withdrawal of water from a shoreline leaving the land uncovered. Boundaries usually change with reliction.

~~((+61))~~ (62) "Renewable resource" means a natural resource which through natural ecological processes is capable of renewing itself.

~~((+62))~~ (63) "Residential use" means any noncommercial habitation of:

(a) A floating house, as defined in WAC 332-30-106(23); or

(b) A vessel, as defined in WAC 332-30-106(74), when any one of the following applies:

(i) Any person or succession of different persons resides on the vessel in a specific location, and/or in the same area on more than a total of ~~((thirty))~~ 30 days in any ~~((forty))~~ 40-day period or on more than a total of ~~((ninety))~~ 90 days in any ~~((three hundred sixty five))~~ 365-day period. "In the same area" means within a radius of one mile of any location where the same vessel previously moored or anchored on state-owned aquatic lands. A vessel that is occupied and is moored or anchored in the same area, but not for the number of days described in this subsection, is considered used as a recreational or transient vessel;

(ii) The city or county jurisdiction, through local ordinance or policy, defines the use as a residential use or identifies the occupant of the vessel as a resident of the vessel or of the facility where it is moored;

(iii) The operator of the facility where the vessel is moored, through the moorage agreement, billing statement, or facility rules, defines the use as a residential use or identifies the occupant of the vessel as a resident of the vessel or of the facility; or

(iv) The occupant or occupants identify the vessel or the facility where it is moored as their residence for voting, mail, tax, or similar purposes.

~~((+63))~~ (64) "Riparian" means relating to or living or located on the bank of a natural water course, such as a stream, lake or tide-water.

~~((+64))~~ (65) "Scientific reserves" means sites set aside for scientific research projects and/or areas of unusually rich plant and animal communities suitable for continuing scientific observation.

~~((+65))~~ (66) "Second class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city (RCW 79.105.060(17)). These boundary definitions represent the general rule; however, exceptions do exist. To determine if shorelands are more than two miles from the corporate limits of a city, the distance is measured along the shoreline from the intersection of the corporate limit with the shoreline.

~~((+66))~~ (67) "Second class tidelands" means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city and between the line of ordinary high tide and the line of extreme low tide (RCW 79.105.060(18)). In general, the line of ordinary high tide is the landward boundary. The line of extreme low tide is the waterward boundary. To determine if the tidelands are more than two miles from the corporate limits of a city, the distance is measured along the shoreline from the intersection of the corporate limit with the shoreline.

((+67+)) (68) "Shore" means that space of land which is alternately covered and left dry by the rising and falling of the water level of a lake, river or tidal area.

((+68+)) (69) "State-owned aquatic lands" means those aquatic lands and waterways administered by the department of natural resources or managed under department agreement by a port district. "State-owned aquatic lands" does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department of natural resources (RCW 79.105.060(20)).

((+69+)) (70) "Statewide value." The term statewide value applies to aquatic land uses and natural resources whose use, management, or intrinsic nature have statewide implications. Such uses and resources may be either localized or distributed statewide. Aquatic land uses of statewide value provide major statewide public benefits. Public use and access, renewable resource use and water-dependent use have been cited by the legislature as examples of such uses. Aquatic land natural resources of statewide value are those critical or uniquely suited to aquatic land uses of statewide value or to environmental quality. For example, wild and scenic rivers, high quality public use beaches and aquatic lands fronting state parks are of statewide value for public use and access. Commercial clam and geoduck beds and sites uniquely suited to aquaculture are of statewide value to renewable resource use. Harbor areas are of statewide value to water-dependent navigation and commerce. Certain aquatic land habitats and plant and animal populations are of statewide value to recreational and commercial fisheries, wildlife protection, and scientific study.

((+70+)) (71) "Streamway" means stream dependent corridor of single or multiple, wet or dry channel, or channels within which the usual seasonal or stormwater run-off peaks are contained, and within which environment the flora, fauna, soil and topography is dependent on or influenced by the height and velocity of the fluctuating river currents.

((+71+)) (72) "Terminal" means a point of interchange between land and water carriers, such as a pier, wharf, or group of such, equipped with facilities for care and handling of cargo and/or passengers (RCW 79.105.060(21)).

