

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

In the Matter of the Shellfish)	OPS NO. 92-12-11-305 SF
Permit of:)	
)	
BLACKSTONE OYSTER COMPANY,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Applicant.)	AND FINAL ORDER
_____)	

A hearing was held before Health Law Judge Brian D. Peyton, Presiding Officer for the Secretary of the Department of Health (the Department), on March 22, 1995, and April 13, 1995, at the Melbourne Tower, 1511 Third Avenue, Seattle, Washington. Alex G. Perlman represented the Applicant, Blackstone Oyster Company (Blackstone). Harold P. Dygert, Assistant Attorney General, represented the Department. Having considered the evidence and the arguments of the parties, the Presiding Officer now issues the following:

I. PROCEDURAL HISTORY

1.1 In June 1992, Blackstone applied for a shellfish operation license and certificate of approval for the commercial harvest of shellfish in three locations in Dye's Inlet (Phinney Bay, off Erlands Point, and in Chico Bay) in which commercial shellfish harvest was at that time prohibited.

1.2 In a letter dated November 16, 1992, the Office of Shellfish Programs (the Shellfish Program) denied reclassification of the Phinney Bay and Erlands Point tracts; they remained classified as "prohibited." The Shellfish Program determined that the Chico Bay tract warranted further investigation.

1.3 In a Notice of Appeal dated December 10, 1992, Blackstone appealed the decision not to reclassify the Erlands Point tract. Blackstone did not contest the decision to retain the “prohibited” classification for Phinney Bay. Blackstone requested only that the issue of the proper classification of the Erland’s Point tract be remanded to the Shellfish Program for additional investigation.

1.4 In a letter dated December 2, 1993, the Shellfish Program notified Blackstone that, after further investigation, the Chico Bay tract had been reclassified from “prohibited” to “restricted.” In a Notice of Appeal dated December 27, 1993, Blackstone appealed the reclassification decision. Blackstone requested that the Chico Bay tract be reclassified as “approved” or “conditionally approved.”

1.5 A Scheduling Order was issued on January 26, 1994, which scheduled a prehearing conference for May 9, 1994, and the hearing for June 20, 1994.

1.6 A prehearing conference was held on May 9, 1994. By agreement of the parties, the two Blackstone appeals were consolidated, under OPS No. 92-12-11-305 SF, for hearing. Prehearing Order No. 1: Final Prehearing Order, paragraph 4. The parties also agreed that the Shellfish Program would conduct further investigation into the proper classification of the Erlands Point tract, in effect giving Blackstone the relief it had requested in its December 1992 appeal. The only issue remaining for hearing was the reclassification of the Chico Bay tract. Id. at paragraph 5.

1.7 Counsel for Blackstone withdrew, and on June 22, 1994, the hearing in this matter was continued for 120 days to allow Blackstone time to obtain new counsel. Prehearing Order No. 2: Order of Continuance.

1.8 The hearing was rescheduled for October 25, 1994. A prehearing conference was held on October 3, 1994, at which Blackstone requested a continuance of the hearing. The hearing was continued until December 2, 1994. Prehearing Order No. 3: Order of Continuance.

1.9 By agreement of the parties, the hearing was again continued, and a prehearing conference was held on December 15, 1994. Mr. Perlman, new counsel for Blackstone, was given until January 4, 1995, to file any amendments to the matters set forth in Prehearing Order No. 1. Prehearing Order No. 4: Order of Continuance. At the January 4, 1995 prehearing conference, Mr. Perlman stated that he proposed no such amendments. Id. The hearing was rescheduled for March 22, 1995.

1.10 In a letter dated March 1, 1995, Blackstone stated that the proper disposition of the Erlands Point appeal was unclear, and that in light of the prior agreement of the parties to remand the matter, “it makes little sense to consider this a consolidated appeal.” In response, counsel for the Shellfish Program stated that a plan of investigation of the Erlands Point tract had been developed, and that the Blackstone appeal should be withdrawn, as its counsel had agreed at the prehearing conference on May 9, 1994.

1.11 A prehearing conference was held on March 21, 1995. At the conference, Blackstone moved, in effect, to amend the December 1992 Notice of Appeal and challenge at hearing the merits of the 1992 decision not to reclassify the Erlands Point tract. In light of the prior agreement to remand the matter, and Blackstone’s failure to raise the issue in the more than two years its appeal had been pending, its motion was denied.

