STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS

In the Matter of:	)	Docket No. 97-06-C-1011SF
	)	
ARTHUR P. MILLER,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Applicant.	)	AND FINAL ORDER
_____	)	

A hearing was held before Health Law Judge Arthur E. DeBusschere, Presiding Officer, Office of Professional Standards, on August 22, 1997 at Airdustrial Park, Tumwater, Washington. The Applicant, Arthur P. Miller, appeared with Dennis D. Reynolds, Attorney at Law. Alan Copsey, Assistant Attorney General, was present to represent the Department of Health, Office of Shellfish Program (the Shellfish Program). The proceedings were recorded by Cynthia J. LaRose, court reporter.

I. PROCEDURAL HISTORY

1.1 The Shellfish Program, by letter dated February 4, 1997, notified the Applicant of its decision to deny his application for a Shellfish Operation License and Certificate of Approval.

1.2 On February 25, 1997, the Applicant filed a Request for an Adjudicative Proceeding/Demand for Formal Hearing.

1.3 On February 27, 1997, the Office of Professional Standards (OPS) served the Scheduling Order/Notice of Hearing. The hearing was set for July 23, 1997 and a prehearing conference for June 17, 1997. In preparation for the hearing, both the Shellfish Program and the Applicant filed Prehearing Conference Statements.

1.4 Following the June 17, 1997 prehearing conference, the Presiding Officer in Prehearing Order No. 1 issued an order defining conduct at the hearing. The hearing was continued to August 5, 1997. In Prehearing Order No. 2, the Presiding Officer allowed the parties additional time to file their exhibits and continued the hearing to August 22, 1997.

1.5 On August 19, 1997, the Applicant filed a Hearing Memorandum. Attached was Applicant's Exhibit B. On August 20, 1997, the Shellfish Program filed a letter in response.

II. HEARING

2.1 In support of its case in chief, the Shellfish Program called Robert Woolrich and Frank Meriwether. In support of his case in chief, the Applicant testified and called Richard Oestman.

2.2 The Shellfish Program Exhibits A through I (Program's Exhibits) were admitted. There was no Program Exhibit D. During the hearing, Program's Exhibit C-3 was admitted. It was an enlarged map of Hammersley Inlet. Program's Exhibits C-1 and C-2 were also maps of Hammersley Inlet and the surrounding area.

2.3 The Applicant offered one exhibit, Applicant's Exhibit B, a report from Jones & Stokes, in memo form from Rick Oestman to Dennis Reynolds dated July 31, 1997. Applicant's Exhibit B was admitted and included a one page attachment.

2.4 During the hearing, the parties and the Presiding Officer also referred to the National Shellfish Sanitation Shellfish Program Manual of Operations, ISSC, Part 1, Sanitation of Shellfish Growing Areas, 1995 Revision, published by the United States Department of Health and Human Services, Public Health Service, Food and Drug

Administration (the NSSP Manual).

III. FINDINGS OF FACT

Based upon the testimony of the witnesses at the hearing and the exhibits admitted into the record, the Presiding Officer hereby makes the following Findings of Facts:

3.1 Arthur P. Miller, the applicant in this matter, owns about seven and one-half acres with a 173-foot frontage on Hammersley Inlet. He plans to move to this property and to harvest clams. He applied for a Shellfish Operations License and Certificate of Approval to harvest shellfish. In a letter dated February 4, 1997, the Shellfish Program notified the Applicant that his application was denied. The reason for the denial was that the Applicant's property lies within a prohibited area surrounding the Shelton Wastewater Treatment Plant (the Shelton Plant). The Applicant appealed this decision.

3.2 In his appeal, the Applicant proposed that the Shellfish Program reevaluate the prohibited area surrounding the Shelton Plant or, in the alternative, the Shellfish Program undertake a feasibility study (pilot project) to consider new regulatory criteria for the Applicant to harvest in areas which are prohibited. He offered to contribute a reasonable sum toward the cost for the reevaluation. The Applicant said he would accept a license that would allow him to harvest shellfish only during the summer months. Further, the Applicant would be willing to participate in any pilot project.

3.3 Robert R. Woolrich is a Section Supervisor of the Office of Shellfish Program, Department of Health. He has a Bachelor’s degree from Colorado State

University in environmental science and has been certified as a wastewater treatment plant and water treatment plant operator. He is a Registered Sanitarian (environmental health specialist). He testified about the Shellfish Program's regulation of shellfish in the state of Washington.