((+72+)) (73) "Thread of stream - thalweg" means the center of the main channel of the stream at the natural and ordinary stage of water.

((+73+)) (74) "Town" means a municipal corporation of the fourth class having not less than ((three hundred)) 300 inhabitants and not more than ((fifteen hundred)) 1,500 inhabitants at the time of its organization (RCW 35.01.040).

((+74+)) (75) "Vessel" means a floating structure that is designed primarily for navigation, is normally capable of self propulsion and use as a means of transportation, and meets all applicable laws and regulations pertaining to navigation and safety equipment on vessels, including, but not limited to, registration as a vessel by an appropriate government agency.

((+75+)) (76) "Water-dependent use" means use which cannot logically exist in any location but on the water. Examples include, but are not limited to, waterborne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks (RCW 79.105.060(24)).

~~((76))~~ (77) "Waterfront" means a parcel of property with upland characteristics which includes within its boundary, a physical interface with the existing shoreline of a body of water.

~~((77))~~ (78) "Water oriented use" means use which historically has been dependent on a waterfront location, but with existing technology could be located away from the waterfront. Examples include, but are not limited to, wood products manufacturing, watercraft sales, fish processing, petroleum refining, sand and gravel processing, log storage, and houseboats (RCW 79.105.060(25)).

~~((78))~~ (79) "Waterway" means an area platted across aquatic lands or created by a waterway district providing for access between the uplands and open water, or between navigable bodies of water.

~~((79))~~ (80) "Wetted perimeter" means a fluctuating water line which separates submerged river beds from the dry shoreland areas at any given time.

NEW SECTION

WAC 332-30-138 Commercial finfish net pen aquaculture. Commercial finfish net pen aquaculture shall not be authorized on state-owned aquatic lands.

Exhibit B

January 22, 2025

**Notice of Final Determination
Commercial Finfish Net Pen Rule Making
SEPA File No. 24-101601**

The Department of Natural Resources issued a Determination of Non-significance (DNS), Mitigated Determination of Non-significance (MDNS), Modified DNS/MDNS on October 16, 2024 for this proposal under the State Environmental Policy Act (SEPA) and WAC 197-11-340(2).

This threshold determination is hereby:

Retained.

Modified. Modifications to this threshold determination include the following:

Withdrawn. This threshold determination has been withdrawn due to the following:

Delayed. A final threshold determination has been delayed due to the following:

Summary of Comments and Responses (if applicable):


Comments received during the comment period and their responses are available online at:
https://www.dnr.wa.gov/publications/amp_sepa_nonpro_netpenrule_summary.pdf

Responsible Official: Thomas Gorman

Position/title: Aquatic Resources Division Manager

Phone: 360-902-1100

Address: 1111 Washington St SE; MS: 47027 Olympia, WA 98504



Date: January 22, 2025

Signature: _____

There is no DNR administrative SEPA appeal.

Exhibit C



**DEPARTMENT OF
NATURAL RESOURCES**

**ENVIRONMENTAL & LEGAL AFFAIRS –
SEPA CENTER**
PO BOX 47015
OLYMPIA, WA 98504-7015

360-902-2117
SEPACENTER@DNR.WA.GOV
WWW.DNR.WA.GOV

DETERMINATION OF NONSIGNIFICANCE

Description of proposal: The Department is undergoing rule-making for amendments and addition to chapter 332-30 WAC regarding the use of state-owned aquatic lands for commercial finfish net pen aquaculture.

Proponent: WA State Department of Natural Resources

Location of proposal, including street address, if any: State-owned aquatic lands statewide

Lead agency: Department of Natural Resources

The lead agency for this proposal has determined that it does not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21c.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public on request.

There is no comment period for this DNS

This DNS is issued under 197-11-340(2); the lead agency will not act on this proposal for 14 days from October 16, 2024. Comments must be submitted by 11:59 PM on November 7th, 2024.

Responsible official: Thomas Gorman

Position/Title: Aquatic Resources Division Manager **Phone:** 360-902-1100

Address: 1111 Washington St SE; MS: 47027 Olympia, WA 98504

Date: 10/16/2024 **Signature:** _____

There is no DNR administrative SEPA appeal.

