

Legal authorities and requirements

Commercial marine net-pen aquaculture facilities in Washington are regulated by local, state and federal permits and licenses. An explanation of the legal authorities and most commonly required authorizations for marine net pens of Atlantic salmon are included here. This section is not exhaustive. Additional authorizations may be necessary to site, build or operate a particular project.

This section does not provide details on the authorities and requirements related to activities and onshore development ancillary to in-water net pens, which are outside the scope of this project. Washington Department of Health, Washington Department of Transportation, the U.S. Food and Drug Administration, local governments and many other entities have roles to play overseeing hatcheries and processing facilities, ensuring worker and food safety, licensing boat operations, and other ancillary activities.

In Washington, applicants can file the Joint Aquatic Resource Permit Application (JARPA)¹ and submit the same application to multiple agencies (applicable city or county, Ecology, WDFW, WDNR, USACE, and USCG). Each agency may ask for additional information to assist in conducting a thorough and appropriate review (Figure X., Commercial Net Pen Permitting Flowchart).

Local authorities and requirements

Cities and counties have a role in authorizing commercial net-pen facilities within their jurisdiction. They review project proposals for compliance with land use regulations codified in their Comprehensive Land Use Plan, Shoreline Master Program, environmental regulations, zoning and other codes. They typically conduct their proposal review prior to state and federal agencies, and conduct the State Environmental Policy Act (SEPA) review (p. X).

City and counties have a particular role in considering if the proposed use and its impacts, such as visual or noise impacts, are compatible with existing uses. Some local jurisdictions require a visual impacts assessment as part of the application process.

Shoreline Master Program

Washington's coastal cities and counties are required to have Shoreline Master Programs by the Shoreline Management Act (SMA) of 1971.² The SMA directs local governments and Ecology to “*plan for and foster all reasonable and appropriate uses*” in a manner that enhances the public interest, protects against adverse environmental impacts, and preserves the natural character of shorelines.

¹ State of Washington, Governor's Office for Regulatory Innovation and Assistance. ePermitting – home of the JARPA. Accessed August 7, 2017. http://www.epermitting.wa.gov/site/alias_resourcecenter/9978/default.aspx

² Chapter 90.58 RCW: Shoreline Management Act of 1971. <http://apps.leg.wa.gov/RCW/default.aspx?cite=90.58>

The SMA was established as a cooperative management program between local governments and Ecology. Within the bounds of Ecology's administrative codes,³ each local jurisdiction is responsible for developing and administering its own Shoreline Master Program with goals, policies and regulations adjusted to fit local conditions. Shoreline programs must contain permitting standards consistent with Ecology's permit rule.⁴

Substantial Development Permit (SDP)

SDPs are required for substantial shoreline development. "Substantial development" is any shoreline development where the total cost or fair market value exceeds \$7047, or any development which materially interferes with the normal public use of the water or shorelines of the state.⁵ All proposals for new commercial net pens would require a locally-issued SDP because of this cost threshold. Local governments may approve SDPs that are consistent with the SMA and applicable SMP provisions. Local governments may attach project-specific conditions to SDPs. Ecology does not have authority to approve or condition SDPs.

Conditional Use Permit (CUP)

Depending on the standards in each jurisdiction's shoreline program, commercial net-pen facilities may also require a CUP. Local governments may approve CUPs where applicants demonstrate consistency with review criteria found in Ecology rules. The CUP review criteria include, among other things, a demonstration that the project's use of the site and the design will be compatible with other authorized uses in the area, and that the proposed use will not cause significant adverse effects to the environment. In granting permits, consideration must also be given to cumulative impacts of additional requests for like actions in the area.⁶ CUPs are issued by local governments (approved or denied), then sent to Ecology for further review and approval or disapproval. In authorizing a conditional use, local governments or Ecology may attach special conditions to the permit to prevent undesirable effects of the project.