3.4 The shellfish operations license and certificate of approval is a combined application issued by the Shellfish Program. The certificate of approval refers to the evaluation of the area to be harvested; that is, the area listed on the application must be classified as safe for harvesting. The license refers to the person permitted to do the harvesting; that is, only the person listed on the certificate can do the harvesting.

3.5 The Shellfish Program regulates the harvesting, processing and shipping of shellfish which are clams, mussels, oysters and scallops. These shellfish are potentially hazardous and responsible for a number of human related diseases. There are three categories of health hazards: The first category includes biotoxins such as red tide or paralytic shellfish poisons. The second includes bacteria and viruses from man through his activities. Most of the diseases come from viruses which often are not identifiable, although a common virus is Hepatitis A. Bacteria contaminates include Salmonella, typhoid, and cholera. The third category of health hazards includes chemical pollution. A primary source of pollution is from sewage, but it also comes from stormwater runoff, agricultural contaminates or wildlife contaminates.

3.6 Shellfish filterfeed from the plankton in the water. Filter feeding is like pouring water through a mesh screen and the shellfish picks off the food from the screen. If bacteria and viruses are present, then the shellfish will collect them along with the plankton. Oysters will draw in 50 gallons of water in a single day and it will

magnify the concentration of the contaminates as much as a 1000 times the amount of contaminates in the sea water. Not only do the shellfish collect the contaminates, but also the contaminates are not destroyed when eaten. The public often eat shellfish raw or slightly cooked and eat the entire animal. So if the contaminates are in any part of the shellfish, then they are consumed. The consumer cannot detect by taste or smell if it is contaminated.

3.7 One way to prevent the contaminates from reaching shellfish is to classify growing areas based upon surveys which are designed to determine whether an area is safe for harvesting for human consumption. To classify the growing areas, the Shellfish Program is required to follow the classification system outlined in the NSSP Manual which was prepared by the Interstate Shellfish Sanitation Conference (the ISSC), a broad based organization composed of the U.S. Food and Drug Administration (the FDA), other federal agencies, state regulatory agencies and the shellfish industry. Washington State participates in the ISSC as a member along with Washington shellfish industries and Washington tribes. If the requirements of the NSSP Manual are met, then the growers are allowed to be listed on the interstate shippers list and can ship the shellfish interstate without question.

3.8 In general, the classification of harvesting areas is performed by the Shellfish Program by conducting a sanitary survey. Based on the results of the sanitary survey, shellfish growing areas are classified into the one of the following: "Approved," "Conditionally Approved," "Restricted," "Conditionally Restricted," and "Prohibited." These are separate classifications. The NSSP Manual does not provide for a conditionally approved area in a prohibited area. The classification areas, however, can

be changed such as a change in the source of the pollution. Examples of a change in a pollution source would be a sewage treatment plant was moved, a marina was closed down and dismantled, or a sewage system failure was repaired.

3.9 Mr. Meriwether reviewed the Applicant's application and was familiar with the property on Hammersley Inlet. Mr. Meriwether is an environmental engineer and has worked for the Shellfish Program since May of 1990. He has a Bachelors degree in fisheries, a Masters in Fisheries and Aquaculture and a Masters in Civil Engineering with an environmental engineering emphasis. He oversees the National Shellfish Sanitation Program's regulatory requirements for the conditionally approved areas in the state. He testified about his review of the criteria in the NSSP Manual in determining the prohibited area surrounding the Shelton Plant.

3.10 The NSSP Manual lists the criteria for determining the prohibited area. See, NSSP Manual, Part I, pages C-21 to C-22. The NSSP Manual requires that the area adjacent to and surrounding a sewage treatment plant be classified as prohibited. In determining the boundary surrounding the prohibited area of the Shelton Plant, the Shellfish Program considers, among other criteria, the pollution conditions such as location of the resource, the performance of the sewage treatment plant, upset or adverse conditions and the flow rate of the effluent from the sewage treatment plant outfall pipe into the bay.

3.11 The boundary line that surrounds the prohibited area is called a sanitary line, a bumper line or a closure line. The NSSP Manual described the prohibited area:

> prohibited growing area is when there is no current sanitary survey or when the sanitary survey or other monitoring program data indicate that fecal material, pathogenic microorganisms, poisonous or deleterious substances, marine toxins,

> or radionuclides may reach this area in excessive concentrations. The taking of shellfish for any human food purposes from such areas is prohibited.

