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Sent electronically via: laurie.niewolny@ecy.wa.gov

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RE: *Draft Cooke Aquaculture National Pollutant Discharge Elimination System (NPDES) permit modifications to raise steelhead (*Oncorhynchus mykiss*) in Puget Sound open water net pens.*

Dear Laurie,

Thank you for the opportunity to comment on the Draft Cooke Aquaculture (Cooke) permit modifications to rear *Oncorhynchus mykiss* steelhead National Pollutant Discharge Elimination System (NPDES) water quality permits for Cooke. Please add the following comment(s) to the administrative record.

Orca Conservancy is a 501c3 Washington State nonprofit working on behalf of *Orcinus orca*, the killer whale, and protecting the wild places on which it depends. Our urgent attention is on the 74 remaining critically endangered Southern Resident killer whales (SRKWs) which inhabit the waters of Washington State. SRKWs are dietary fish-specialists and depend on abundant populations of healthy, wild salmon for their survival, social cohesion and reproductive success. Orca Conservancy works towards increasing prey resources, reducing the accumulation of marine toxins, including reducing the destruction of salmon spawning and nearshore habitats; nurseries of the Salish Sea.

Southern Resident Killer Whales (SRKW):

On November 18, 2005, after evaluating the five listing factors of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, the National Marine Fisheries Service (NMFS) issued a final ruling listing the Southern Resident Killer Whale, a distinct population segment (DPS), as endangered under the Act. The SRKW population is

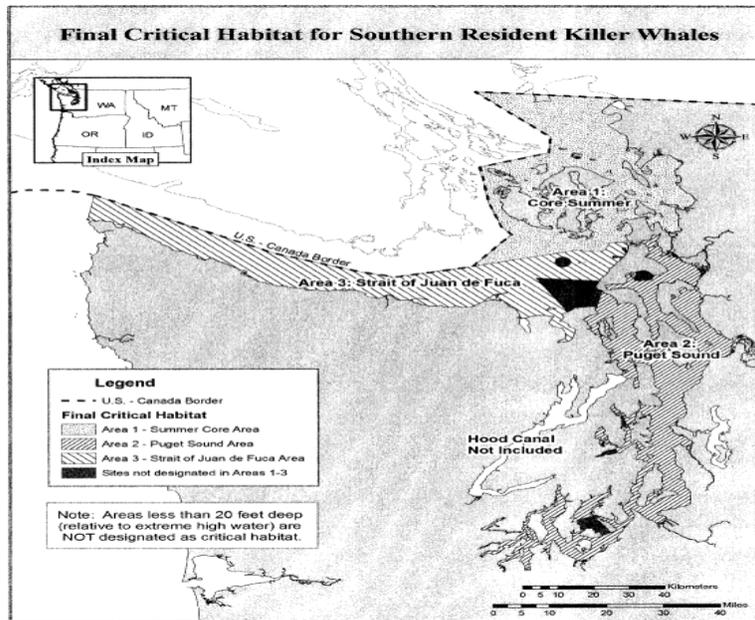
comprised of three pods (identified as J-, K-, and L-Pods) and is arguably the most familiar killer whale population to the general public, especially here in the Pacific northwest.

Critical habitat is defined Critical habitat is designated for the SRKW as described below. The textual descriptions of critical habitat in section §226.206 are the definitive source for determining the critical habitat boundaries. The overview map (below) is provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) *Critical Habitat Boundaries.* Critical habitat includes three specific marine areas of Puget Sound, Washington, within the following counties: Clallam, Jefferson, *King*, *Kitsap*, Island, Mason, Pierce, San Juan, *Skagit*, Snohomish, Thurston, and Whatcom. Critical habitat includes all waters relative to a contiguous shoreline delimited by the line at a depth of 20 feet (6.1 m) relative to extreme high water in each of the following areas:

1. *Summer Core Area:* All U.S. marine waters in Whatcom and San Juan counties; and all marine waters in Skagit County west and north of the Deception Pass Bridge (Highway 20) (48°24'25" N./122°38'35" W.).
2. *Puget Sound Area:* All marine waters in Island County east and south of the Deception Pass Bridge (Highway 20) (48°24'25" N./122°38'35" W.), and east of a line connecting the Point Wilson Lighthouse (48°8'39" N./122°45'12" W.) and a point on Whidbey Island located at 48°12'30" N./122°44'26" W.; all marine waters in Skagit County east of the Deception Pass Bridge (Highway 20) (48°24'25" N./122°38'35" W.); all marine waters of Jefferson County east of a line connecting the Point Wilson Lighthouse (48°8'39" N./ 122°45'12" W.) and a point on Whidbey Island located at latitude 48°12'30" N./122°44'26" W., and north of the Hood Canal Bridge (Highway 104) (47°51'36" N./122°37'23" W.); all marine waters in eastern Kitsap County east of the Hood Canal Bridge (Highway 104) (47°51'36" N./122°37'23" W.); all marine waters (excluding Hood Canal) in Mason County; and all marine waters in King, Pierce, Snohomish, and Thurston counties.
3. *Strait of Juan de Fuca Area:* All U.S. marine waters in Clallam County east of a line connecting Cape Flattery, Washington (48°23'10" N./124°43'32" W.), Tatoosh Island, Washington (48°23'30" N./124°44'12" W.), and Bonilla Point, British Columbia (48°35'30" N./124°43'00" W.); all marine waters in Jefferson and Island counties west of the Deception Pass Bridge (Highway 20) (48°24'25" N./122°38'35" W.), and west of a line connecting the Point Wilson Lighthouse (48°8'39" N./122°45'12" W.) and a point on Whidbey Island located at 48°12'30" N./122°44'26" W.

(b) An overview map of final critical habitat for the Southern Resident killer whale follows:



(c) *Primary Constituent Elements*. The primary constituent elements essential for conservation of the SRKW are:

1. Water quality to support growth and development;
2. Prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth; and
3. Passage conditions to allow for migration, resting, and foraging.

The Department of Ecology (Ecology), an agency whose mission is to protect, preserve, and enhance Washington's environment for current and future generations, has determined switching species from Atlantic salmon to steelhead at Clam Bay, Fort Ward, Orchard Rocks (Rich Passage), and Hope Island (Skagit County) would not change potential impacts on water quality, and claims to be strengthening regulations within the draft permits to ensure water quality is protected.

Since 1996, Orca Conservancy continues to work with best available science and evidentiary records here in the PNW, and internationally, which continue to factually document the severe environmental risks that commercial open water net pens -- also known as concentrated animal feeding operations (CAFOs) -- pose to species listed under the Endangered Species Act (ESA). This includes the water quality standards under the Clean Water Act (CWA), and ultimately, the entire ecosystem of Puget Sound.

Thus, reviewing the Department of Ecology's (Ecology) modifications to the existing NPDES permits, there are still severe environmental risks and consequences related to rearing high densities of highly domesticated fish - in this case steelhead - within marine open water net pens. Ecology is not adhering to well-documented risks which are inherent to what open water net pens can and do to materialize and endanger the health of our waters. Waters which are working harder than ever to support our culture, economy, wild salmon, and killer whales; especially the critically endangered SRKW population.

It would be reckless to issue permits that could allow the planting of steelhead in Puget Sound net pens since Ecology is well aware of the ongoing legal and scientific reviews including the potential to release new environmental impacts to water quality and marine ecosystem.

1. Ecology should not authorize Cooke's modified NPDES permits while the underlying SEPA review is being challenged. In October 2020, WDFW posted a SEPA “mitigated determination of non-significance” (MDNS) analyzing the potential genetic and environmental impacts of Cooke’s proposal to transition from farming Atlantic salmon to farming steelhead in several of the company’s existing facilities. WDFW’s decision to issue MDNS without fully analyzing and considering the potential significant environmental consequences posed by net pen aquaculture may have violated the State Environmental Policy Act (SEPA). WDFW’s decision to grant Cooke’s permits based on the MDNS is currently being litigated in a Washington Superior Court with a pending ruling from Judge Johanna Bender, who held trial on this issue September 24, 2020¹.