Applicable state laws and administrative codes

Chapter 90.58 RCW: The Shoreline Management Act of 1971

Chapter 173-27 WAC: Shoreline Management Permit and Enforcement Procedures

³ Ecology. Chapters 173-18, 20, 22, 26 and 27 WAC: Shoreline Management Act (SMA) Rules. Accessed May 1, 2017. <http://www.ecy.wa.gov/programs/sea/rules/1506ov.html>

⁴ Chapter 173-27 WAC: Shoreline management permit and enforcement procedures. <http://apps.leg.wa.gov/WAC/default.aspx?cite=173-27>

⁵ RCW 90.58.030(3)(e): Definitions and concepts. <http://apps.leg.wa.gov/RCW/default.aspx?cite=90.58.030>. The cost threshold for substantial development permits is adjusted by Washington Office of Financial Management every five years based on inflation. The most recent adjustment was July 1, 2017 and took effect September 2, 2017. The next adjustment will occur July 1, 2022.

⁶ WAC 173-27-160: Review criteria for conditional use permits. <http://apps.leg.wa.gov/wac/default.aspx?cite=173-27-160>

State authorities and requirements

Washington Department of Agriculture (WSDA)

The WSDA is responsible for fostering the State's aquaculture industry and providing market assistance.⁷ WSDA also has a supporting role in the monitoring and control of aquaculture diseases. The State veterinarian leads WSDA's Animal Health program, which supports WDFW in the monitoring and control of aquaculture diseases. The veterinarian must be notified by WDFW if there is a diagnosis of any regulated finfish pathogens.⁸

Applicable state laws and administrative codes

Chapter 69.07 RCW: Washington Food Processing Act

Chapter 15.85 RCW: Aquaculture Marketing

WAC 16-603-010: Aquaculture identification requirements

WAC 220-370-050: Definitions – Aquaculture disease control

Washington Department of Ecology (Ecology)

National Pollutant Discharge Elimination System (NPDES) Permit

The NPDES permit translates the general requirements of the Clean Water Act into specific provisions tailored to each operation discharging pollutants. The facilities must adhere to specific operating requirements and best management practices to minimize water quality impacts.

USEPA authorizes Ecology's Water Quality Program to administer NPDES permits in Washington. NPDES permits are required for any net-pen operation that qualifies as a Concentrated Aquatic Animal Production (CAAP) facility. CAAPs are defined as those facilities that either harvest more than 20,000 lbs. of fish per year or feed more than 5,000 lbs. of fish food during any calendar month.⁹ (See Appendix C for more detail.)

The NPDES permits for the existing commercial net pens of Atlantic salmon in Washington require:

- Accidental fish release response plan (coordinated with WDFW)
- Fish release prevention and monitoring plan (coordinated with WDFW)
- Annual fish release report
- Significant fish release report
- Emergency spill plan
- Monthly disease control chemical use report
- Monthly fish biomass and feeding report
- Pollution prevention plan

⁷ RCW 15.85.030: Department principle agency for aquaculture marketing support.

<http://app.leg.wa.gov/RCW/default.aspx?cite=15.85&full=true#15.85.030>

⁸ WAC 220-370-050: Definitions – Aquaculture disease control. <http://app.leg.wa.gov/WAC/default.aspx?cite=220-370-050>

⁹ USEPA. NPDES Aquaculture Permitting. Accessed June 1, 2017. <https://www.epa.gov/npdes/npdes-aquaculture-permitting>. Also see 40 CFR Part 122: <https://www.gpo.gov/fdsys/search/searchresults.action?st=40+CFR+122>.

- Sea lice monitoring results
- Sediment sampling and analysis
- Underwater photographic survey
- Water column dissolved oxygen profile

If the results of sediment quality monitoring are in exceedance of the limits listed in the Sediment Management Standards,¹⁰ an enhanced sediment quality monitoring plan is implemented. Ecology also requires closure monitoring to evaluate benthic recovery if pens are moved or removed.¹¹

*Section 401 Water Quality Certification*¹²

An installation may require a section 401 Certification. Issuance of a certification means that Ecology has reasonable assurance that the applicant's project will comply with state water quality standards and other aquatic resources protection requirements under Ecology's authority. The certification can cover both the construction and operation of a proposed farm. Conditions of the certification become conditions of the NPDES permit.