NSSP Manual, Part I, page C-21.

3.12 In this case, the Shelton Plant is located near Shelton, Washington, at the confluence of Oakland Bay and Hammersley Inlet near Eagle Point. There is a sanitary line that runs across Oakland Bay from Munson Point to the north of the Shelton Plant (the Munson Point Line). There is also a sanitary line that runs across Hammersley Inlet east of the Shelton Plant. The Applicant's property is on Hammersley Inlet, about two miles east from the Shelton Plant and is about 200 feet inside the sanitary line of the prohibited area. Program's Exhibits C-1, C-2 and C-3.

3.13 The Shelton Plant receives both sewer and stormwater run-off. Mr. Meriwether visited the Shelton Plant at least once a year. He testified that the Shelton Plant is about 18-years-old and incidents of a malfunction are more likely to occur now than when it was first built. In general, his reports have shown that the Shelton Plant has had satisfactory compliance during attendance. Program's Exhibits A and F. He testified that his assessments of the Shelton Plant have been admirable, but added that one needs to be cautious of the additional hook ups to the Shelton Plant in view of its overload of wastewater arriving at the plant and the need for more staffing.

3.14 Following the NSSP Manual guidelines, upset or adverse conditions at the Shelton Plant must be considered. Upset conditions occur without warning, result in a higher flow rate of sewage effluent and result in inadequately treated sewage. The sewage may also come from manholes or from combined sewer overflow points from downtown Shelton, so that the sewage goes in the bay without reaching the Shelton

Plant. Upsets also include a sewage treatment failure such as a problem with disinfectant, a power outage or a sewage bypasses of a sewage treatment component.

3.15 The reported upset conditions at the Shelton Plant generally refer back to combined sewage overflow problem. The sewage cannot be held in the collection lines or pumped adequately enough to the Shelton Plant which results in raw sewage or combined sewage being discharged into the inner harbor of Shelton. Overflows occur when you do not see it, such as in the evening when water flows on the street. Those were the type of reported upsets in the last five years. These upsets have occurred a couple times a year. There are some alarms at the plant for a lack of power, for intrusion, for improper operations of a lift station, or for a chlorine gas leak. There are no alarms for a disinfection failure.

3.16 Part of considering upset conditions for the prohibited area is the capability of the Shellfish Program to notify shellfish harvesters when an upset condition occurs. That is, the sanitary line across Hammersley Inlet was established so that there would be sufficient time to notify the property owners in approved areas to stop harvesting. The employees at the Shelton Plant are required to notify the Shellfish Program immediately if an upset condition occurs. Staff are not always at the Shelton Plant. It is attended about 8-9 hours a day during week days, and about 4 hours a day during weekends. The rest of the time it is not attended. If there is a malfunction in the evening, it is likely the staff would not discover it until they arrive the next day. The Shelton Plant has contacted the Shellfish Program within twelve hours of an upset condition and sometimes they have contacted the Shellfish Program after a couple of

days, that is, within a day or two. Mr. Meriwether testified about a recent upset condition where the Shellfish Program had not received a report from the Shelton Plant.

3.17 The Applicant maintained that the Shelton Plant has shown a consistent flow during the summer months which would allow harvesting during that time. Applicant's Exhibit B. However, the sanitary lines were established not only based upon seasonal reliability, but also upon an analysis of the upset conditions at the Shelton Plant. During an upset condition when there is sewage discharge from the Shelton Plant that is traveling down Hammersley Inlet, the Shellfish Program has a limited amount of time to notify the property owners to stop harvesting.

3.18 The prohibited area can be determine either by a computer modeling program based upon theoretical assumptions, or by the completion of a field study. The field study is more accurate than a computer modeling program, because in the field study, the surveyors use dyes and drogues planted in the bay to measure the actual dispersion, dilution and flow of the effluent as it leaves the sewage treatment plant and travels through the bay. In the case of Hammersley Inlet, the Shellfish Program had not only conducted a field study, but a field study was also performed by the surveyors from the technical arm of Public Health Service of the FDA; the field study was conducted in 1979 and a report was issued in 1980 (the 1979 FDA Studies). Program's Exhibit G.