Exhibit D



Home

Commissioner Franz Ends Net Pen Aquaculture in Washington's Waters

News Date:
NOVEMBER 18, 2022

Washington's public aquatic lands will no longer be home to commercial finfish net pen aquaculture. Commissioner of Public Lands Hilary Franz announced today on Bainbridge Island an executive order that would prohibit commercial finfish net pen aquaculture on state-owned aquatic lands managed by her agency, the Washington State Department of Natural Resources (DNR).

"As we've seen too clearly here in Washington, there is no way to safely farm finfish in open sea net pens without jeopardizing our struggling native salmon. Today, I'm announcing an end to the practice. We, as a state, are going to do better by our salmon, by our fishermen, and by our tribes," said **Commissioner of Public Lands Hilary Franz**. "Commercial finfish farming is detrimental to salmon, orcas and marine habitat. I'm proud to stand with the rest of the west coast today by saying our waters are far too important to risk for fish farming profits."

Commissioner Franz's order will align Washington's net pen salmon aquaculture policy with policies already in place in Alaska, California, and Oregon.

Commissioner Franz was joined in her announcement by Chairman Leonard Forsman of the Suquamish Tribe and Emma Helverson, Executive Director of the Wild Fish Conservancy.

"On behalf of the Suquamish people, I want to thank Commissioner Franz for listening to Tribes and others who place the health of the Salish Sea as their top priority," said **Leonard Forsman, Chairman of the Suquamish Tribe**. "Ending commercial finfish farming in our ancestral waters is an important step towards protecting marine water quality, salmon populations, and the endangered Southern Resident Killer Whales. The impacts of commercial finfish farming put all of that at risk, and threatened treaty rights and ultimately our way of life and culture."

"The importance of this new policy for wild fish, water quality, and the greater health of Puget Sound cannot be overstated. We are so grateful to Commissioner Franz for listening to the public and taking action to protect Puget Sound, not just today, but far into the future for the benefit of so many generations to come," says **Emma Helverson, Executive Director of Wild Fish Conservancy**. "All week, we have been hearing from people throughout our region and colleagues around the world already celebrating Commissioner Franz's decision earlier this week to deny leases to the net pen industry. Now, this historic and bold policy is setting a new model that will go on to bolster efforts around the world working toward this same end. What we've accomplished together is truly something for Washington to be proud of."

"The Salish Sea is one of our eldest relations and was here long before us. It is one of our most powerful teachers, and we have a sacred obligation to preserve, promote, and protect it at all costs," said **Anthony "Tse Sum Ten" Hillaire, Lummi Nation Chairman**. "Since time immemorial, we have harvested finfish and shellfish, and ensuring that our children and grandchildren have access to those same rights is of utmost importance, as a healthy and productive Salish Sea is essential to our survival."

"Tulip is committed to protecting the environment and restoring historic fish numbers, and this is why we urge caution as alternative methods of production are considered. The Salish Sea is a delicate ecosystem which requires our conservation and stewardship," said **Teri Gobin, Chairwoman of the Tulip Tribes**.

"We say, 'the table is set when the tide goes out.' Seafoods have always been a staple of Samish diet and traditions," said **Tom Wooten, Samish Indian Nation Chairman**. "By removing the Sound's remaining net pens, our delicate ecosystem now gets a chance to replenish, repair and heal. We are grateful and lift our hands to the DNR's partnership in helping protect the Salish Sea that tie us to our history and culture."

Commissioner Franz's order directs DNR staff to develop necessary changes to agency rules, policies, and procedures to prohibit commercial finfish aquaculture on state-owned aquatic lands.

This order only applies to commercial net pen fin fish aquaculture, and does not apply to hatcheries that restorative or boost native stocks.

Commercial finfish farming has operated in marine net pens in Puget Sound for more than 40 years, operating on aquatic lands leased from DNR. Citing several areas where the Cooke violated terms of the leases, Commissioner Franz Monday terminated the two remaining finfish net pen aquaculture facilities leases in Washington.

DNR's denial of Cooke Aquaculture's request to re-lease the sites to continue finfish net pen aquaculture gives the company until December 14 to finish operations and begin removing its facilities and repairing any environmental damage. The Hope Island lease expired in March and has been in month-to-month holdover status since. The Rich Passage lease expired in November.