*Coastal Zone Management (CZM) Consistency Determination*¹³

Activities and development located within Washington's coastal counties that involve federal activities, federal licenses or permits, such as an USACE section 10 permit, require a written Consistency Determination by the state's CZM Program, which is currently managed by Ecology's Shorelands and Environmental Assistance Program (SEA).

Applicable state laws and administrative codes

Chapter 90.48 RCW: Water Pollution Control

Chapter 173-201A WAC: Water Quality Standards for Surface Waters of the State of Washington

Chapter 173-204 WAC: Sediment Management Standards

Chapter 173-220 WAC: National Pollutant Discharge Elimination System Permit Program

Washington Department of Fish and Wildlife (WDFW)

WDFW's primary responsibility is to preserve, protect, perpetuate, and manage the fish and wildlife species of the state.¹⁴ They have a primary role in regulating finfish aquaculture through licensing, permits and fish health inspection programs.

¹⁰ Chapter 173-204 WAC: Sediment Management Standards. <http://apps.leg.wa.gov/WAC/default.aspx?cite=173-204>

¹¹ WAC 173-204-412(3)(e): Marine finfish rearing facilities. <http://app.leg.wa.gov/WAC/default.aspx?cite=173-204-412>

¹² Ecology. Federal Permits Home. Accessed May 4, 2017. http://www.ecy.wa.gov/programs/sea/fed-permit/#What_is_a_401_Water_Quality_Certification

¹³ Ecology. Coastal Zone Management (CZM), Federal Consistency. Accessed May 30, 2017. <http://www.ecy.wa.gov/programs/sea/czm/fed-consist.html>

¹⁴ RCW 77.04.012: Mandate of department and commission. <http://app.leg.wa.gov/RCW/default.aspx?cite=77.04.012>

*Aquatic Farm Registration*¹⁵

State code requires an aquatic farm¹⁶ be registered with WDFW in order to produce private sector cultured aquatic products.¹⁷ It also states that registrations must be renewed annually and that reporting of aquaculture activities during the previous year constitutes renewal for the following year. Registered aquatic farms are also required to report quarterly on the species cultured, quantity harvested for sale, and unit value.¹⁸

*Marine finfish aquaculture permit*¹⁹

In order to raise any species of marine finfish in net pens within Washington's marine waters, aquatic farmers must possess a permit from the WDFW director for rearing or holding a species, stock or race of marine finfish, defined as finfish being raised in marine waters, in net pens, cages or other rearing vessels. The application must be accompanied by an operations plan, escape prevention plan and an escape reporting and recapture plan. The permit may stipulate additional conditions consistent with state law, such as marking of fish and the prohibition on transgenic fish.²⁰ The permit is valid for five years.

*Live Fish Transport/Importation Permits*²¹

Anyone wishing to transport fish into or through Washington must obtain a Fish Transport Permit. The purpose of the Fish Transport Permit is to protect native fish species and ensure that: 1) live fish being brought into Washington are free from reportable fish pathogens; 2) undesirable fish species, if introduced into state waters, cannot cause harm to native species; and 3) Aquatic Invasive Species do not get shipped with the desired fish species.

*Hydraulic Project Approval (HPA)*²²

Projects in or near state waters require a Hydraulic Project Approval (HPA) from WDFW. The HPA is authorized under the Hydraulic Code Rules and is intended to help protect fish and their habitat.

Other requirements

- All fish are marked to identify the producer. The current net-pen facilities use otolith marking.

¹⁵ WAC 220-370-060: Aquatic farm registration required. <http://app.leg.wa.gov/WAC/default.aspx?cite=220-370-060>. See also Governor's Office of Regulatory Innovation and Assistance, Aquatic Farm Registration. Accessed August 1, 2017. <http://apps.oria.wa.gov/permithandbook/permitdetail/26>

¹⁶ WAC 220-370-040: Aquatic farm – Definition. <http://app.leg.wa.gov/WAC/default.aspx?cite=220-370-040>

¹⁷ RCW 15.85.020: Aquaculture Marketing, Definitions. <http://app.leg.wa.gov/RCW/default.aspx?cite=15.85.020>

¹⁸ WAC 220-370-160: Duties of Aquatic Farmers. <http://apps.leg.wa.gov/WAC/default.aspx?cite=220-370-160>;

WAC 220-370-170: Description of aquatic farm production report.