1.12 A hearing was held on March 22, 1995 and April 13, 1995. John Poppe, Donald Melvin, Keith Grellner, Dr. Kenneth Brooks, Frank Meriweather, Jack Lilja, and Maryanne Guichard testified. Exhibits 1 through 26 were admitted into evidence.

II. FINDINGS OF FACT

A. The Proposed Chico Bay Growing Area.

2.1 Chico Bay is a small embayment located near the western shore of Dyes Inlet, to the west of Erlands Point. Sanitary Survey of Chico Bay, Exhibit 4, p. 2; See Exhibits 1 and 1A. Commercial harvest of shellfish has been prohibited in the entire Dyes Inlet area since the 1960's, due to water pollution levels caused by, inter alia, sewage treatment plants, combined sewer overflows, and bypassing pump stations. Exhibit 4, p. 2. Studies undertaken from 1988 through 1992 concluded that no portion of Dyes Inlet was suitable for reclassification to allow commercial harvest of shellfish. The 1992 study, in connection with the Blackstone application, indicated that Chico Bay merited further study. Id.

2.2 Chico Bay is relatively shallow, and extensive areas of the bay are exposed at high tide. Chico Creek, which drains an area that is primarily residential, empties into the bay. Chico Bay is surrounded by residential development, all of which relies on on-site sewage disposal systems. Exhibit 4. The area of Chico Bay which Blackstone seeks to have upgraded from "restricted" to "approved" or "conditionally approved" is:

The area south of a line from the northernmost tip of Erlands Point to the west shore on a true bearing of 270° and east of a line from a point 100 yards east of the mouth of Chico Creek extending on a true bearing of 0°.

December 2, 1993 Notice of Decision, Exhibit 17.

2.3 The record indicates that there are a number of sources that contribute to pollution of the waters of Chico Bay. Runoff from residential development and hobby farms drains into Chico Creek, which empties into the bay. Sewage pump stations located on Kitsap Lake, which drain into Chico Creek, can fail, sending sewage downstream and into the bay. Failing on-site sewage systems pollute the bay. The December 1993 Sanitary Survey cited a Bremerton Kitsap County Health District (BKCHD) study which found that seven percent of the 334 residential septic systems surrounding the bay had failed, and twelve percent were considered suspect. Exhibit 4. Most of the failures identified in the BKCHD study have been repaired. However, residential septic systems constantly fail; at any particular time, five to ten percent of residential septic systems can be expected to be failing.

B. The Classification of Shellfish Growing Areas.

2.4 A shellfish growing area from which shellfish are removed for sale for human consumption must be in “a safe and sanitary condition,” and certified as such by the Department. RCW 69.30.050. To receive certification, a growing area must be located in an area not adversely affected by human waste or other sources of pollution which may have a detrimental influence on the water quality of the shellfish growing beds. WAC 246-282-020(2).

2.5 The Shellfish Program follows the procedures for classification and the classification system set forth in Part I of the United States Food and Drug Administration’s National Shellfish Sanitation Program Manual of Operations, 1993

Revision (the NSSP Manual). The NSSP Manual appears in the record as Exhibit 9. All applicants for Shellfish Operation Licensure must agree to comply with the NSSP Manual. See Blackstone Application for Shellfish Operation License and Certificate of Approval, Exhibit 15. The NSSP Manual standards were incorporated into the WAC rules governing shellfish sanitation effective December 9, 1994. See WAC 246-282-005; WSR 94-23-026.

2.6 Under the NSSP Manual classification scheme, a shellfish growing area is classified as one of the following: "approved," "conditionally approved," "restricted," or "prohibited." An "approved" area is an area in which shellfish may be grown and harvested for direct marketing. Exhibit 9, p. DEF-1. A "conditionally approved" area must meet the criteria for the "approved" classification for a reasonable and predictable period of time, during which shellfish may be grown and harvested. Id. A "restricted" area is an area in which shellfish may be harvested only if subjected to "a suitable and effective cleansing process," such as relating to an "approved" area, prior to marketing. Exhibit 9, p. DEF-3. Taking of shellfish for human food purposes is forbidden in an area classified "prohibited." Id.