Given the magnitude of scientific evidence WDFW failed to consider during the review, it is possible that the Court could rule that WDFW violated SEPA, invalidating the MDNS and permits granted to Cooke, and requiring WDFW to reinstate the SEPA process to conduct additional environmental review such as an environmental impact statement. As a partner agency in this SEPA review, Ecology should not authorize NPDES permits until the Court announces their final decision in this legal matter. Furthermore, comprehensive environmental review of the impacts posed by Puget Sound net pens has not occurred since the 1990 EIS. If an EIS is required by the Court, it is likely to unveil significant pollution and water quality risks and harms posed by net pen aquaculture that Ecology would need to address and review through the NPDES permitting process. This would include environmental impacts associated with the practice of net pen aquaculture in general, as well as environmental impacts associated with the expansion to steelhead.

2. Ecology should not authorize Cooke's modified NPDES permits while federal ESA consultation on the impacts of Puget Sound net pens are ongoing. NOAA Fisheries is currently preparing a biological opinion of Puget Sound net pens in response to the Environmental Protection Agency’s initial determination in May 2020² that Puget Sound net pens “are likely to adversely impact” ESA-listed Puget Sound salmon, steelhead, and rockfish populations. This consultation is addressing water quality standards needed to issue the permits and therefore it would be premature and inappropriate for Ecology to finalize the NPDES permit review and issue permits while this federal ESA consultation is ongoing and without fully addressing and reviewing NOAA Fisheries’ findings. Additionally, that determination released a new analysis directly related to impacts of Puget Sound finfish net pens pose to ESA-listed species and designated critical habitat.

It is clear that the legislature intended to alter the risk assessment framework used for marine finfish aquaculture in general from the status quo. The Environmental Protection Agency (EPA) made an initial species effects determination that Puget Sound’s marine finfish net pens “are likely to adversely affect” the following ESA-listed fish populations: Chinook salmon (Puget Sound ESU), Chum Salmon (Hood Canal summer-run ESU), Steelhead (Puget Sound DPS), Boccaccio (Puget Sound/ Georgia Basin DPS) and the Yelloweye Rockfish (Puget Sound/ Georgia Basin DPS).

¹ 2020. (September 24). Wild Fish Conservancy, Center for Biological Diversity, Center for Food Safety, Friends of the Earth. https://www.goskagit.com/news/environment/judge-hears-lawsuit-over-fish-farms/article_bee1ad57-88c7-5b8a-9e59-b30a378765fd.html
² 2020. (May 29). Environmental Protection Agency (EPA). BA. Addendum. https://drive.google.com/file/d/1o_-bsup2_W6qBz80PedBznLddCxqJEQL/view

Notably, Chinook and other salmonid species currently listed under the ESA are continuing to decline in Washington state and the inability to control Nonpoint Source Pollution (NPS) is merely a fraction of the larger picture. Endangered Southern Resident killer whales rely on Chinook and chum salmon for survival and social cohesion.

Congress passed the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U. S. C. §1251(a); see also PUD No. 1, 511 U. S., 700, 714, the “national goal” being to achieve “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U. S. C. §1251(a)(2). Section 401 is a critical piece of the CWA which was specifically written to block or reduce environmental impacts from fossil fuel pipelines, hydroelectric and other dams, cooling water intakes, large commercial and housing developments, mining, dredging, and other destructive projects that require a federal license or permit.

Under the NPDES, the CWA defines a ‘point source’ as “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel, or other floating craft from which pollutants are or may be discharged.”³ ‘Nonpoint sources’ are defined as those sources not traceable to a single conveyance.⁴

3. Clarifying that any fish reared in Cooke’s net pens are prohibited from release.

The Washington Pollution Control Board (WPCB) has found that escaped salmon are “agricultural or industrial waste,” another statutory example of the definition of pollutant.⁵ As the federal government also considers aquaculture to be a form of agriculture, escaped salmon may similarly be treated as *agricultural or industrial waste* under the CWA.⁶ Meaning, said pollutant, must be introduced into the water from outside the water.⁷ Therefore, open net fish farms, “physically introduces a pollutant into water from the outside world.”⁸

4. Adding requirements and details on how to notify state agencies of events that could potentially lead to fish escape.

Escapes from an aquaculture facility can occur for a variety of reasons, including an overflow during flooding events, equipment failures, or improper facility design. Reducing the potential for escape events is extremely important in preventing unintentional introductions of invasive species into state waters. States generally focus on regulating the location and design of aquaculture facilities to mitigate the risk of escapes.