<http://apps.leg.wa.gov/WAC/default.aspx?cite=220-370-170>

¹⁹ WAC 220-370-100: Marine finfish aquaculture—Approval permit for marine finfish aquaculture.

<http://apps.leg.wa.gov/wac/default.aspx?cite=220-370-100>

²⁰ WAC 220-76-100: Marine finfish aquaculture – Approval permit for marine finfish aquaculture.

<http://apps.leg.wa.gov/WAC/default.aspx?cite=220-370-100>

²¹ WDFW. Fish Transport Permits. Accessed May 1, 2017.

http://wdfw.wa.gov/licensing/fish_transport/transport_app.html

²² WDFW. Hydraulic Project Approval (HPA). Accessed July 18, 2017. <http://wdfw.wa.gov/licensing/hpa/>

- Farm access must be granted for fish health inspection.²³

Applicable state laws and administrative codes

Chapter 77.115 RCW: Aquaculture Disease Control

Chapter 15.85 RCW: Aquaculture Marketing

Chapter 220-660 WAC: Hydraulic Code Rules

Chapter 220-370 WAC: Aquaculture

Washington Department of Natural Resources (WDNR)

Aquatic Use Authorization (Aquatic Lands Lease)

WDNR manages State-owned aquatic lands. WDNR manages these lands for a balance of public benefits for all citizens, including: encouraging direct public use and access; fostering water-dependent uses; ensuring environmental protection; and utilizing renewable resources. Generating revenue in a manner consistent with these four goals is public benefit. WDNR must charge rent for the private use of public land.

Aquatic uses proposed to locate on state-owned aquatic lands, such as commercial net pens, require use authorizations (leases) from WDNR. These leases specify location, structural development, operational practices, lease terms, environmental monitoring, rent, and other requirements. Leases are typically for 10 years, but must be “for periods not to exceed thirty years.”²⁴ Re-leases may be issued for up to an additional 30 years.²⁵ WDNR has latitude to require insurance, bonds, and other security.²⁶

Lessees must obtain all other local, state and federal permits before WDNR will grant the lease.²⁷ The agency reviews the proposal for consistency with state laws and rules and potential environmental impacts to aquatic lands and the natural resources associated with these lands, and risks to public health and safety. WDNR may develop lease conditions for construction and operations to minimize impacts. WDNR coordinates with other agencies during the application review process.

Applicable state laws and administrative codes

Chapter 79.105 RCW: Aquatic Lands – General Aquatic Use Permit Application and Aquatic Lands Lease

²³ WAC 220-370-080: Aquaculture facility inspection authority – Generally.

<http://apps.leg.wa.gov/WAC/default.aspx?cite=220-370-080>. Also see WAC 220-370-050: Definitions – Aquaculture disease control, for disease classifications including “regulated finfish pathogens”.

<http://apps.leg.wa.gov/WAC/default.aspx?cite=220-370-050>. Also see WAC 220-370-190: Finfish aquaculture disease control, for additional regulations. <http://apps.leg.wa.gov/WAC/default.aspx?cite=220-370-190>

²⁴ RCW 79.135.110: Leasing beds of tidal waters for shellfish cultivation or other aquaculture use.

<http://apps.leg.wa.gov/rcw/default.aspx?cite=79.135.110>

²⁵ RCW 79.135.150: Renewal lease – Application. <http://apps.leg.wa.gov/rcw/default.aspx?cite=79.135.150>

²⁶ WAC 332-30-122(5): Insurance bonds, and other security. <http://apps.leg.wa.gov/WAC/default.aspx?cite=332-30-122>

²⁷ WDNR. Leasing and Land Transactions. Accessed May 30, 2017. <http://www.dnr.wa.gov/programs-and-services/aquatics/leasing-and-land-transactions>

