

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:

RODNEY ALLEN CLARK,
Owner and operator of
G & R QUALITY SEAFOOD INC.,
WA-1518-SS,

Respondent.

Master Case No. M2009-1003

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

APPEARANCES:

Respondent Rodney Allen Clark, Owner and Operator of
G & R Quality Seafood Inc., pro se

Department of Health, Office of Food Safety Shellfish Program (Program), by
Office of the Attorney General, per
Dorothy H. Jaffe, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Health Law Judge

A hearing was held in this matter on August 31, 2010, regarding allegations that the Respondent, Rodney Allen Clark, as owner and operator of G & R Quality Seafood, Inc., WA-1518-SS, failed to comply with the laws, regulations and requirements relating to sanitary control of shellfish under chapter 69.30 RCW and chapter 246-282 WAC. License revoked.

The Respondent is assessed a civil penalty in the amount of \$16,000.00.

ISSUES

- A. Did the Respondent Rodney Allen Clark, owner and operator of G & R Quality Seafood, Inc., violate WAC 246-282-012; WAC 246-282-014; WAC 246-282-080; and the 2007 National Shellfish Sanitation Program (NSSP) Model Ordinance

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Chapters X.05B and XIII.01A by failing to identify shellstock harvested by his company with approved shellfish tags?

- B. Did the Respondent violate the 2007 NSSP Model Ordinance Chapter XIII.02 by storing shellfish in a manner that exposed shellfish to contamination by water located in a prohibited area?
- C. Did the Respondent violate the 2007 NSSP Model Ordinance Chapter XIII.02C by storing oysters on a barge next to a can of gasoline without a protective barrier which could result in cross contamination?
- D. Does the conduct described in Paragraphs 3.3 through 3.13 of the Program's Prehearing Statement constitute grounds for a civil penalty in the amount of \$63,600.00, pursuant to RCW 69.30.145, RCW 69.30.150, WAC 246-282-102, and WAC 246-282-104?
- E. Does the conduct described in Paragraphs 3.3 through 3.13 of the Program's Prehearing Statement constitute grounds for the revocation of Respondent's G & R Quality Seafood, Inc., Shellfish Operation License and Certificate of Approval, with no right to reapply for 477 months, pursuant to RCW 69.30.080, WAC 246-282-102, WAC 246-282-104, and WAC 246-282-110?

SUMMARY OF PROCEEDINGS

At the hearing, the Program presented the testimony of:

- 1. Rodney Allen Clark, the Respondent
- 2. Sergeant Duane Makoviney, Washington Department of Fish and Wildlife (WDFW)
- 3. Sergeant Phillip Henry, WDFW
- 4. Officer Wendy Willette, WDFW
- 5. Inspector Cathy Barker, Department of Health (DOH), Office of Food Safety & Shellfish
- 6. Maryanne Guichard, Director, DOH, Office of Food Safety & Shellfish

The Respondent testified on his own behalf, did not call any other witnesses, and did not offer any exhibits.

The Presiding Officer admitted the following Program exhibits:

- Exhibit P-1: Respondent's Shellfish Operation License and Certificate of Approval, effective October 1, 2009.
- Exhibit P-2: Respondent's Harvest Site Certificates, end date September 30, 2010.
- Exhibit P-3: Respondent's Interstate Shellfish Dealer Certification, expiration September 30, 2010.
- Exhibit P-4: G&R Quality Seafood, dba Quilbay Seafood Shellstock, Certification tags, July and August 2009.
- Exhibit P-5: WDFW Supplemental Report and photographs dated March 19, 2010.
- Exhibit P-6: January 22, 2010 DOH Notice of Correction.
- Exhibit P-7: WDFW Affidavit of Facts and photographs on Citation L-133844, dated November 21, 2009.
- Exhibit P-8: WDFW General Report and photographs, dated October 23, 2009 on Case No. L-133843.
- Exhibit P-9: WDFW General Report for Case No. C07636 and photographs dated July 11, 2009.
- Exhibit P-10: Seattle-King County Inspection Report, dated June 28, 2009.
- Exhibit P-11: June 11, 2009 DOH Notice of Correction.
- Exhibit P-12: King County District Court Docket, Case No. L00098973, dated April 2, 2010.
- Exhibit P-13: DOH Inspection Report, dated May 21, 2009.
- Exhibit P-14: DOH Inspection Report, dated August 20, 2009.