New Policy Driven by 2017 Collapse

DNR determined that allowing Cooke to continue operations posed risks of environmental harm to state-owned aquatic lands resulting from lack of adherence to lease provisions and increased costs to DNR associated with contract compliance, monitoring, and enforcement.

In August of 2017, a net pen at Cooke's Cypress Island fish farm collapsed, releasing hundreds of thousands of Atlantic salmon into Puget Sound. As a result, [DNR terminated that lease](#). Cooke was fined \$332,000 and found negligent by the state Department of Ecology.

In December of 2017, DNR terminated Cooke's Port Angeles lease due to Cooke operating in an unauthorized area and failing to maintain the facility in a safe condition. Cooke challenged that termination in the superior court and that litigation is still pending.

The Washington state Legislature in 2018 phased out Atlantic salmon farming, and the company since shifted operations at its remaining leaseholds in Rich Passage and Hope Island to grow sterile steelhead trout.

Commissioner Franz's full order is available at https://www.dnr.wa.gov/publications/em_commissioners_order_net_pens.pdf

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MEDIA CONTACT

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FORESTRY	LAND LEASES	PRODUCTS	AQUATIC RESOURCES	WILDFIRE RESOURCES	EARTH RESOURCES	MORE RESOURCES
Landowner Assistance	Agriculture and Grazing	Timber	Reserves	Fighting Fire	Geologic Information	Media Contacts
Portal - NEW	Commercial Real Estate	Biomass	Creosote Removal	Defending Your Home	Portal	Boards and Commissions
Forest Practices	Communications Towers	Firewood	Mooring Buoys	Prevention	Energy, Mining, and	Public Disclosure
Application (FPARS)	Energy	Mining and Minerals	Razor Clams	Burn Permits	Minerals	Rule Making
Family/Small Forest	Geoducks	Maps	Aquatic Leasing	Industrial Fire Precaution	Earthquakes	SEPA
Owner Resources	Land Appraisal Unit	Trail Maps	Other Aquatic Resources	Levels (IFPL)	Landslides	Tribal Relations
Cultural Resources	Shellfish	Seedlings		Burn Bans	Volcanoes	Youth Education
Forest Health Assistance	More Land Lease	Discover Pass		Fire Business Documents	Tsunamis	Reports
Forest Legacy	Resources	Recreation		Wildfire Ready	Other Geology	Open Data
Urban Forestry	More Aquatic Lease	Product Sales		Neighbors	Resources	E-newsletter
Other Forest Regulation	Resources			Wildfire Media Contact		
Resources						
Other State Forest						
Resources						

Exhibit E

business and rural counties on what this prohibition on aquaculture will do and mean to their future.

02:57:59.580 -- The SBEIS and CBA also does not consider their increased costs of importing seafood which makes a healthy protein source less affordable.

02:58:06.140 -- I asked the commissioners, I asked the board to delay this process if fully considered.

Response to I-518-1

Comment noted and DNR respectfully disagrees. DNR has followed the requirements outlined in the Administrative Procedures Act (RCW 34.05) and conducted Tribal Government outreach beyond the APA's requirements. DNR provided adequate notice of available public and Tribal comment opportunities. Tribal Governments, the public, local, state, and federal agencies had multiple opportunities throughout the process to provide comment through multiple methods. DNR is directed by statute (RCW 79.105.030) to manage state-owned aquatic lands to

provide a balance of public benefits for all citizens of the state. These public benefits include: (1) Encouraging direct public use and access; (2) Fostering water-dependent uses; (3) Ensuring environmental protection; (4) Utilizing renewable resources. Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit. DNR must balance competing paramount concerns such as industry growth and environmental protection through its policy decisions. Commercial finfish net pen siting guidance has stressed that site-specific conditions may influence guideline applicability on a case-by-case basis. DNR's science team has thoroughly reviewed the available literature and completed a synthesis at https://www.dnr.wa.gov/publications/aqr_cfnpa_review_for_rulemaking.pdf. Through the proposed rule language, DNR, as managers of Washington State-owned aquatic land proposes to prevent further damage to these important aquatic habitats instead of mitigating or responding to negative impacts resulting from commercial finfish net pen aquaculture.