Chapter 79.135 RCW: Aquatic Lands – Oysters, Geoducks, Shellfish, Other Aquacultural Uses, and Marine Aquatic Plants
Chapter 332-30 WAC: Aquatic Land Management

Additional state authorities – Ocean Resource Management Act (ORMA)²⁸

The goal of the ORMA is to establish policies and guidelines for management of Washington’s coastal waters, seabed and shorelines. This is specific to coastal counties and includes Grays Harbor and Willapa Bay. It gives priority to activities that will not adversely impact renewable resources, and prohibits leasing of Washington’s coast for oil or gas exploration, development or production. Washington participates in Federal ocean and marine resource decisions to the fullest extent possible to ensure consistency with the State’s policy.²⁹

Applicable state laws and administrative codes

RCW 43.143: Ocean Resources Management Act

WAC 173-26-360: Ocean management

Additional state authorities – State Environmental Policy Act (SEPA)³⁰

SEPA requires consideration of significant adverse environmental impacts through completion of an environmental checklist and review prior to local or state approval of a proposed farm. An environmental impact statement may be required if there are probable significant environmental impacts.³¹ Cities and counties where a net-pen facility is proposed typically conduct the SEPA review.

Applicable state laws and administrative codes

Chapter 43.21C RCW: State Environmental Policy

Chapter 197-11 WAC: SEPA Rules

²⁸ Chapter 43.143 RCW: Ocean Resources Management Act.

<http://apps.leg.wa.gov/RCW/default.aspx?cite=43.143&full=true>

²⁹ Ecology. *Marine Spatial Planning in Washington: Final Report and Recommendations of the State Ocean Caucus to the Washington State Legislature*. WA Department of Ecology, Olympia, WA. [Publication no. 10-06-027](#). January 2011.

³⁰ Ecology. State Environmental Policy Act (SEPA). Accessed May 30, 2017.

<http://www.ecy.wa.gov/programs/sea/sepa/e-review.html>

³¹ Ecology. SEPA Online Handbook. Accessed July 13, 2017.

<http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbintro.html>

Federal authorities and requirements

National Oceanic and Atmospheric Administration (NOAA)

National Marine Fisheries Service (NMFS)

NMFS does not directly administer permits for aquaculture installations in Washington waters. However, pursuant to the Endangered Species Act (ESA), the Marine Mammal Protection Act and the Magnuson-Stevens Fishery Conservation Act, NMFS provides consultation to federal agencies on any federal action (such as USACE or EPA permit issuance). The consultations may result in recommendations to avoid, minimize, or mitigate for adverse impacts to ESA-listed species, critical habitat, and/or essential fish habitat. There may be situations or activities that require special permits from NMFS such as Incidental Harassment Authorizations or Letters of Authorization for aquaculture activities that interact with marine mammals.³²

Office for Coastal Management (OCM)

The Coastal Zone Management Act (CZMA) is administered by NOAA's Office for Coastal Management and implemented through state coastal zone management programs. In Washington, the program is managed by Ecology's Shorelands and Environmental Assistance Program (SEA). The Act requires an applicant for a federal license or permit for an activity affecting the coastal zone to provide a certification that the proposed activity complies with the enforceable policies of approved state coastal zone management programs.

*Office of National Marine Sanctuaries (ONMS)*³³

The National Marine Sanctuaries Act (NMSA) authorizes NOAA's Office of National Marine Sanctuaries (ONMS) to identify, designate, and manage ocean and Great Lake areas of special national significance as national marine sanctuaries. Aquaculture may or may not be allowed, with a permit, in a national marine sanctuary.

U.S. Army Corps of Engineers (USACE)

The USACE's Regulatory Program involves the regulating of discharges of dredged or fill material into waters of the United States, and structures or work in navigable waters of the United States, under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. A proposed project's impacts to these areas will determine what permit type is required.³⁴ The USACE is required to consult with other federal agencies prior to issuing a permit. The agencies must review the project and, if needed, recommend mitigation measures to protect the environment or wildlife.