3.19 The 1979 FDA Studies calculated the flow rate of the effluent from the Shelton Plant's outfall pipe. The flow rate includes not only the discharge from the sewage treatment plant, but also the receiving water flow in the bay. The results from the 1979 FDA Studies showed the average flow from the outfall pipe to be just over

2 million gallons per day. During a study conducted in 1991 by Mr. Meriwether, he found the flow rates to be higher compared to the flow rates that were initially taken in 1979 when the Shelton Plant was first built. Program's Exhibit H. The increased flow rates result in a reduced dilution to the receiving water with other factors being the same at the Shelton Plant.

3.20 The increased flow rates will continue. The City of Shelton has submitted plans to the Department of Ecology to be allowed to hook up more residences, the Shelton Prison, commercial establishments and the State Patrol Academy. They cannot do it now, because the Shelton Plant becomes hydraulically overloaded when heavy rain occurs and is under a Department of Ecology Administrative Order issued on April 2, 1997. Program's Exhibit B. If the City complies with that Order, then the Shelton Plant will increase its in-flow rates. The long term effects would be an increase in the loading or base flow during the dry months and some reducing during the wetter months.

3.21 In determining the prohibited area surrounding the Shelton Plant, the Shellfish Program is also required to consider the time of travel of the effluent from the outfall pipe down Oakland Bay and Hammersley Inlet. Using the information from the 1979 FDA Studies, Mr. Meriwether testified that it took about 90 minutes for the sewage effluent to reach the Applicant's property. Program's Exhibit G. He also calculated that based upon the 1979 FDA Studies, the transit time for the effluent to reach the Munson Point Line on a flood tide was 146 minutes and, on ebb tide the time was 95 minutes.

3.22 In order to predict the decay rate of the contaminates down Hammersley Inlet near the Applicant's property, the Shellfish Program had to take a fecal coliform

count of the non-disinfectant effluent at the Shelton Plant. In September 1991, Mr. Meriwether took a sample of the non-disinfected effluent and the sample results showed a fecal coliform count of 2.5 million fecal coliforms/100 ml and 170,000 fecal coliforms/100 ml. Mr. Meriwether stated that he expected to have a great deal of variability in split samples such as in this instance, because the bacteria he was sampling is known not to be uniformly distributed.

3.23 The Applicant maintained that this sampling method performed by Mr. Meriwether at the Shelton Plant was unreasonable and should be repeated. The Applicant presented the testimony of Mr. Richard Oestman. He has a Bachelors of Science Degree and a Masters of Science Degree in Fisheries. He has worked with the Environmental Protection Agency to evaluate applications for discharge permits of industrial facilities. He has also worked with sewage treatment plants in evaluating outfall sightings and configurations.

3.24 Mr. Oestman testified that the fecal coliform sample of 2.5 million fecal coliforms/100 ml seemed high for a treatment plant of this type. He testified that there was no sampling error, but that there was very little data concerning this test result. He recommended that there be more samples taken and there would statistically be ways to decide how many samples to take, probably in the range of 10 to 15 samples, which is the way the Department of Ecology goes about it. He testified that getting a fix on fecal coliform effluent would make a large difference in terms of where the sanitary lines would be placed. He, however, limited his testimony to the general relationship concerning the fecal coliform count and the relationship of the sanitary line. Without further data and testing, he could not testify about the effects of increase in flow rates

which he stated would make a difference upon the dispersion and dilution of the effluent.

3.25 Mr. Oestman testified that the purpose of sampling bacterial quality for the Department of Ecology is to look at chlorine residuals for protection of human health, and not for the classification of shellfish growing areas. Mr. Oestman did not know whether the bacterial quality standard used by the Department of Ecology takes into account the biological concentration of contaminates by shellfish. Mr. Oestman also stated that he has not directly used the NSSP Manual for purposes to provide guidance to various companies or industries.

3.26 The Presiding Officer finds the testimony of Mr. Meriwether in this matter to be more convincing than the testimony of Mr. Oestman. Mr. Meriwether testified that bacteria samples taken for the Department of Ecology are used to check to see if the bacteria quality is within the permit limits during normal plant operations. He testified that he did not take several samples and did not use a mean average, because he followed guidelines in the NSSP Manual which require that he take into account the adverse or upset conditions that occur and that can be reflected in the fecal coliform amount that come out of the secondary clarifier due to processes that may not be obvious or visible. When he visited the Shelton Plant in September of 1991, all the equipment was working and the plant staff were present. The sample result did not come from raw sewage, but sewage that had gone through secondary treatment in its oxidation ditch and through its secondary clarification process. The Shellfish Program accepted the sample values from the lab, he recognized that there was a high value,

but he reasoned that it was indicative of conditions that could happen while the plant is operating.