Exhibit P-15: Topographical map of Quilcene Bay, dated September 2, 2008.

Exhibit P-16: Program's penalty matrix regarding the Respondent's violations, review date April 2010.

The Program withdrew the allegations contained in Paragraph 1.5 of the Findings of Fact, Conclusions of Law and Initial Order Assessing Civil Penalties and Suspending Shellfish Operation License and Certificate of Approval dated April 6, 2010 (the 2010 Initial Order) relating to the November 18, 2009 incident (moorage of barge containing oysters at the Port Townsend Marina). The Respondent did not oppose the Program's withdrawal request. The allegations contained in Paragraph 1.5 are dismissed.

PROCEDURAL HISTORY

On April 6, 2010, the Program issued the 2010 Initial Order that revoked the Respondent's Operation License and Certificate of Approval and assessed an administrative fine. Along with the 2010 Initial Order, an Ex Parte Order of Summary Suspension was issued to immediately suspend the Respondent's Shellfish Operation License and Certificate of Approval pending a further adjudicative proceeding.

On April 27, 2010, the Respondent filed his request for adjudicative proceeding to contest the allegations.

I. FINDINGS OF FACT

Sanitary Control of Shellfish

1.1 The sanitary control of shellfish is required to establish the minimum performance standards for growing, harvesting, processing, packing, storage,

transporting and selling of shellfish for human consumption.¹ “Shellfish” means all varieties of fresh or fresh-frozen oysters, clams, scallops or mussels.² The sanitary control of shellfish is regulated both by Washington state regulation (chapter 246-282 WAC) and a model federal act (the 2007 NSSP Model Ordinance).

1.2 Shellfish are “filter feeders”, which means that shellfish obtain their nutrients from filtering them out of the water. If there are toxins or biotoxin pollution in the water or harvest site, the shellfish will draw any toxins/pollution in during the filter feeding process and any contaminants in the water/harvest site can become concentrated at high levels in the shellfish tissue. For that reason, water quality and harvest sites³ must be free of contaminants so that a person consuming the shellfish will not be infected with any gastrointestinal illnesses.⁴

1.3 To ensure the safety of shellfish, it is necessary for the shellfish dealer or harvester, or the shellfish dealer/harvester’s employee, to immediately place a shellfish tag on any shellfish that are harvested (that is, shellfish removed from a harvest site). The tag includes basic information regarding the shellfish harvest, including: who harvested the shellfish; the location from which the shellfish was harvested; the

¹ See WAC 246-282-001.

² See WAC 246-282-010(24).

³ “Harvest site” means an area of intertidal or subtidal property within a commercial shellfish growing area, that is described by a unique county parcel number, department of fish and wildlife tract number, department of fish and wildlife catch area number, tribal identification number, or other government identification. WAC 246-282-010(12).

⁴ Gastrointestinal illnesses may include hepatitis, typhoid, salmonella, and biotoxin poisoning.

time/date when the shellfish was harvested; and the quantity of shellfish harvested.⁵ It is only through the proper and timely tagging of the harvested shellfish that the Department of Health or the Department of Fish and Wildlife (the enforcement arm of the Department of Health) can ensure the safety of any shellfish from any given harvest.

Respondent

1.4 The Respondent was granted a Shellfish Operation License in the state of Washington on September 28, 2009, which granted the Respondent the authority to harvest and sell commercial quantities of shellfish in the state of Washington for all periods relevant to this matter. The Respondent also possessed a valid harvest site certificate (permission to harvest shellfish from an identified location) during all periods relevant to this matter.

