

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of:)	
)	Docket No. 97-06-C-1009SF
OCEAN LIVE FISH,)	
Jong Min Park, Owner,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent,)	AND ORDER
)	
)	

A hearing was held before Health Law Judge Arthur E. DeBusschere, Presiding Officer, Office of Professional Standards, on June 25, 1996, Airdustrial Center, Clean Water Lane, Building No. 3, Tumwater, Washington. Joseph J. Randazzo, Assistant Attorney General, represented the Department of Health, Environmental Health Division, Office of Shellfish Programs (the Program). Jong Min Park, owner and operator of Ocean Live Fish/Ocean Seafood Market was present and represented by G. Saxon Rogers, Attorney at Law. For the purposes of this order, Jong Min Park and his business, Ocean Live Fish, will be referenced as the Respondent.

I. PROCEDURAL HISTORY

1.1 On March 7, 1997, the Program issued an Order of Abatement (Order of Abatement) permanently prohibiting the sale or disposition for human consumption of 80 cases of frozen, vacuum packed geoduck meat owned by the Respondent. The Order of Abatement also ordered that the geoducks be destroyed by placing them in a sanitary landfill on or before May 1, 1997. According to the Order of Abatement, if a hearing was requested, the geoduck did not have to be destroyed unless so directed by a final order entered following the hearing.

1.2 On March 28, 1997, the Respondent filed an Application for Adjudicative Proceeding.

1.3 On April 3, 1997, the Office of Professional Standards issued a Scheduling Order/Notice of Hearing. On April 23, 1997, an Amended Scheduling Order/Notice of Hearing was issued scheduling, among other matters, a prehearing conference for June 2, 1997, and the hearing for June 25, 1997.

1.4 After the June 2, 1997 prehearing conference, the Presiding Officer issued Prehearing Order No. 1: Order Defining Conduct at Hearing. On June 16, 1997, the Respondent filed a Motion and Affidavit for Order to Test Product.

1.5 Following a prehearing conference on June 18, 1997, the Presiding Officer issued Prehearing Order No. 2: Report on Prehearing Conference Discussion. On June 23, 1997, the Program filed its Response to Motion and Affidavit for Order to Test Product.

1.6 During the hearing on June 25, 1997, Mr. Randazzo presented the following witnesses: Jennifer Tebaldi, Stan Iwagoshi, and Quynh-Anh Nguyen. Mr. Rogers presented the Respondent's and Cody Malta's testimony. Young Lee served as the interpreter for the Respondent.

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II. EXHIBITS

2.1 During a prehearing conference, Mr. Randazzo offered Program Exhibits A through E. The exhibits were paginated. During the hearing, the Presiding Officer ruled that the following Program Exhibits were admitted:

Program Exhibit A:

Respondent's Shellfish Operation License and Certificate of Approval, issued December 9, 1996 (Page No. 3).

Food and Drug Administration Form for Operational License, expiration date September 30, 1997 (Page No. 4).

Validation Slip of Money Paid (Page No. 5).

Respondent's Application for Shellfish Operation License and Certificate of Approval, received on July 31, 1996 (Page No. 6).

Respondent's Shellfish Operation License and Certificate of Approval, issued January 3, 1996 (Page No. 10).

Food and Drug Administration Form for Operational License, expiration date September 30, 1996 (Page No. 11).

Respondent's Application for Shellfish Operation Live and Certificate of Approval, received on November 21, 1995 (Page No. 12 and 13 (back side)).

Shellfish Processing Plant Inspection Form, dated February 5, 1996 (Page No. 14).

Shellfish Processing Plant Inspection Report, dated December 3, 1996 (Page No. 15).

Hold Order Notice, dated November 21, 1996; Shellfish Processing Plant Inspection Report, dated November 21, 1996; NSSP Standardized Shellfish Processing Plant Inspection Form, dated November 21, 1996; Shellfish Processing Plant Inspection Report, dated November 21, 1996 (Page Nos. 16-19).

Hold Order Notice, dated March 27, 1996; Shellfish Processing Operation Inspection Report (Page Nos. 36-39) This document was admitted for the limited purpose of showing the Hold Order Notice and content, not for proving the violation at issue.