3.27 In determining the prohibited area surrounding the Shelton Plant, the Shellfish Program also conducts bacteriological surveys. For a bacteriological survey, the NSSP Manual follows a fecal coliform count standard as an indicator for contaminates. The fecal coliform are bacteria found in the gut of warm blooded animals and are the most numerous and common. They are the easiest thing to find when there is pollution. They do not tell everything about the contaminates, because some viruses outlive the fecal coliform and are difficult to find.

3.28 The Applicant maintained that since his property has consistently met the bacteriological quality standard, he should be able to harvest shellfish. Near the Applicant's property were two sampling stations, Number 9 and Number 10. From 1992 to 1996, the data for the Applicant's property show that the fecal coliform count at these two sampling stations met the approved numeric standard. Exhibit I.

3.29 Mr. Meriwether took into account the fecal coliform count data taken near the Applicant's property. He explained, however, that these sampling results are long term ambient type of water quality samples. They are not premised upon the adverse or upset conditions that occur. He referred to the NSSP Manual to explain the reasoning for his assessment of the bacteriological data taken:

> Studies have shown that enteric bacteria in seawater may survive for a few hours to five days and longer. Field and laboratory studies have demonstrated that enteric viruses can survive in marine water and shellfish from a few days to over 130 days. The survival of viruses in seawater becomes greatly prolonged once they become associated with sediments. Virus concentrations may be many-fold greater in sediments than in overlying water. In general, viruses survive longer at lower temperatures, at low salinity, and in waters contaminated by sewage. Evidence from many field studies indicates that a constant relationship does not

> exist between either pathogen (bacterial or viral) or coliform content of shellfish and overlying water.
>
> The effectiveness of sewage treatment processes must be considered in evaluating the sanitary quality of a growing area since the bacterial and viral content of the effluent will be determined by the degree of treatment which is obtained. The results of bacteriological sampling must also be correlated with sewage treatment plant operation and evaluated in terms of the minimum treatment which can be expected with the possibility of malfunctioning, overloading, or poor operations.

NSSP Manual, Part I, pages C-10 & C-11. Mr. Meriwether verified that viral and biological contaminates come from a sewage treatment plant even under optimum operating conditions and that viruses released from the Shelton Plant can survive the travel down Hammersley Inlet and reach the Applicant's property.

3.30 Mr. Meriwether further explained that one could be next to the sewage treatment plant and still have a bacteriological count within the approved level. The fecal coliform standard is useful if you took a sample in Puget Sound that has no proximity to a sewage treatment plant. That is, when trying to account for contaminates from wildlife, the threat to produce an infection is relatively low when the bacteriological count is within the approved standard. However, when talking about pathogenic organisms that are coming out of sewage treatment plant pipes, the threat for human illness is relatively high even if the bacteriological count is still within the approved levels. The reason is that the fecal coliforms in the sewage effluent are readily killed off by the disinfectant from the sewage treatment plant in comparison to viruses and other pathogens of concern. Although the Shellfish Program has taken samples in the prohibited area to determine where the sanitary line should be located, the sample results do not necessarily dictate under the NSSP Manual where the sanitary lines should be set.

3.31 Mr. Meriwether also testified that any reassessment of the sanitary line across Hammersley Inlet would take into account not just the fecal coliform count levels, but the increase in flow rates from the outfall pipe. For all treatment plants, the Shellfish Program utilized the high monthly average flows which is indicative of adverse conditions. Mr. Meriwether testified that in assessing where the sanitary line should lie, the data from the bacteriological survey may be more than balanced out by the increase flows from the Shelton Plant.

3.32 Since the 1979 FDA Studies were conducted, the Shellfish Program relocated the sanitary line in Hammersley Inlet from Church Point to the West to its present location. The sanitary line was not moved far enough West to include the Applicant's property. This relocation of the sanitary line across Hammersley Inlet was done in 1992 and was prompted by a request from a property owner. Exhibit E.