³² NOAA. Federal Aquaculture Regulatory Fact Sheet Series. Accessed May 5, 2017. http://www.nmfs.noaa.gov/aquaculture/docs/policy/agency_fact_sheets/noaa_aq_regulatory_fact_sheet_update_d.pdf

³³ NOAA. Olympic Coast National Marine Sanctuary, Management 101. Accessed July 20, 2017. <http://olympiccoast.noaa.gov/management/management101.html#permits>

³⁴ USACE. Obtain a Permit. Accessed May 3, 2017. <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>

Tribal governments also have the opportunity to comment on federal permits. Tribes may comment on proposals regarding habitat and treaty-reserved Usual and Accustomed (U&A) areas and provide information on potential affects to historic properties. The USACE must address comments prior to issuing a permit.³⁵ Absent tribal consent, the USACE is not authorized to permit a project that would qualify or limit the tribes' ability to access one of their usual and accustomed fishing sites or grounds for a purpose other than conservation of salmon.³⁶ This applies to commercial marine salmon net pens.³⁷

Section 10 Permit

Section 10 of the Rivers and Harbors Appropriation Act of 1899 requires a permit from the USACE for work taking place in navigable waters of the United States.³⁸ Installation of farm infrastructure (anchors, buoys and pens) would require a section 10 permit or Letter of Permission. Issuance of a section 10 permit also includes consideration of impacts to treaty-reserved rights.³⁹

Letters of permission may be used where, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. In such situations, the proposal is coordinated with Federal and State resource agencies, and in most cases, adjacent property owners who might be affected by the proposal. However, the public at large is not notified. The public interest review process is central to the decision-making process for letters of permission.⁴⁰

Section 404 Permit⁴¹

If activities in waters of the United States result in the discharge of dredge or fill, a section 404 permit is required.

U.S. Coast Guard (USCG)

The USCG administers the Private Aids to Navigation (PATON) permit for marking a structure/object/hazard and ensuring the safety of the boating public. Permission to install Private Aids to Navigation can be obtained by submitting an application. The USACE, WDNR and local jurisdictions are involved with PATON permit issuance.⁴²

³⁵ Ecology. *Shoreline Master Programs Handbook, Chapter 16, Aquaculture. Appendix 1: Overview of state and federal aquaculture requirements*. WA Department of Ecology, Olympia WA. [Publication no. 11-06-010](#). Revised December 2015.

³⁶ See e.g., *Muckleshoot v. Hall*, 698 F. Supp. 1508, 1514 (W.D. Wash. 1988).

³⁷ See *Northwest Sea Farms v. Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996).

³⁸ U.S. Government Printing Office. 33 U.S.C. 403. Section 10 of the Rivers and Harbors Appropriation Act of 1899. May 3, 2017. <https://www.gpo.gov/fdsys/pkg/CFR-2011-title33-vol3/pdf/CFR-2011-title33-vol3-part322.pdf>

³⁹ See e.g., *Northwest Sea Farms v. Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996).

⁴⁰ USACE. U.S. Army Corps of Engineers Permitting Process Information. Accessed May 3, 2017.

<http://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>

⁴¹ USACE. Section 404 of the Clean Water Act. Accessed May 3, 2017.

http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/materials/cwa_sec404doc.pdf

⁴² USCG. PATON (Private Aids to Navigation). April 8, 2015. <https://www.uscg.mil/d13/dpw/docs/patonguide.pdf>

U.S. Environmental Protection Agency (USEPA)

Section 402 of the Clean Water Act addresses water pollution by regulating point sources that discharge pollutants to waters of the United States through the National Pollutant Discharge Elimination System (NPDES). NPDES permits are required for discharges associated with Concentrated Aquatic Animal Production (CAAP) facilities.⁴³ As discussed in “*National Pollutant Discharge Elimination System*” on p. X, Ecology is authorized by USEPA to administer the NPDES program for Washington. EPA is the section 402 permit authority in Indian Country and in Washington, and retains section 402 permit authority for federal facilities.