Notice of Correction, dated January 10, 1997 (Page Nos. 54-55).

Program Exhibit B:

Alpine Cold Storage Co. fax sheet, dated February 20, 1997;
Inventory of Ocean Live Fish Company, as of February 20, 1997;
February 17, 1997 form acknowledging that a Bill of Lading was
issued (Page Nos. 62-64).

Program Exhibit C:

Two Hold Order Notices, dated February 20, 1997 (Page Nos. 65
and 66).

2.2 During a prehearing conference, Mr. Rogers offered Respondent's Exhibits A through F. During the hearing, the Presiding Officer ruled that the following Respondent's Exhibits were admitted:

Respondent's Exhibit E:

Food Service Establishment Permit, dated March 1, 1997 (Page No. 2) (This document was admitted with the limited purpose to show the Respondent's understanding of the license with the Tacoma-Pierce County Health Department with the understanding that the document did not give the Respondent any rights or privileges to shuck or pack.)

Respondent's Exhibit F: (four pages)

Copy of check for \$250 to Department of Health Shellfish from Respondent, dated November 7, 1996 (Page 1).

Back side of page 1 \$250 check (Page 2).

Cashier's check , dated August 30, 1996 from Respondent to the Department of Health (Page 3).

Back side of page 3 Cashier's check (Page 4).

Respondent's Exhibit G:

Diagram of Respondent's operation (one page document) (This document was admitted for demonstrative purposes only.)

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III. ISSUES AND ARGUMENTS OF PARTIES

3.1 Prior to the start of the hearing, the parties stipulated that the sole issue was whether the Respondent was legally licensed and certified as a shucker-packer. The parties stipulated that if the Presiding Officer determined that the Respondent was not licensed to shuck and pack the geoduck, then the Presiding Officer would address the Respondent's Motion to Test Product.

3.2 In closing argument, Mr. Rogers raised additional issues. He argued that there was no legal authority which requires the Respondent to have a shucker-packer license independent of a shellstock shipper license. Mr. Rogers argued that there was also no authority for the Program to issue a license with limited function and that the licensee is entitled to perform all functions related to shellfish operations. The Program, he asserted, made these requirements without statutory authority and without notice as required by due process. Further, he argued that the Program should be estopped from following through with its Order of Abatement because the Respondent had made a good faith effort and had substantially complied with the licensing requirements. The Program argued that the Order of Abatement should be upheld.

3.3 The Presiding Officer allowed the parties to brief this issue after the hearing. The Program submitted a Post-hearing Memorandum Regarding Licensing Authority and Classification arguing that the law and rules clearly detail the Program's authority for issuing separate certificates for shellstock shipper and shucker-packer operations. Mr. Rogers stated during the hearing that he was not going to submit additional briefing and he has not done so.

IV. FINDINGS OF FACTS

Based upon the parties' stipulations, the testimony of the witnesses and the exhibits admitted into the record, the Presiding Officer hereby makes the following Findings of Fact:

4.1 Jong Min Park is the owner and operator of Ocean Live Fish Company/Ocean Seafood Market, which is located in Tacoma, Washington. As stated above, Jong Min Park and his business, Ocean Live Fish, will be referenced as the Respondent.

4.2 In November 1995 the Respondent applied for a Shellfish Operation License and Certificate of Approval. The application required the applicant to select one of the following categories of shellfish operation: (1) shellstock shipper, or (2) shucker-packer. The instructions for completing the application describe shellstock shipper as "shippers who grow, harvest, buy/or sell shellstock. They are not authorized to shuck shellfish or to repack shucked shellfish." A shucker-packer is described in the application as "shippers who shuck and pack shellfish. A shucker-packer may act as a shellstock dealer." On this application the Respondent requested a shellstock shipper license, not a shucker-packer license. The Respondent signed this application.

4.3 On January 3, 1996, the Program issued a Shellfish Operation License and Certificate of Approval to the Respondent. This license and certificate expired on September 30, 1996. In the left hand lower corner of the certificate, the words "Shellstock Shipper" were typed in. According to Jennifer Tebaldi, section manager for the Program, the Program issues two types of licenses: (1) a shellstock shipper license; and (2) a shucker-packer license. The Respondent was issued only a shellstock shipper license.

