

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

| | | |
|------------------------------------|---|---------------------------|
| In the Matter of the Sale or |) | |
| Disposition of Shellfish for Human |) | Docket No. 06-06-C-2000SF |
| Consumption by Carl Johnson Clams |) | |
| & Oysters owned and operated by |) | FINDINGS OF FACT, |
| Carl H. Johnson, |) | CONCLUSIONS OF LAW |
| |) | AND FINAL ORDER |
| Respondent. |) | |
| |) | |
| |) | |
| |) | |
| <hr/> | | |

APPEARANCES:

Respondent, Carl H. Johnson, per
W. C. Henry, Attorney at Law

Department of Health Shellfish Program (the Program) by
Office of the Attorney General, per
Dori Jaffe, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

On June 20, 2006, Health Law Judge, Arthur E. DeBusschere conducted a prompt hearing in Tumwater, Washington. The Department of Health, Shellfish Program, had issued a Findings of Fact, Conclusions of Law and Order of Abatement (the Abatement Order). The Respondent requested a hearing. The Abatement Order is Affirmed.

ISSUES

Whether the Abatement Order issued on June 5, 2006, should be affirmed, dismissed, or revised with alternate conditions order?

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

SUMMARY OF PROCEEDING

The Program presented testimony of Jason Langbehn, Frank Cox, and Robert Woolrich. The Respondent testified on his behalf and presented the testimony of Jerrold Weidner.

The Presiding Officer admitted the following exhibits:

- Department's Exhibit No. 1: Hold Order Notice issued by the Department of Health to Carl H. Johnson Clams & Oysters on June 2, 2006. p. 1;
- Department's Exhibit No. 2: Frank Cox's Weight Tally Sheet for sacks of clams at Carl H. Johnson's plant. pp. 1-2;
- Department's Exhibit No. 3: Copy of Tags on Washing Table at Carl H. Johnson's Plant, pp. 1-3;
- Department's Exhibit No. 5: Fish Tickets from Carl H. Johnson's Clams & Oysters, pp. 1-48;
- Department's Exhibit No. 6: Color Photographs of Clams at Carl H. Johnson's Clams & Oysters, pp. 1-9;
- Department's Exhibit No. 7: Color Photograph of Certification Tags and Wash Rack at Carl H. Johnson's Clams & Oysters, p. 1;
- Department's Exhibit No. 8: Color Photographs of Fish and Wildlife Officers examining sacks of shellfish at Carl H. Johnson's Clams & Oysters, pp. 1-2;
- Department's Exhibit No. 9: Color Photographs of sacks of clams in wet storage at Carl H. Johnson's Clams & Oysters, pp. 1-2;
- Department's Exhibit No. 10: Color Photographs of sacks of clams at Carl H. Johnson's Clams & Oysters, pp. 1-6;
- Department's Exhibit No. 11: Color Photographs of Clams in pickup and refrigerator truck at Carl H. Johnson's Clams & Oysters, pp. 1-4;

Department's Exhibit No. 14: Copy of filled out tags from Carl H. Johnson's Clams & Oysters, p. 1;

Department's Exhibits Nos. 4, 12 and 13: were withdrawn by the Department.

Department's Exhibit No. 14 was admitted for the limited purpose of showing samples of filled out tags at Carl H. Johnson's Clams & Oysters.

I. FINDINGS OF FACT

1.1 Carl H. Johnson is the owner and operator of Carl Johnson's Clams & Oysters located in Nordland, Washington.

1.2 On June 1, 2006, the Washington State Department of Fish and Wildlife (WDFW) notified the Program that they were at Carl Johnson's Clams & Oysters. WDFD discovered bags of clams that had no tags or tags that were partially filled out or illegible (the Subject Clams).

1.3 On June 1, 2006, Frank Cox, Inspector for the Department of Health, responded and assisted WDFD in weighing and securing the Subject Clams in a refrigerated truck. The Subject Clams totaled 152 bags and weighed in total 5,125.3 pounds.

1.4 The Respondent failed to properly tag or identify the Subject Clams and, therefore, there was no way to confirm the origin of the Subject Clams from sacks without any tags or tags that were partially filled out or illegible. The origin of the Subject Clams is not determined by verbal assurances from Jerrold Weidner, Plant Manager at Carl Johnson's Clams & Oysters. The groups of bags in wet storage were neither separated sufficiently enough nor tagged to have identifiable lots or to prevent commingling of clam bags from different locations. Further, the Subject Clams from the

processing plant were not tagged. There was a pile of tags located on the washing tray in the processing plant that could not be correctly re-positioned on unmarked bags of clams sitting on pallets.

1.5 The Subject Clams could not be cleansed through a relay process whereby under a relay permit, the clams are placed from a limited degree of pollution area to an approved area where the clams over a time can cleanse themselves of the contaminants such as bacteria. ¹

1.6 On June 2, 2006, a Hold Order was issued to place the Subject Clams, the 152 bags of clams, in wet storage so that the Subject Clams could be clearly identified as being “on hold” until an adjudicative hearing could be held to determine the disposition of such clams (the Hold Order).