1.5 In 2009, the Respondent took over the operation of G & R Quality Seafood from his mother Gloria Howard. The Respondent's stated goal was to create a family business that would create jobs in his local community. The Respondent admits that he failed to properly manage the employees of G & R Quality Seafood to ensure that they properly tagged and harvested the shellfish.

Shellfish Violations by the Respondent

Officer Wendy Willette

1.6 On January 11, 2008, Department of Fish and Wildlife Officer Wendy Willette issued to Karen Kenyon, an employee of G & R Quality Seafood, a citation for offering shellfish for sale that did not bear a certificate of compliance with the

⁵ An example of a shellfish tag is found in Exhibit P-4.

sanitary requirements under chapter 69.30 RCW. This violation was resolved by the Respondent forfeiting the \$200.00 bail amount.⁶

1.7 On July 11, 2009, Officer Willette was conducting a patrol visit of the Maple Valley Farmers Market and inspected G & R Quality Seafood's vendor booth.⁷ Respondent employee Mark Rodriguez was selling manila clams and oysters at the booth. While the oysters were properly tagged, the 24 bags of manila clams were not. When Officer Willette brought this to Mr. Rodriguez's attention, he pulled out and began filling out a number of certificate of compliance tags to evidence that the manila clams were, in fact, in compliance with the necessary sanitary requirements.

1.8 Upon questioning by Officer Willette, Mr. Rodriguez stated that he sold two bags of manila clams (approximately five total pounds of clams). However, Mr. Rodriguez admitted he originally had 100 pounds of clams. Officer Willette seized and weighed the 24 bags of manila clams, which weighed 54 pounds. Officer Willette determined that the amount of untagged manila claims sold by Mr. Rodriguez was approximately 41.5 pounds. Officer Willette issued a citation against the Respondent/G & R Quality Seafood, seized the 24 bags of manila clams in the possession of Mr. Rodriguez, and destroyed the remaining manila clams. This citation was for the same violation Officer Willette issued against G & R Quality Seafood in January 2008.

⁶ See Exhibit P-12.

⁷ See Exhibit P-9.

Sergeant Phillip Henry

1.9 On October 23, 2009, Department of Fish and Wildlife Sergeant Phillip Henry was on patrol in east Jefferson County, Washington. At about 9:30 a.m., Sgt. Henry arrived at the Quilcene Marina⁸ and observed a barge that was tied up to the dock.⁹ On the barge were oysters contained in bags. Sgt. Henry noted that the bags of oysters were not tagged. Sgt. Henry approached the barge and spoke with Ryan Wills, an employee of G & R Quality Seafood. Mr. Wills informed Sgt. Henry that he was not the harvester of the oysters but was sent to place a bulk tag on the barge load of oysters.

1.10 Sgt. Henry then contacted the Respondent to advise him that tagging the oysters after the fact was illegal. The Respondent informed Sgt. Henry that the weather on October 22, 2009 (the day the oysters were, in fact, harvested) was nasty and his harvesting crew was not able to immediately tag the oyster bags for that reason. Sgt. Henry cited the Respondent with Possession of Commercial Quantities of Oysters Without Tags to Identify the Shellstock.¹⁰

1.11 On October 23, 2009, Sgt. Henry also photographed a gasoline can next to the loose oysters on G & R Quality Seafood's barge.¹¹

⁸ See Exhibit P-15 (a topographical map of Quilcene Bay).

⁹ See Exhibit P-8.

¹⁰ Shellstock is a shorthand reference to "shellstock shipper" (a shellfish operation that does not shuck shellfish [that is, remove it from the shell] or repack shucked shellfish). See WAC 246-282-010(29). The witnesses used the terms "shellfish" and "shellstock" interchangeably during the testimony at hearing.

¹¹ See the photographs attached as a part of Exhibit P-8.