4.4 In July 1996 the Respondent sent a check for \$250 to the Department of Health for recertification/renewal of his license. This check was returned for insufficient funds. After the Respondent reissued a cashier's check in August 1996 the Respondent received a Shellfish Operational License and a Certificate of Approval issued on December 9, 1996. As before, the Respondent's renewal application requested a shellstock shipper license, not a shucker-packer license. From September 1996 to December 9, 1996, the Respondent's Shellfish Operational License had expired. Several Program employees testified that it is not uncommon for an operational license to be expired pending the recertification process.

4.5 After the Respondent was issued his Shellfish Operational License and Certificate of Approval, Program investigators inspected the Respondent's premises during 1996 and 1997. During at least two of these inspections, the investigators discovered cases of vacuum packed geoduck. On March 27, 1996, Stanley Iwagoshi, state of Washington Department of Health Shellstock Shipper Inspector, inspected the Respondent's premises and discovered 42 cases of one quarter pound geoducks, vacuum packed, in the Respondent's display case at the market. Mr. Iwagoshi testified that he asked the Respondent if he was aware that he was required to be certified to shuck and pack geoduck and the Respondent stated that he was approved to shuck shellfish through his Department of Agriculture Seafood Processing license. Mr. Iwagoshi informed the Respondent that his Department of Agriculture license permitted him to process or sell all seafood except mollusk and shellfish. Mr. Iwagoshi instructed the Respondent that he needed a separate certification through the Program for shucking and packing geoduck.

4.6 On November 21, 1996, Quynh Anh Nguyen, a state of Washington Department of Health Shellstock Shipper Inspector, inspected the Respondent's premises and discovered 14 cases of 1.25 pounds of vacuum packed geoduck. According to Ms. Nguyen, the Respondent admitted that he shucked the geoduck and again stated he had a Department of Agriculture license to do so. Both the Respondent and Mr. Malta, the manager, testified they told Ms. Nguyen that they had applied for a shucker-packer license. Ms. Nguyen, however, testified that she was not told that the Respondent had applied for a shucker-packer license.

4.7 On approximately February 20, 1997, the Program received anonymous information that Alpine Storage in Tacoma, Washington, had a number of unmarked cases of geoducks. Program inspectors discovered 80 cases of geoduck marked "geoduck meat, vacuum packed." It was discovered that these geoduck were owned by the Respondent. A hold order was issued followed by an Order of Abatement, dated March 7, 1997.

4.8 According to the Respondent, he borrowed approximately \$30,000 to \$40,000 from Ocean Fares to purchase the geoduck at issue from the Skokomish Indian tribe. The Respondent attempted to sell the geoducks while they were still in the shell. According to the Respondent, he was unable to find a buyer because the price he was requesting was higher than buyers could purchase elsewhere. According to the Respondent, one to two days after the geoducks were purchased, he and Mr. Malta shucked them.

4.9 The Respondent maintained that he was licensed to shuck the geoducks. He sent to the Department of Health a check for \$250, dated November 7, 1996, with a

notation at the bottom of the check stating "Shell Shucker Lic. (geoduck)" The Respondent testified that after he found out he needed a shucker-packer license, his manager, Mr. Malta requested the paperwork from the Department of Health and was told to submit a check for \$250 for the shucker-packer license with the application. According to Mr. Malta, he filled out the paperwork the Department of Health sent, and mailed it in with the check for \$250, after the Respondent signed the documents. According to both the Respondent and Mr. Malta, Mr. Malta called the Department of Health three times regarding the status of the application; he left a message twice and on the third time, he testified that he was told that it was probably caught up in paperwork and they would receive it. Mr. Malta could not identify the person with whom he had the discussion. Mr. Malta did not retain a copy of these documents. Neither the Respondent nor the Program has a copy of any application for a shucker-packer license. According to Ms. Tebaldi, the Program has no record of receiving an application from the Respondent for a shucker-packer license or of receiving phone calls from Mr. Malta or the Respondent.

4.10 According to the Respondent, he substantially complied with the applicable steps necessary to obtain a shucker-packer license by sending in a check and an application. The Respondent argued that he acted in good faith and relied on the history of his contact with the Program--you pay the fee and it takes a while to get the license and certification. The Respondent contended that the Respondent substantially complied with all of the requirements and the Program should be estopped from issuing the Order of Abatement.