3.33 The Presiding Officer finds that the Shellfish Program proved by a preponderance of the evidence that the establishment of the prohibited area surrounding the Shelton Plant was reasonable and within the NSSP Manual guidelines to ensure the sanitary harvesting of shellfish. The Presiding Officer further finds that the Applicant failed to establish by a preponderance of the evidence that his application for a Shellfish Operation License and Certificate of Approval meets the applicable standards for the harvesting of shellfish from his property adjacent to and part of Hammersley Inlet. Further, the Applicant failed to provide justification by a preponderance of the evidence to order that the Shellfish Program undertake a pilot project or to order a reevaluation of the of the prohibited area. The Presiding Officer

finds that the Shellfish Program's denial of the Applicant's Application should be affirmed.

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IV. CONCLUSIONS OF LAW

Based upon 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:

4.1 When an adjudicative proceeding is conducted by a presiding officer authorized to make the final decision, the presiding officer shall issue a final order containing findings of fact, conclusions of law, and an order. WAC 246-10-605.

4.2 In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence. WAC 246-10-606. In this case, the burden was on the Applicant to establish that his application for a Shellfish Operations License and Certificate of Approval meets the applicable criteria the harvesting of shellfish from his property on Hammersley Inlet.

4.3 The purpose of chapter 69.30 RCW is to provide for the sanitary control of shellfish. Protection of the public health requires assurances that commercial shellfish are harvested only from approved growing areas. RCW 69.30.005. Furthermore, the legislature authorized the adoption of rules for establishing minimum performance

standards for the growing and harvesting of shellfish for human consumption. WAC 246-282-001.

4.4 The Shellfish Program of the Department of Health, is the agency authorized under chapter 69.30 RCW and chapter 246-282 WAC to regulate the harvesting of shellfish in the state of Washington. RCW 69.30.010(6); WAC 246-282-010(3).

4.5 Any person desiring to remove shellfish in a commercial quantity or for sale for human consumption for a growing area in the state of Washington shall first apply to the Shellfish Program for a certificate of approval of the growing area. The Shellfish Program shall cause the shellfish growing area to be inspected and if the area meets the requirements of this chapter and the State Board of Health, the Shellfish Program shall issue a certificate of approval for such area. RCW 69.30.050. In this case, the Respondent submitted an application to harvest shellfish from his property on Hammersley Inlet. The Shellfish Program denied his application and he appealed. In his appeal, the Applicant sought a stay of this hearing, plus an order directing the Shellfish Program to reevaluate the prohibited area.

4.6 The Shellfish Program follows "satisfactory compliance" standards of the 1995 revision of 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 (referenced above in this Order as the NSSP Manual). WAC 246-282-005.

4.7 The Presiding Officer concludes that the Shellfish Program proved by a preponderance of the evidence that the establishment of the prohibited area

surrounding the Shelton Plant was reasonable and within the dictates of the NSSP Manual to ensure the sanitary harvesting of shellfish. As stated in the above Findings of Facts, the Presiding Officer found that the Shellfish Program demonstrated that the Shellfish Program reasonably used the criteria established in the NSSP Manual and that the sanitary line across Hammersley Inlet was based upon a careful analysis of those criteria. Taking into account the upset conditions, the Shellfish Program's consideration of the pollution conditions along with the hydrographic and bacteriological data was reasonable and within the guidelines of the NSSP Manual. The Presiding Officer found the testimony of Mr. Meriwether more persuasive than the testimony of Mr. Oestman regarding the sampling of the non-disinfected effluent taken at the Shelton Plant. The sanitary lines were established not only based upon seasonal reliability at the plant, but also upon an analysis of upset conditions.

4.8 In 1992, the Shellfish Program, based upon a property owner's request, reviewed the location of the sanitary line across Hammersley Inlet and relocated the line further Westward. The Presiding Officer was also convinced from the testimony of Mr. Meriwether that if the Shellfish Program again conducted a reevaluation of the prohibited area, the sanitary line at Hammersley Inlet, due to the increases in flow rate from the outfall pipe and other factors, would not benefit the Applicant. Additionally, the City of Shelton has expressed its intent for the Shelton Plant to bring on new users and this would increase the average daily flow even during the summer months. Notwithstanding the Applicant's willingness to make a reasonable contribution to the cost of reevaluating the prohibited area, the Applicant, in this instance, failed to show by a preponderance of the evidence that the Shellfish Program's consideration of the

Applicant's application in respect to the prohibited area surrounding the Shelton Plant was unreasonable.