A-1: Washington Department of Fish and Wildlife, Kenneth Warheit

Submit Date: 11/07/2024 4:34 PM

Submit Method: Website

Comment A-1-1

Comments: Commercial Finfish Net Pen Aquaculture Rulemaking (File No. 24-101601) Following the August 2017 net-pen collapse near Cypress Island the Washington State Legislature passed and the Governor signed EHB 2957 prohibiting the farming of non-native marine fish species on Washington State aquatic lands. The law required that the Departments of Agriculture, Ecology, Fish and Wildlife, and Natural Resources (WSDA, Ecology, WDFW, and DNR, respectively) "continue the existing effort to update guidance and informational resources to industry and governments for planning and permitting commercial marine net pen aquaculture." Efforts to update the State's guidance for the operation of marine net-pen aquaculture began in August 2016.

In April 2022, Washington State published a guidance and risk management document for commercial marine finfish net-pen aquaculture (CFNPA) in Puget Sound and Strait of Juan de Fuca (henceforth, "Guidance Document"). This document, required by law, was authored jointly and equally by the WSDA, Ecology, WDFW, and DNR, and was reviewed by staff representing the University of Washington, Washington State University, Northwest Indian College, NOAA Fisheries, Lower Elwha Tribe, and Stillaguamish Tribe of Indians (Department of Ecology Publication No. 22-06-008; <https://apps.ecology.wa.gov/publications/documents/2206008.pdf>). The 144-page Guidance Document provides authoritative content on current risks of net-pen aquaculture in Puget Sound. It is also a blueprint for government agencies to ensure that best management practices are used to mitigate many of these risks and to reduce environmental impacts from CFNPA to the Puget Sound environment. The Guidance Document was tailor-made for understanding the risks and the management of CFNPA in Puget Sound. Unfortunately, it appears that the document was at best minimally used by DNR in development of their SEPA Checklist, despite the fact that DNR was one of the authors of the document. In response to Question 8 in their SEPA Checklist, DNR states that "[w]hile there is limited data on the specific impacts of CNPA on habitats and habitat elements in Washington State, this document compiles the best available science to present how certain operations, infrastructure, and mechanisms of net pen aquaculture may influence the health of local nearshore habitats" (SEPA Checklist, Page 3, emphases added). The Guidance Document was not cited in DNR's response to Question 8, although the Guidance Document contains sections and specific language on the risks and best practices related to "habitats and habitat elements in Washington State" (see Table of Contents in the Guidance Document). In the Reasons supporting proposal section of their CR-102, DNR does cite the Guidance Document in two sections. In each of these two sections DNR indicates that impacts from CFNPA effluent and marine debris can be mitigated, consistent with the Guidance Document. However, DNR emphasized the risks rather than the best practices that can mitigate these risks. The Guidance Document includes entire chapters dedicated to water quality and effluent, benthic environment, and marine debris. If DNR had used these chapters more thoroughly they might have provided a more comprehensive assessment of the effects of CFNPA on the habitat and habitat elements discussed in both the CR-102 and the related SEPA Checklist. In their response to Question 8 in their SEPA Checklist, in a section titled "DNR Aquatic Resources Division draft science synthesis" (emphasis added), DNR used the phrase "best available science" in two places. These sections indicate that DNR used best science, that is expertise, to produce both the Checklist and the CR-102 when addressing issues related to habitats, water quality, ecosystems, and organisms. In addition to underutilizing the Guidance Document, DNR did not consult with the expertise available in WSDA and WDFW as they indicated they would in the CR-101. DNR did consult with Ecology and Ecology's water quality expert directed DNR to the Guidance Document. In the SEPA WAC 197-11-920, Ecology and/or WDFW are listed as experts in water resources and water quality, fish and wildlife, natural resource development, and land use and development, each category relevant to the DNR's CR-102 and SEPA. We are uncertain how DNR's analysis of stressors and environmental impacts from CFNPA can be considered "best" or thorough. In the absence of consulting with all the appropriate state agencies with expertise in the subject matter and more fully using the Guidance Document, DNR's analysis should be considered, simply, DNR's opinion rather than "best available science." WDFW recommends that DNR consult with all the appropriate state agencies, as they did with several Tribes in the Puget Sound area before they move to adopt the changes to WAC 332-30.