4.11 The Program maintained that the Respondent does not have a shucker-packer license. The Program did receive and cash a check from the Respondent. However, the check in the amount of \$250 was insufficient for a shucker-packer license. The Program maintained that the Respondent did not submit any application along with the check and that there had not been any pre-operation inspection to make sure the Respondent was in compliance with the rules. This inspection must be completed before the Respondent can be certified as a shucker-packer.

4.12 The Presiding Officer finds that the check submitted by the Respondent in the amount of \$250 with the notation "Shell Shucker Lic. (geoduck)" is not an application for a license. Further, the Presiding Officer finds that the Respondent did not submit any other application for a shucker-packer license. The Presiding Officer did not find credible Mr. Malta's testimony that he filled out an application and sent it to the Department of Health along with the check. In determining credibility, the Presiding Officer considered as factors Mr. Malta's demeanor during his testimony and that his answers seemed to be developed after the fact to achieve the desired result. Further, even assuming the Respondent made application and paid a fee, the Respondent had not had his facilities inspected and approved for shucking shellfish to ensure that the public was protected from eating contaminated shellfish. Thus, the Presiding Officer finds that the Respondent did not have a Shellfish Operation License and Certificate of Approval as a shucker-packer prior to and at the time the Order of Abatement was issued on March 7, 1997.

V. CONCLUSIONS OF LAW

Based upon the parties' stipulations, the Procedural History, the Exhibits admitted into the record and the above Findings of Facts, the Presiding Officer hereby makes the following Conclusions of Law:

5.1 The Program has the burden of proving that there is a preponderance of the evidence to support its decision to issue an Order of Abatement. WAC 246-10-606.

5.2 The legislature enacted chapter 69.30 RCW to provide, in part, for the sanitary control of shellfish and to protect the public health by assuring that processing of shellfish is conducted in a safe and sanitary manner. RCW 69.30.005. In this case, shucked and packed geoducks are at issue. RCW 69.30.060 mandates that a person culling, shucking, or packing geoducks be certified by the Department of Health to cull, shuck, and do any of these activities:

No person shall cull, shuck, or pack shellfish in the state of Washington in a commercial quantity or for sale for human consumption unless the establishment in which such operations are conducted has been certified by the department as meeting the requirements of the state board of health. . . .

5.3 RCW 69.30.060 outlines the necessary prerequisites to obtaining certification to cull, shuck, or pack shellfish:

Any person desiring to cull, shuck or pack shellfish within the state of Washington in a commercial quantity or for sale for human consumption, shall apply to the department for a certificate of approval for the establishment in which such operations will be done. The department shall cause the establishment to be inspected, and if the establishment meets the sanitary requirements of the state board of health, the department shall issue a certificate of approval. . . . (Emphasis added).

5.4 In determining if an establishment meets the sanitary requirement of the state board of health, the legislature authorized the adoption of rules and regulations to

establish minimum standards for the sanitation of shellfish plant facilities and operations to protect the public and to carry out the provisions of this chapter.

WAC 246-282-001, RCW 69.30.030. Pursuant to WAC 246-282-005, the Department of Health follows the federal guidelines in the National Shellfish Sanitation Program (NSSP) Manual of Operations Part I and II, published by the United States Department of Health and Human Services, Public Health Service, Food and Drug Administration. The NSSP Manual contains detailed and distinct requirements for operations as a shucker-packer as well as separate and distinct requirements for shellstock shipper.

5.5 The Department of Health has promulgated rules in the state of Washington similar to the NSSP Manual. WAC 246-282-990(2) defines the two types of operations to which certificates of operation can be issued:

(2) Type of operations are defined as follows:

(a) "Shellstock shipper" shall mean shippers growing, harvesting, buying, or selling shellstock. Shellstock shippers are not authorized to shuck shellfish or to repack shucked shellfish.

(b) "Shucker-packer" shall mean shippers shucking and packing shellfish. A shucker-packer may act as a shellstock dealer.