1.12 On November 21, 2009, Sgt. Henry arrived at the Port of Port Townsend, Quilcene Marina, and observed one of the oyster barges operated by the Respondent with two large piles of oysters on it.¹² Leonard Nichols, an employee of the Respondent, was placing oysters into mesh bags and inserting certification tags into the bags. Mr. Nichols informed Sgt. Henry that he was instructed by the Respondent to go to the dock to tag the oysters the Respondent harvested the night before. Sgt. Henry issued a citation to the Respondent/G & R Quality Seafood for its failure to properly tag the oysters. Specifically, Sgt. Henry cited the Respondent for failing to tag the oysters immediately upon harvesting from an approved site.

Sergeant D. Duane Makoviney

1.13 On March 18, 2010, Sergeant Duane Makoviney and Officer Win Miller, Department of Fish and Wildlife, seized two commercial style shellfish barges, and associated equipment owned or used by the Respondent, in the marina located in Quilcene Bay, Jefferson County, Washington.¹³ Sgt. Makoviney located and took the first of two barges under tow. The barge had several stackable style oyster cages and oysters contained in mesh bags. Some of the mesh bags containing oysters were hanging over the side of the barge in the water, which is a method of keeping the oysters cold.

1.14 Hanging mesh bags containing oysters over the side of a barge so that they remain cold is not, in and of itself, a violation. However, the barges were within the

¹² See Exhibit P-7.

¹³ See Exhibit P-5.

marina. Leaving the mesh bags containing oysters hanging in the water of a marina increases the potential exposure of the oysters to toxins because such toxins are more concentrated in marina waters. The increased presence of toxins arises from the increased number of boats or other marine vessels.

1.15 Sgt. Makoviney observed that the mesh bags were not tagged for identification. Because the bags were not properly tagged, Sgt. Makoviney could not determine with certainty who harvested the shellfish and whether the shellfish were harvested from an approved shellfish harvest area location. However, there were old certification tags and buoys located on the barge bearing the name of G & R Quality Seafood. Sgt. Makoviney inferred from these tags and buoys that the barges belonged to G & R Quality Seafood and that the shellfish had been harvested by the Respondent/G & R Quality Seafood. Sgt. Makoviney's inferences were confirmed by the Respondent, namely that the shellfish were harvested by the Respondent or one of his employees.

1.16 Sgt. Makoviney then towed in the second smaller barge, which had a 25 horsepower outboard motor attached. Both barges were towed to the Washington Department of Fish and Wildlife facility where the shellfish were destroyed.

Public Health Advisor Cathy Barker

1.17 Cathy Barker is employed as a Department of Health Shellfish and Water Protection Public Health Advisor. On May 21, 2009, Ms. Barker inspected the G & R Quality Seafood facility in Port Hadlock, Washington.¹⁴ Ms. Barker uncovered a barge

¹⁴ See Exhibit P-13.

load of oysters that were not properly tagged (either with individual tags or a bulk load shipment tag or invoice), except for one out-of-date tag contained inside one of the bags dated May 16, 2009.

1.18 In addition to the Respondent's failure to properly tag the oysters, there was some confusion regarding where the Respondent harvested the oysters. The Respondent's beach manager stated the shellfish were harvested from Nylund Beach. The Respondent identified Brooke White as the location from which the oysters were harvested. Because the Respondent failed to properly tag the harvested oysters, Ms. Barker could not clearly determine whether the Respondent, in fact, harvested the oysters from either location.¹⁵

Additional Violation

1.19 On June 28, 2009, Seattle-King County Public Health Department Inspector Marcela Cecil conducted an inspection at the Mercer Island Farmers Market. During the course of her inspection, Ms. Cecil observed Karen Kenyon, whom Ms. Cecil knew to be an employee of the Respondent's business, selling clams that were not tagged. When Ms. Kenyon was asked about the shellfish tags, Ms. Cecil observed Ms. Kenyon produce a blank shellfish tag to fill out. Ms. Cecil then cited the Respondent's company for the failure to properly tag the shellfish for commercial sale.¹⁶

¹⁵ The Respondent's Harvest Site Certificate (License No. WA-1518-SS) would appear to allow harvesting from either of the two locations. See Exhibit P-2, pages 2-3. However, the Respondent still failed to correctly tag the harvested oysters as required.