1.7 The proper tagging and identification of shellfish (including clams) is a fundamental requirement of the public health laws, which have been enacted to ensure that the public is protected from eating contaminated shellfish. Proper tagging of the shellfish sacks or containers is essential to ensuring that shellfish sold for human consumption were harvested from an approved source and harvested and processed by an approved operation. In addition, in the event of a disease outbreak, proper tagging and identification of the shellfish allows the public health officials to quickly and adequately respond to the outbreak. Shellfish from unknown sources present a

¹ Clams with a biotoxin poisoning cannot be cleansed through the relay process. Only those clams from a designated restricted area or from a designated conditionally approved area are allowed to go through the relay permit process. Since these clams were from an unknown source and therefore could have had biotoxin poisoning, there is a potential risk to the public and they are not allowed to go through the relay permit process.

potential risk for the transmission of infectious diseases or ingestions of toxins to consumers of shellfish.

1.8 Shellfish (including clams) feed by filtering large volumes of water through their bodies. Any contaminants in the water tend to be concentrated at high levels in the shellfish tissue. A person consuming shellfish, sometimes raw or lightly cooked, may become infected with the illness such as, but not limited to, biotoxin poisons, viruses, or gastrointestinal illnesses.

1.9 On June 5, 2006, the Program issued the Abatement Order to Carl H. Johnson permanently prohibiting the sale or disposition of the Subject Clams being held. The Program ordered that the Subject Clams be destroyed by depositing them in a sanitary landfill, or other method approved by an authorized representative of the Program on or before June 21, 2006, and that an authorized Program representative witness the destruction.

II. CONCLUSIONS OF LAW

2.1 The Department of Health, Office of Food Safety and Shellfish Programs, Environmental Health Division, has jurisdiction over the Respondent, owner and operator of Carl Johnson's Clams & Oysters. RCW 69.30 and WAC 246-282.

2.2 In addition to being subject to chapter 69.30 RCW and chapter 246-282 WAC, the Respondent must comply with the 2003 National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish, published by the United States Department of Health and Human Services, Public Health Service, Food and Drug Administration. WAC 246-282-005(1)(a).

2.3 Here, the Program issued an Order of Abatement against the Respondent for violations under chapter 69.30 RCW and chapter 246-282 WAC. The Respondent requested an emergency adjudicative hearing. RCW 34.05.479. The Program has the burden to prove the alleged factual basis of the Abatement Order by a preponderance of the evidence. WAC 246-10-606.

2.4 The Respondent is required to follow RCW 69.30.110, which provides, in pertinent part:

It is unlawful for any person to possess a commercial quantity of shellfish or to sell or offer to sell shellfish in the state which have not been grown, shucked, packed, or shipped in accordance with the provisions of this chapter.

2.5 Shellfish possessed by the Respondent must bear a Certificate of Compliance:

Only shellfish bearing a certificate of compliance with the sanitary requirements of this state or a state, territory, province or country of origin whose requirements are equal or comparable to those established pursuant to this chapter may be sold or offered for sale in the state of Washington.

RCW 69.30.020

2.6 The Respondent is required to properly identify the shellfish with an approved tag:

Any person who possesses a commercial quantity of shellstock or any quantity of shellstock 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.

WAC 246-282-080(2).

2.7 The WDFD may seize the shellfish that is not properly tagged or labeled:

Any authorized representative of the department, fish and wildlife patrol officer or ex officio patrol officer may, without previously providing a statement of deficiencies, immediately seize shellfish or issue written hold orders prohibiting the disposition or sale of shellfish whenever a commercial quantity of shellfish or any amount of shellfish for sale for human consumption is on the premises of, or in the possession of, any person who:

...

(c) Fails to maintain each container of shellfish properly tagged or labeled as required by chapter 69.30 RCW, these rules, and the NSSP Model Ordinance.

WAC 246-282-110(2)(c).

2.8 The Program may order the destruction of the shellfish because it has been determined that the shellfish are unsafe for human consumption:

Shellfish that the department seizes or places under a hold order and determines are unsafe for human consumption are subject to such abatement as the department considers appropriate. The department may require any one or more of the following measures be taken by a person in possession of shellfish that are the subject of an abatement order:

- (a) Permanent prohibition on the disposition of the shellfish for human consumption;
- (b) Immediate destruction of the shellfish by measures such as denaturing and placing in a sanitary landfill, witnessed by an authorized representative of the department who provides a record of destruction to the person; or
- (c) Temporary prohibition on the disposition of the shellfish for human consumption pending relay to an approved growing area for a sufficient period of time to assure natural purification of the shellfish.

WAC 246-282-110(4).

2.9 Based upon the above Findings of Fact, Paragraphs 1.1 through 1.9, the Program proved by a preponderance of the evidence that the Abatement Order should be affirmed. Further, the Hold Order issued by the Department should be lifted to allow

the Abatement Order to remain in full force and effect. The Abatement Order should be modified to state that the Subject Clams should be destroyed no later than fourteen (14) days from the date this Final Order is served.

III. FINAL ORDER

Based upon the above Findings of Facts and Conclusions of Law, the Presiding Officer hereby ORDERS the following:

3.1 The Abatement Order, that was issued by the Washington State Department of Health, Environmental Health Division, on June 5, 2006, is AFFIRMED with the following modification: the Subject Clams shall be destroyed no later than fourteen (14) days from the date this Final Order is served upon the parties.

3.2 The Hold Order issued by the Department shall be lifted for the sole purpose of allowing the Abatement Order to remain in full force and effect.

Dated this ____ day of June, 2006.

ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

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
PO Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Shellfish Program
PO Box 47824
Olympia, WA 98504-7824

The request must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit has not responded to the petition or served written notice of the date by which action will be taken on the petition.

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, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. 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(19).