U.S. Fish and Wildlife Service (USFWS)

USFWS does not directly administer permits for net pens. However, pursuant to the Endangered Species Act, Migratory Bird Treaty Act, and the Fish and Wildlife Coordination Act, USFWS reviews federal permit applications (such as section 10). The reviews may lead to recommendations for mitigation measures. The WDFW Live Fish Transport Permit is an extension of USFWS’ Injurious Wildlife program.⁴⁴

Aquatic Animal Drug Approval Partnership (AADAP)

The USFWS’s National INAD Program is administered by AADAP (Bozeman, MT). This program provides the means through which federal, state, tribal, and private agencies or organizations are allowed to use certain critical drugs necessary to maintain the health and fitness of aquatic species under Investigational New Animal Drug (INAD) exemptions. The FDA grants the INAD exemptions.⁴⁵ NPDES permits in Washington do allow for the use of INAD’s under certain circumstances with veterinary oversight. A farm can only obtain the drug once it has registered with AADAP – who requires definitive disease diagnosis and detailed reporting of drug use and results.

U.S. Food and Drug Administration (FDA)

Center for Veterinary Medicine (CVM)

The FDA’s Center for Veterinary Medicine approves drugs for use in aquaculture and may allow exemptions for Investigational New Animal Drugs (INAD). INAD exemption is required if a

⁴³ USEPA. NPDES Aquaculture Permitting. Accessed May 30, 2017. <https://www.epa.gov/npdes/npdes-aquaculture-permitting>

⁴⁴ USFWS. Fisheries and Aquatic Resource Conservation. Accessed May 5, 2017. http://www.nmfs.noaa.gov/aquaculture/docs/policy/agency_fact_sheets/usfws_aq_regulatory_fact_sheet.pdf. Also see 50 CFR §16.13: Importation of Live or Dead Fish, Mollusks, and Crustaceans, or Their Eggs. <https://www.gpo.gov/fdsys/granule/CFR-2001-title50-vol1/CFR-2001-title50-vol1-sec16-13>

⁴⁵ USFWS. Aquatic Animal Drug Approval Partnership. *Standards for the U.S. Fish and Wildlife Service’s National INAD Program*. Accessed June 8, 2017. <https://www.fws.gov/fisheries/aadap/PDF/NIP-Standards-April-2011.pdf> Revised April 2011.

drug is going to be used on a fish species or pathogen that is not already on the drug label. CVM also regulates animal feed ingredients and feed production.⁴⁶

*Center for Food Safety and Applied Nutrition*⁴⁷

The FDA operates a mandatory safety program for all domestic and imported fish and fishery products under the provisions of the Federal Food, Drug and Cosmetic Act (FFDCA), and pertinent regulations. A Hazard Analysis and Critical Control Points (HACCP) program addresses food safety through the analysis of hazards that may arise during the course of a product's production, handling, processing, distribution and/or consumption.⁴⁸ An aquaculture operation may not require a formal HACCP plan if no processing takes place. However, a processor will require information from the grower to include in the processor's HACCP plan. Growers should be familiar with HACCP and the information pertaining to aquaculture drugs, environmental chemical contaminants and pesticides, which the processor will be required to evaluate as a Critical Control Point in his HACCP plan.⁴⁹

Tribal authorities and requirements

Tribal governments of Western Washington are sovereign nations recognized by the United States. They have authority to ensure cultural and natural resources are protected and that treaty rights are upheld. Each tribal reservation constitutes a neighboring jurisdiction to Washington, subject to tribal and federal laws including, in many cases, USEPA approved Clean Water Act water quality standards.

The Treaty Tribes of Western Washington possess treaty-reserved rights to take fish at all their usual and accustomed places for commercial, ceremonial and subsistence purposes. These tribes are co-managers of fisheries resources, including salmon, groundfish and shellfish.⁵⁰ This authority is exercised during the state and federal permitting process in a variety of ways, including consultations. For further information see the following examples of legal decisions:

- **United States v. Winans, 198 U.S. 371 (1905)**
Case law, U.S. Supreme Court decision establishing treaty interpretation principles and the right of access guaranteed under the treaties negotiated by Territorial Governor Stevens on behalf the United States. From a case originating on the Columbia River with the Yakama Nation, as party to one of the Stevens treaties, the Court determined that the

⁴⁶ FDA. About the Center for Veterinary Medicine (CVM). Accessed May 4, 2017.