¹⁶ See Exhibit P-10.

Report of Shellfish Related Illness

1.20 On July 25, 2008, Maryanne Guichard, Director of the Department of Health Office of Food Safety & Shellfish, received a complaint of a shellfish related illness, which was traced to a sale of shellfish at one of the local farmers markets.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by designated authority, the Presiding Officer) has jurisdiction over the Respondent and the subject of this proceeding. Chapters 69.30 RCW and 246-282 WAC.

2.2 The standard of proof in a commercial shellfish operation license proceeding is proof by a preponderance of the evidence. WAC 246-10-606; *see also Islam v. Washington State Department of Early Learning* (Division 1, Docket No. 63362-7) (2010).

Sanitary Control of Shellfish

2.3 Any person engaged in a shellfish operation or possessing a commercial quantity of shellfish or any quantity of shellfish for sale for human consumption must comply with the requirements of the 2007 NSSP Guide for the Control of Molluscan Shellfish and chapter 246-282 WAC. See WAC 246-282-005(1)(a) and (c). The Department of Health may deny, revoke, or suspend a shellfish operation license or harvest site certificate, and may assess a civil penalty for violations of the shellfish law (chapter 69.30 RCW) or regulation (chapter 246-282 WAC), or a violation of the 2007 NSSP Guide for the Control of Molluscan Shellfish. See WAC 246-282-102. A “violation” means the commission of an act or acts prohibited by the provisions of

chapter 69.30 RCW, these rules, or the NSSP Model Ordinance. See WAC 246-282-010(32).

Violations

2.4 WAC 246-282-012 provides:

(1) The department issues two types of certificates of approval to persons who conduct shellfish operations. These are shellfish operation licenses and harvest site certificates.

...

(3) Any person who harvests a commercial quantity of shellfish or any quantity of shellfish for sale for human consumption must possess, or act on behalf of a person who possesses, a valid harvest site certificate. In order for a person to obtain a harvest site certificate, all of the following requirements must be met.

(a) The person possesses a valid shellfish operation license.

(b) The person submits to the department a completed application that describes the following characteristics of the site:

(i) Geographic location;

(ii) Map showing legal boundaries;

(iii) Unique government identification number, such as a county parcel number, department of fish and wildlife tract number, department of fish and wildlife catch area number, or tribal identification; and

(iv) Documentation of legal ownership or lease for shellfish harvesting.

WAC 246-282-012. A “commercial quantity” means any quantity exceeding: (a) Forty pounds of mussels; (b) One hundred oysters; (c) Fourteen horse clams; (d) Six geoducks; or (e) Fifty pounds of scallops. WAC 246-282-010(6).

2.5 WAC 246-282-014 provides:

(3) Any person who places a commercial quantity of shellfish or any quantity of shellfish for sale for human consumption in containers at a harvest site must do so only at a site for which the person possesses a valid harvest site certificate.

...

- (5) The owner(s) and the designated person in charge of a shellfish operation must:

...

- (c) Ensure, by supervision at harvest site or other adequate means, that those individuals working on behalf of the operation harvest only from harvest sites approved by the department for the operation...

WAC 246-282-014(3) and (5)(c).

2.6 WAC 246-282-080 provides:

- (2) Any person who possesses a commercial quantity of shellfish or any quantity of shellfish for sale for human consumption must identify the shellstock by an approved tag with permanent marking, according to requirements of the NSSP Model Ordinance, upon removal from the harvest site.

...

- (5) Information recorded by the harvester-shipper shall include:
 - (a) Location of harvesting area(s) by name or code, (b) name and quantity of shellfish, (c) date of harvest, (d) date shipped.

WAC 246-282-080(2) and (5).