Orca Conservancy encourages Ecology to acquire enacting and enforcing more specific requirements. Meaning, Ecology must not issue a permit until said aquaculture facility (Cooke), has submitted substantiated details that prevent the escape and/or release of organisms including the discharge of biological effluents which include procedures intended to protect marine life, animals and humans against disease of harmful biological agents, and are willing to submit monthly pathogen reporting made available to the general public.

3 33 U.S.C. 1362(14)

4 William H. Rodgers, Jr., Handbook on Environmental Law, 4.4, at 375 (1977); S. Rep. No.92-414, at 212 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3760. Senator Bob Dole defined a nonpoint source as “one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit. . . .” *Id*

5 1998. Wash. Rev. Code Ann. 15.85.010 (West)

6 1996. Robert R. Stickney, Aquaculture in the United States: A Historical Survey 228 (stating that the Department of Agriculture was involved in the aquaculture industry in the late 1970s and that it controlled the specific area of inland species which were of commercial interest) [hereinafter Stickney, Historical Survey]; 33 U.S.C. 1362(6)

7 *Consumers Power*, 862 F.2d at 588-89; *Gorsuch*, 693 F.2d at 174-75

8 *Gorsuch*, 693 F.2d at 175; see *Consumers Power*, 862 F.2d at 584

As we stated in our letter dated, June 8, 2020 (see attached), Cooke has shown time and time again that they are not a trustworthy permit operator, let alone a good neighbor. Orca Conservancy is opposed to allowing any industry, especially Cooke, to self-monitor and self-report violations.

While the safety of human life is undoubtedly a priority, securing the net pen should happen simultaneously with the emergency notification and recovery of feral fish, not afterward, and not at the discretion of Cooke.

Having said that, we recognize any NPDES permit can be revoked or modified in whole or in part during its terms for: violation of any term or condition of the permit; obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; or a determination that the permit activity endangers human health of the environment, or contributes to water quality standard violation.

While the state agency report on the investigation into Cooke's August 19, 2017 catastrophic net pen failure are damning, said report highlights outright lies and misinformation that Cooke told state agency officials and tribal governments. Additionally, the 2018 investigation report found, among other things; the "probable cause of both the July incident and the August failure was due to the lack of accountability by Cooke to adequately clean the nets containing the fish. 35 33 WAC 173-220-150(1)(d); WAC 172-220-190. 34 WAC 173-220-190(3).

And yet knowing all that, the state agencies did NOT investigate further.

Since endangered SRKWs rely on healthy wild Chinook salmon for their survival, we believe Ecology should engage in its own SEPA analysis under RCW Ch. 43.21c due to: 1. Cooke's Pollution Prevention Plan being incomplete and deficient, 2. that Cooke's Fish Escape Prevention Plan is incomplete and deficient, 3. given Cooke's history of non-compliance should have more accountability measures, 4. that Cooke's Fish Recovery and Recapture Plan is still incomplete and deficient, 5. an analysis for ESA-listed Steelhead and Chinook must be included in Ecology's water pollution data, and 6. the new tier II analysis should be required in accordance to Washington's Antidegradation Policy (WAP). Meaning, SRKWs, as a species listed under the ESA, falls under the Antidegradation policy⁹ as 'existing uses' and is covered under the water quality standards. Simply put, antidegradation means that no pollutant discharges or activities will be permitted if these may cause surface waters already meeting water quality standards to drop below those standards.

⁹ 2020. EPA. Key Concepts Module 4: Antidegradation. <https://www.epa.gov/wqs-tech/key-concepts-module-4-antidegradation>

In closing, said modified permits still fail to account for changes in risk assessment imposed by HB2957¹⁰, which clearly states to eliminate commercial marine net pen escapement, and to eliminate negative impacts to water quality and native fish, shellfish, and wildlife as intended by the Washington state legislature in passing this law.

Ecology is incorrect to treat Cooke's current permit application as an extension of an existing practice, and permitting should not occur and especially without thorough consultation with local, state, federal and tribal governments.

Sincerely,



Shari L. Tarantino
Executive Director

¹⁰ 2017-18. Reducing escape of nonnative finfish from marine finfish aquaculture facilities. Sponsors: Lytton, Peterson, Robinson, Wilcox, Talor, Stambaugh, Sawyer, Chapman, Pollet, Stanford. <https://app.leg.wa.gov/billsummary?BillNumber=2957&Year=2017>