2.7 Classification of an area is made after a sanitary survey has been conducted. A sanitary survey includes (a) a shoreline survey; (b) an evaluation of the meteorological effects, hydrographic influences, and geographic characteristics that may affect the distribution of pollutants over the growing area; and (c) a bacteriological water sampling survey. Exhibit 9, pp. C-1 and C-2. The sanitary survey for Chico Bay appears in the record as Exhibit 4.

2.8 At issue in this proceeding is the appropriate classification of the proposed Chico Bay growing area, based on the water quality of the bay. The NSSP Manual requires a minimum of 30 samples, obtained randomly as set forth in the Manual, from each sampling station. To be classified as “approved,” the water quality of all sampling stations must meet the following standard:

the fecal coliform median or geometric mean MPN (most probable number) of the water does not exceed 14 per 100 ml and not more than 10 percent of the samples exceed an MPN of 43 per 100 ml for a 5-tube decimal dilution test.

Exhibit 9, p. C-9. To be classified as “conditionally approved,” the water quality must meet the standard for an “approved” area for “a reasonable period of time,” as a result of pollution factors that “are known, are predictable, and are not so complex as to preclude a reasonable management approach.” *Id.* at p. C-12.

C. The Water Quality of the Proposed Chico Bay Growing Area.

2.9 From April 1993 through January 1994, the Shellfish Program collected 30 water samples at each of 10 sampling stations in and around Chico Bay. May 5, 1994 Memo from Don Melvin, Exhibit 5. Three of these stations, stations 39, 40, and 41, were located in the proposed growing area. The location of the stations is set forth on the map which is included in Exhibit 5. The samples were collected under a variety of weather conditions. The data indicates that stations 39 and 41 failed the NSSP Manual criteria for approved status, because more than ten percent of the samples had a fecal coliform geometric mean greater than 43 per 100 ml of water. Exhibit 5, Table 2.

2.10 The Shellfish Program collected additional samples from January 1994 to May 1994, increasing the number of samples taken to 40. March 3, 1995 Memo from

Don Melvin, Exhibit 7. That additional data did not change the results from the first 30 samples. Stations 39 and 41 still failed the NSSP Manual criteria for approved status, because more than ten percent of the samples had a fecal coliform geometric mean greater than 43 per 100 ml of water. Exhibit 7, Table 2.

2.11 The Shellfish Program also evaluated the water sample data to determine whether Chico Bay satisfied the criteria for “conditionally approved” classification. The water quality data was examined to determine if a predictable relationship existed between significant rainfall events and subsequent pollution levels in the bay, i.e., that a significant amount of rainfall results in elevated fecal coliform counts. Rainfall of less than one-half inch in a 24-hour period is excluded in this analysis because it is so frequent, and therefore unpredictable.

2.12 Shellfish Program witnesses testified that they look to see if fecal coliform levels become elevated in three days or less after one-half inch of rain. If fecal coliform levels are elevated within this three-day period, the elevated levels can be attributed to rainfall; thus, predictability of pollution levels from significant rainfall has been established. If fecal coliform levels become elevated more than three days after significant rain, a link between the two events cannot be reliably established.

2.13 The water quality data for Chico Bay was analyzed by excluding data from samples with one-half inch or more of rain in increasingly longer periods prior to the sampling date (one through seven days prior). Exhibits 5 and 7. Even under relatively drier conditions, i.e., no significant rain for four or more days prior to sampling, stations 39 and 40 always failed to meet “approved” water quality criteria. Exhibit 7, p. 1 and Tables 6, 7, and 8. That evidence, and Exhibit 7 generally, indicate that elevated fecal

coliform levels cannot be reliably and predictably linked to significant rainfall, even without reference to some three-day standard.

2.14 Other factors make the predictability of pollution unlikely. For example, the sewage pump stations on Kitsap Lake can accidentally discharge sewage down Chico Creek into the bay. Testimony indicated that it could take 24 hours or more for the BKCHD to be notified of such a discharge. In short, given the undisputed evidence that fecal coliform levels exceed “approved” levels, and the number of potential pollution sources, it is not possible to define periods of adequate water quality in a manner that is predictable and sufficiently straightforward to allow management of the growing area.