2.7 The minimum performance standards set forth in WAC 246-282-005(1)(a) requires that a person engaged in shellfish operations must comply with the requirements of the 2007 NSSP Guide for the Control of Molluscan Shellfish. This includes the 2007 NSSP Model Ordinance in Section II. The definition section provides, in pertinent part, that the term “harvest” means “the act of removing shellstock from growing areas and its placement on or in a manmade conveyance or other means of transport.” Other sections of the 2007 NSSP Model Ordinance that apply to the present matter include:

Chapter X.05 Shellstock. Identification

...

(B) Tags

...

- (2) The dealer's tag shall contain the following indelible, legible information in the order specified below:
 - (a) The dealer's name and address
 - (b) The dealer's certification number
 - (c) The harvest date
 - ...
 - (f) The most precise identification of the harvest location as is practicable including the initials of the state of harvest, and the Authority's designation of the growing area by indexing, administrative or geographic designation. If the Authority has not indexed growing areas, then an appropriate geographical or administrative designation must be used (e.g., Long Bay, Decadent County, lease number, bed or lot number).
 - (g) The type and quantity of shellstock...

Chapter XIII.01 Critical Control Points

- (A) Receiving Critical Control Point – Critical Limits. The dealer shall ship or repack only shellstock that is:
 - (1) Obtained from a license harvester who has:
 - ...
 - (b) Identified the shellstock with a tag on each container or transaction record on each bulk shipment...

Chapter XIII.02 Sanitation

- (A) Safety of Water for Processing and Ice Production.
 - ...
 - (3) Shellstock washing.
 - (a) Water from either a potable water supply or a growing area in the approved classification shall be used to wash shellstock.

Chapter XIII.02C

- (C) Prevention of Cross Contamination.
 - (1) Protection of shellfish.
 - (a) Shellstock shall be stored in a manner to protect shellstock from contamination in dry storage and at points of transfer.

2.8 The Program proved by a preponderance of the evidence that the Respondent violated WAC 246-282-012; WAC 246-282-014; WAC 246-282-080; and the 2007 NSSP Model Ordinance Chapters X.05B and XIII.01A by failing to identify

shellstock harvested by his company with approved shellfish tags on: May 21, 2009; June 28, 2009; July 11, 2009; October 23, 2009; November 21, 2009; and March 18, 2010.

2.9 The Program proved by a preponderance of the evidence that the Respondent violated 2007 NSSP Model Ordinance Chapter XIII.02 by storing shellfish in a manner that exposed shellfish to contamination by water located in a prohibited area on March 18, 2010.

2.10 The Program proved by a preponderance of the evidence that the Respondent violated the 2007 NSSP Model Ordinance Chapter XIII.02C by storing oysters on a barge next to a can of gasoline without a protective barrier which could result in cross contamination on October 23, 2009.

Civil Penalties

2.11 The Respondent's conduct constitutes grounds for the imposition of a civil penalty under RCW 69.30.145, RCW 69.30.150(1), WAC 246-282-102, and WAC 246-282-104. The statutes and regulations state:

As limited by RCW 69.30.150, the department may impose civil penalties for violations of standards set forth in this chapter or rules adopted under RCW 63.30.030.

RCW 69.30.145.

In addition to any other penalty provided by law, every person who violates standards set forth in this chapter or rules adopted under RCW 69.30.030 *is subject to a penalty of no more than five hundred dollars per day for every violation.* Every violation is a separate and distinct offense. In case of a continuing violation, every day's continuance is a separate and distinct violation. Every person who, through an act of commission or omission, procures, aids, or abets in the violation is in violation of this section and is subject to the penalty provided in this section.

RCW 69.30.150(1) (Emphasis added). A “violation” means the commission of an act or acts prohibited by the provisions of chapter 69.30 RCW, these rules [chapter 246-282 WAC] or the NSSP Model Ordinance. See WAC 246-282-010(32).

2.12 WAC 246-282-104 sets out the method for calculating the appropriate penalty in the event of a violation. That section states:

Penalty assignment — Calculation of penalty and proportionate adjustment — Aggravating and mitigating factors.