<https://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CVM/default.htm>

⁴⁷ FDA. Federal Aquaculture Regulatory Fact Sheet Series, Office of Foods and Veterinary Medicine Center for Food Safety and Applied Nutrition. Accessed May 5, 2017.

http://www.nmfs.noaa.gov/aquaculture/docs/policy/agency_fact_sheets/fda_cfsan_aq_regulatory_fact_sheet_updated.pdf

⁴⁸ 21 CFR §123.6: Fish and Fishery Products.

<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?CFRPart=123>

⁴⁹ Miget, R. 2004. *The HACCP Seafood Program and Aquaculture*. Southern Regional Aquaculture Center, SRAC Publication No. 4900.

⁵⁰ Northwest Indian Fisheries Commission, Fisheries Management. Accessed May 3, 2017. <http://nwifc.org/about-us/fisheries-management/>

tribe's treaty rights are not subordinate to the state and upheld the tribe's right of access to private property under the Stevens treaty.

- **United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)**
Case law, the federal district court decision, also known as the “Boldt Decision”, interpreting tribes’ right to harvest share fish “in common with the citizens of the Territory” under the Stevens treaties of western Washington.
- **Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979)**
Case law, U.S. Supreme Court decision upholding the Boldt Decision and establishing that the Stevens treaties reserved the tribes’ “right of taking fish at all usual and accustomed grounds and stations” and entitle tribes to “take a fair share of the available fish.”
- **United States v. Washington, 759 F.2d 1353, 1358–60 (9th Cir. 1985) (en banc)**
Case law, Ninth Circuit Court of Appeals *en banc* decision upholding the tribes’ claim that hatchery fish are fish subject to treaty allocation regardless of whether they originate from state, Indian, or federal hatcheries or from cooperative ventures.
- **Northwest Sea Farms v. Corps of Engineers, 931 F. Supp. 1515 (W.D. Wash. 1996)**
Case law, federal district court decision upholding Corps of Engineers denial of a Section 10 permit for proposed salmon fish farm net pens on the basis of Corps’ determination that the project would interfere with the right of Lummi Nation fishers to access one of their usual and accustomed fishing areas.
- **United States v. Washington – Rafeedie Decision (1994)**
Case law, federal district court decision established that treaty rights extend to shellfish and that the “in common” language means that treaty tribes reserved harvest rights to half of all shellfish from all of the “usual and accustomed places”, with some exception to places “staked or cultivated” by citizens – or those that were specifically set aside for non-Indian shellfish cultivation purposes. The U.S. Supreme Court denied review on this case in 1999 allowing this ruling to stand.

The Permitting Process

Project proponents in Washington have the option to submit the same application to several regulatory authorities (city or county, Ecology, WDFW, WDNR, USACE and USCG) at once using the JARPA (Joint Aquatic Resource Permit Application).⁵¹ The applicant then works with the individual agencies to provide additional information as needed and reach agreement on requirements. Typically, the city or county where the proposed project is located completes their

⁵¹ State of Washington, Governor’s Office for Regulatory Innovation and Assistance. ePermitting – home of the JARPA. Accessed August 7, 2017. http://www.epermitting.wa.gov/site/alias_resourcecenter/9978/default.aspx

review first with the USACE's review overlapping in time. By law, WDNR cannot issue a lease for state-owned aquatic lands until all other authorizations have been acquired by the applicant.⁵²

Figure X., Commercial Net Pen Permitting Flowchart, illustrates the most common steps of the authorization process in Washington. Figure X., NPDES Permitting Flowchart, illustrates the most common steps of the NPDES permit process in Washington. These flowcharts are not exhaustive and other authorizations may be required before siting commercial net pens.

Figure X. Commercial Net Pen Permitting Flowchart

Figure X. NPDES Permitting Flowchart

DRAFT

⁵² WDNR. Leasing and Land Transactions. Accessed May 30, 2017. <http://www.dnr.wa.gov/programs-and-services/aquatics/leasing-and-land-transactions>