4.9 Alternatively, the Applicant sought an order directing the Shellfish Program to conduct a feasibility study (pilot project) at the site to determine whether the Shellfish Program should adopt new regulatory criteria to allow a category of harvest in areas which are prohibited. Pilot projects are provided for under the Administrative Procedures Act (APA), chapter 34.05 RCW:

> If, during development of a rule or after its adoption, an agency determines implementations may produce unreasonable economic, procedural, or technical burdens, agencies are encouraged to develop methods for measuring or testing the feasibility of compliance with the rule, including the use of voluntary pilot study groups. Measuring and testing methods should emphasize public notice, participation by persons who have a recognized interest in or are significantly affected by the adoption of the proposed rule, a high level of involvement from agency management, consensus on issues and procedures among participants in the pilot group, assurance of fairness, and reasonable completion dates, and a process by which one or more parties may withdraw from the process or the process may be terminated if consensus cannot be reached on the rule.

RCW 34.05.313.

4.10 In implementing this rule, the APA provided the legislative intent regarding this statute's implementation:

> ...
> It is therefore the intent of the legislature to encourage flexible approaches to developing administrative rules, including but not limited to negotiated rule making and a process for testing the feasibility of adopted rules, often called the pilot rule process. <u>However, nothing in *this act shall be construed to create a mandatory duty for an agency to use the procedures in RCW 34.05.310 or 34.05.313 in any particular instance of rule making. Agencies shall determine, in their discretion, when it is appropriate to use these procedures.</u>"
>
> *Revisor's note: This act [1993 c 202] consisted of the amendment of RCW 34.05.310 and the enactment of RCW 34.05.312 and 34.05.313.

Finding-Intent-1993 c 202 sec. 1 (emphasis added).

4.11 In this case, the establishment of a prohibited area surrounding and adjacent to a sewage treatment plant prevents owners of property within that prohibited area from harvesting shellfish for human consumption. The Shellfish Program has shown its compliance with the criteria set forth in the NSSP Manual and has evidenced through the application of that criteria that its decision to establish the location of the sanitary lines surrounding the Shelton Plant was reasonable. Further, in accordance with he NSSP Manual, the Shellfish Program cannot allow for conditional harvesting in a prohibited area. The implementation of a pilot project or a feasibility study under RCW 34.05.313 is not mandatory upon the agency and is within its discretion. The Presiding Officer concludes that the Shellfish Program has reasonably and properly exercised its discretion not to implement a pilot project.

4.12 The Presiding Officer concludes that the Applicant failed to establish by a preponderance of the evidence that his application for a Shellfish Operation License and Certificate of Approval meets the applicable standards for the harvesting of shellfish from his property adjacent to and part of Hammersley Inlet. Further, the Presiding Officer concludes that the Applicant failed to prove by a preponderance of the evidence justification to order a reevaluation of the prohibited area surrounding the Shelton Plant. An order should be entered affirming the Shellfish Program's decision denying the Applicant's application for a Shellfish Operation License and a Certificate of Approval.

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V. ORDER

Based upon the above, the Presiding Officer hereby ORDERS that the Shellfish Program's decision denying the Applicant's application for a Shellfish Operation License and Certification of Approval is AFFIRMED.

THE PARTIES ARE FURTHER ADVISED:

As provided in RCW 34.05.461(3), 34.05.470, and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed with the Adjudicative Clerk Office, 2413 Pacific Avenue, P.O. Box 47879, Olympia, WA 98504-7879, within ten (10) days of service of this Order. The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration shall not stay the effectiveness of this Order. The petition for reconsideration is deemed to have been denied 20 days after the petition is filed if the Adjudicative Clerk Office has not acted on the petition or served written notice of the date by which action will be taken on the petition.

"Filing" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(18).

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V,

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Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.542.

DATED THIS 12th DAY OF NOVEMBER, 1997.

_____/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:

DENNIS REYNOLDS, ARTHUR P. MILLER, ALAN COPSEY by mailing a copy properly addressed with postage prepaid.

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

_____
Adjudicatiave Clerk Office

cc: **MARYANNE GUICHARD**