- (1) The department calculates an appropriate penalty based on the following factors:
 - (a) The level of threat to public health;
 - (b) The number of previous violations attributed to the violator; and
 - (c) The presence of aggravating or mitigating factors.
- (2) The department determines administrative penalties from the range in the following penalty schedule. The standard penalty is assessed unless a proportionate adjustment is warranted and/or there are aggravating or mitigating factors present.

Penalty Schedule

NUMBER OF PREVIOUS VIOLATIONS	ADJUSTMENT FACTORS	PUBLIC HEALTH THREAT		
		LOW License Action/ Civil Penalty	INTERMEDIATE License Action/ Civil Penalty	HIGH License Action/ Civil Penalty
0	Mitigated	0 Months/\$150	0 Months/\$300	3 Months/\$350
	Standard	0 Months/\$200	1 Month/\$350	6 Months/\$400
	Aggravated	1 Month/\$250	3 Months/\$400	9 Months/\$450
1	Mitigated	0 Months/\$200	1 Month/\$350	6 Months/\$400
	Standard	0 Months/\$250	3 Months/\$400	9 Months/\$450
	Aggravated	3 Months/\$300	6 Months/\$450	12 Months/\$500
2	Mitigated	0 Months/\$250	3 Months/\$400	12 Months/\$500
	Standard	3 Months/\$300	6 Months/\$450	18 Months/\$500
	Aggravated	6 Months/\$350	9 Months/\$500	24 Months/\$500
3 or More	Mitigated	3 Months/\$300	6 Months/\$450	18 Months/\$500
	Standard	6 Months/\$350	9 Months/\$500	24 Months/\$500
	Aggravated	9 Months/\$400	12 Months/\$500	36 Months/\$500

- (3) The department reserves the right to proportionately increase the civil penalty and decrease the license action under certain circumstances. These circumstances include situations where license actions as a deterrent are ineffective and include, but are not limited to, violations by persons who are not licensed.
- (4) The department reserves the right to proportionately decrease the civil penalty and increase the license action when circumstances in a particular case demonstrate the ineffectiveness of a civil penalty as a deterrent.
- (5)
 - (a) When assessing a civil penalty or license action, the department considers any previous violation(s) for the following period of time, depending on the severity of the previous violation(s):
 - (i) Three years for low public health threat;
 - (ii) Five years for intermediate public health threat; or
 - (iii) No limit for high public health threat.
 - (b) The time period will begin on the date of adjudication or settlement of the previous violation(s), rather than the date on which the incident or conduct occurred.
- (6) The department considers circumstances that increase the seriousness of a violation, including, but not limited to, the following aggravating factors:
 - (a) The extent to which the violation is part of a pattern of the same or substantially similar conduct;
 - (b) The extent to which previous education, technical assistance, or notice of correction has been provided for the same or substantially similar conduct; and
 - (c) The extent to which the violation caused serious and actual injury or death to a person or persons.
- (7) If the department determines that one or more aggravating factors are present, then the department may assess the aggravated penalty or may increase the penalty to a level greater than listed in the penalty schedule, including, but not limited to, revocation of the license.

- (8) The department will consider circumstances that decrease the seriousness of a violation, including, but not limited to, the following mitigating factors:
 - (a) Voluntary disclosure of the violation;
 - (b) Complete cooperation and voluntary disclosure during the investigation of the violation; and
 - (c) Voluntary taking of remedial measures that will result in increased public health protection and that will result in a decreased likelihood that the violation will be repeated and that other violations will occur.
- (9) If the department determines that one or more mitigating factors are present, then the department may assess the mitigated penalty or may decrease the penalty to a level less than listed in the penalty schedule.
- (10) The maximum civil penalty that may be imposed by the department is five hundred dollars per day for each violation.
- (11) The department considers each violation to be a separate and distinct event. Each day a violation is continued is a separate and distinct violation. When a person has committed multiple violations, the violations are cumulative for purposes of calculating the appropriate penalty. Penalties are added together, rather than served concurrently.
- (12) Nothing in this section prevents the department from responding to a violation by:
 - (a) Declining to pursue an administrative penalty;
 - (b) Issuing a notice of correction instead of pursuing an administrative penalty; or
 - (c) Negotiating settlement of a case on such terms and for such reason as the department deems appropriate. Violations covered by a prior settlement agreement may be used for the purpose of determining the appropriate penalty for the current alleged violation(s), unless prohibited by the prior settlement agreement.