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5.6 WAC 246-282-990(1) details the annual fees for a license. The amount of the fee depends on the type of operation for which a person seeks certification. A certificate to conduct operations as a "shellstock shipper" has an annual fee of either \$250 or \$400, depending upon the acreage involved. A certificate to conduct operations as a "shucker-packer" has an annual fee ranging from \$450 to \$1,000, depending upon the floor space of the facility. Thus, the Program can issue a Shellfish

Operation License and Certificate of Approval for two distinct operations:
shucker-packer and shellstock shipper.

5.7 The Presiding Officer rejects the Respondent's contention that a Shellfish Operational License and Certificate of Approval, once issued, covers both shellstock shipper and shucker-packer operations. The legislature clearly authorized the Department of Health to establish sanitary requirements to ensure the public safety regarding shellfish. The statute authorized the Department of Health to promulgate licensure regulations. It has done so in conformance with NSSP standards. The Department of Health requires separate licenses for shellstock shipper and shucker-packer operations. The Respondent's contention that the Program has no authority to establish licenses authorizing limited practices is without merit.

5.8 In this case, the Respondent applied for a shellstock shipper certificate and license. The Program inspected the Respondent's premises and in 1996 issued a certificate and license as shellstock shipper. This license did not entitle the Respondent to have a commercial shellfish operation license as a shucker-packer.

5.9 The Department of Health has the public responsibility to protect the health, safety and welfare of the public. Further, strict adherence to the requirements for licensure is of paramount importance with an activity that can so greatly affect the public health. Due to the serious public health concerns regarding the shucking and packing of geoducks, the Respondent must meet all requirements mandated by statute and rule to receive a shucker-packer license. In this case, the Respondent's facility had not been inspected to determine if his operations met the public health standards as a shucker-packer.

5.10 The Respondent maintained that this circumstance is similar to when he waited for his shellstock shipper license to be renewed, after he had sent in a check and then waited approximately three months for the Program to issue his renewed shellstock shipper license. The Respondent argued that the Program should be estopped from issuing the Order of Abatement.

5.11 The Presiding Officer disagrees. To obtain a certificate as a shucker-packer, the Respondent must first apply for a certificate of approval and then have his facility inspected. If the Respondent's facility meets the sanitary requirements, then the Program would issue a certificate of approval. Here, even assuming the Respondent applied for the shucker-packer certificate and license, no inspections were made or attempted. Although the Respondent was inspected for a shellstock shipper license and issued a Certificate of Approval, he cannot rely on that inspection of a shellstock shipper because of the distinct and different requirements in the two operations. Further, the Respondent had knowledge of these requirements. Not only did the rules put the Respondent on notice of these requirements, but also the Program inspectors had informed the Respondent that he needed a shucker-packer license before he could start shucking shellfish. The Presiding Officer concludes that the Respondent's estoppel argument does not apply.

5.12 The Presiding Officer concludes that the Respondent did not have a Shellfish Operation License and Certificate of Approval as a shucker-packer prior to and at the time when the Order of Abatement was issued on March 7, 1997. Thus, the Order of Abatement issued by the Program on March 7, 1997 should remain in full force and effect subject to the final order issued by the Presiding Officer in this matter. Next,

as agreed by the parties, the Respondent's Motion for an Order to Test Product should now be addressed. A prehearing conference should be scheduled to address the Respondent's motion.

VI. ORDER

Based upon the above, the Presiding Officer hereby issues the following ORDERS:

6.1 The Presiding Officer orders that the Respondent did not have a Shellfish Operation License and Certificate of Approval as a shucker-packer prior to and at the time the Order of Abatement in this matter was issued on March 7, 1997.

6.2 The Order of Abatement in this matter issued by the Program on March 7, 1997 shall remain in full force and effect subject to the final order to be issued by below signed Presiding Officer.

6.3 There shall be a telephonic prehearing conference on September 24, 1997 at 1:00 p.m. to address the Respondent's Motion to Test Product. The Office of Professional Standards shall initiate the telephone conference call.

DATED THIS 11th DAY OF SEPTEMBER, 1997.

S/S

ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record: JONG MIN PARK, G. SAXON ROGERS, JOSEPH J. RANDAZZO by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS _____ DAY OF SEPTEMBER, 1997.

Adjudicative Clerk's Office

cc: MARYANNE GUICHARD