2.15 Blackstone presented an analysis of the Shellfish Program water quality data in which all data for samples taken from January 1 through February 15, 1994 were excluded. With those samples excluded, stations 39, 40, and 41 all met the approved criteria. Blackstone proposed a conditional approval which prohibited harvest annually from January 1 to February 15, a period during which heavy rainfall combined with saturated soils cause heavy runoff which ultimately drains into the bay.

2.16 The evidence does not establish that the proposed January 1 to February 15 harvest prohibition would satisfy the NSSP criteria, and adequately insure the safe and sanitary condition of the growing area. The record indicates that annual rainfall is heavy from October to April; if heavy rainfall and saturated soil contribute to pollution levels, a prohibition in January and February alone does not address the problem. Given the variability of rainfall, heavy rain at other times of the year might have the same pollution effects. Moreover, the evidence indicates that poor water quality could

be a problem at various times of the year, due to a number of factors, including rain, over which Blackstone has little or no control. The relationships are not adequately known, predictable and simple to justify a “conditionally approved” classification.

2.17 Blackstone introduced evidence regarding what it asserted was a departure from NSSP Manual procedures and criteria in the approval/classification of a growing area in Union Bay, Washington. That project is not at issue in this appeal. Even if an error might have been committed in another situation, it in no way makes the proper procedures and criteria inapplicable to this case.

III. CONCLUSIONS OF LAW

3.1 The Department has jurisdiction over Blackstone and the subject matter of this proceeding.

3.2 The December 1992 appeal requested only that application for reclassification of the of the Erlands Point growing area be remanded to the Shellfish Program for investigation. The parties had agreed that the Shellfish Program will conduct additional investigation. Blackstone made an untimely attempt to amend the relief it had requested more than two years after the appeal had been filed, and after its new counsel had been given the opportunity to identify new facts and issues. In light of the agreement of the parties, the December 11, 1992 appeal should be dismissed.

3.3 As set forth above in the Findings of Fact, the proposed Chico Bay growing area does not satisfy the NSSP Manual criteria, incorporated by WAC 246-282-005(1), for an “approved” growing area.

3.4 As set forth above in the Findings of Fact, the proposed Chico Bay growing area does not satisfy the NSSP Manual criteria, incorporated by WAC 246-282-005(1), for a “conditionally approved” growing area.

3.5 Blackstone maintains that the Shellfish Program’s use of the three-day period following significant rainfall (greater than one-half inch in a 24-hour period) to evaluate pollution levels constituted an unpromulgated rule, in violation of the rulemaking procedures of the Administrative Procedures Act, RCW 34.05. The Presiding Officer concludes that the record indicates that the proposed Chico Bay growing area fails to satisfy the “conditionally approved” criteria without application of that particular three-day standard, as set forth in Finding of Fact 2.13.

3.6 Under all the circumstances, the Shellfish Program’s determination that the proposed Chico Bay growing area be classified as “restricted,” as defined by the NSSP Manual and incorporated by WAC 246-282-005(1), should be affirmed.

IV. ORDER

Based on the foregoing Procedural History, Findings of Fact, and Conclusions of Law, the Presiding Officer enters the following:

4.1 Blackstone Oyster Company’s December 11, 1992 appeal is hereby DISMISSED.

4.2 The December 2, 1993 decision of the Office of Shellfish Programs, Department of Health, to reclassify the proposed Chico Bay growing area from "Prohibited" to “Restricted” is hereby AFFIRMED.

THE PARTIES ARE FURTHER ADVISED:

As provided in RCW 34.05.461(3), .470, and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed with the Office of Professional Standards, 2413 Pacific Avenue, PO Box 47872, Olympia WA 98504-7872, within ten 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 Office of Professional Standards (OPS) 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 OPS. 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 the superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, 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 2nd DAY OF AUGUST, 1995.

/s/
BRIAN D. PEYTON, 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: **ALEX G. PERLMAN, HAROLD P. DYGERT, STEPHEN COOK** by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS ____ DAY OF AUGUST, 1995.

Office of Professional Standards

cc: **MARYANNE GUICHARD**