2.13 The Respondent committed five violations (that is, violated five separate sections of chapter 246-282 WAC and/or the 2007 NSSP Model Ordinance relating to

the tagging of shellfish) on each of the following dates: May 21, 2009; June 28, 2009; July 11, 2009; September 30, 2009; October 23, 2009, and March 18, 2010. This represents 30 violations. In addition, the Respondent committed two additional violations for each of the following actions: storing oysters in the water while located in the marina on March 18, 2010; and storing oysters near a gas can on October 23, 2009. This results in a total of 32 violations.

2.14 Under WAC 246-282-104(2), where the number of previous violations is three or more, the appropriate penalty schedule is calculated after a determination whether the threat to the public health is low, intermediate, or high. A “public health threat” is either:

- (a) “Low,” which means a violation that poses a minor possibility of direct or indirect hazard to the public health;
- (b) “Intermediate,” which means a violation that poses a moderate possibility of direct or indirect hazard to the public health; or
- (c) “High,” which means a violation that poses a known significant hazard or possibility of significant direct or indirect hazard to the public health.

WAC 246-282-010(20).

2.15 The following mitigating factors were considered in reaching the decision in this matter: there was only one reported adverse outcome from the Respondent’s violations; and the shellfish seized from the Respondent by the Department of Fish and Wildlife were destroyed before they could be sold for human consumption. The following aggravating factors were considered in reaching the decision in this matter: the frequency of the Respondent’s violations, especially after receiving warnings

(specifically the Notices of Corrections dated June 11, 2009¹⁷ and January 22, 2010¹⁸) regarding the failure to properly tag the shellfish; and the Respondent's willful and repeated failure to properly train and supervise the Respondent's employees in the harvesting, storage and tagging of the shellfish.

2.16 Considering all of the relevant factors, the Presiding Officer concludes the Respondent's 32 violations fall under the aggravated range of the WAC 246-282-104(2) penalty schedule for three or more violations. These violations constitute a high public health threat level. This results in a penalty assessment of \$16,000.00 (32 violations at \$500.00 per violation).

2.17 Considering all of the relevant factors, the Presiding Officer further concludes that the Respondent's continued failure to comply requires the revocation of the Respondent's license under RCW 69.30.080, rather than a suspension or modification of the license. The Respondent cannot apply for a new license before 36 months, consistent with the WAC 246-282-104(2) penalty schedule.

III. ORDER

Based on the foregoing Finding of Fact and Conclusions of Law, it is ORDERED:

3.1 The Operation License and Certificate of Approval (WA-1518-SS) of the Respondent Rodney Allen Clark, Owner and Operator of G & R Quality Seafood Inc., to harvest and sell commercial quantities of shellfish in the state of Washington is

¹⁷ See Exhibit P-6.

¹⁸ See Exhibit P-11.

REVOKED, without right to reapply for a license before 36 months from the effective date of this order.

3.2 The Respondent Rodney Allen Clark, Owner and Operator of G & R Quality Seafood Inc., is assessed a civil penalty of \$16,000.00, payable within 90 days of the effective date of this order. The effective date of this order is that date the Adjudicative Service Unit places the signed order in the U.S. mail.

Dated this 2 day of November, 2010.

/s/
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

This Order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Department of Health
Office of Food Safety Shellfish Program
P.O. Box 47824
Olympia, Washington 98504-7824

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-10-704. The petition is denied if the Adjudicative Service Unit does not respond in writing within 20 days of the filing of the petition.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at <http://www.doh.wa.gov/hearings>.