

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

In the Matter of the Reclassification)	
of Shellfish Beds of:)	OPS No. 94-09-15-399 S
)
SAMISH BAY)	FINDINGS OF FACT,
- Stan Rudd, Owner,)	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 March 28, 1995 and April 18, 1995, at Melborne Towers, 1511 Third Ave, Seattle, Washington. Present were Mr. Stan E. Rudd, pro se, (Applicant), and Mr. Harold P. Dygert, Assistant Attorney General, representing the Department of Health, Office of Shellfish Programs (Program). Ms. Maryanne Guichard, Director, Office of Shellfish Programs, was also present.

I. PROCEDURAL HISTORY

1.1 On August 19, 1994, the Program issued a decision reclassifying certain portions of the commercial shellfish growing area in Samish Bay from approved to restricted and prohibited. This decision was sent to Mr. Stan Rudd by letter dated August 19, 1994.

1.2 On September 12, 1994, Mr. Rudd signed an Application for Adjudicative Proceeding Samish Bay Reclassification. Attached to this Application was a written statement (one page) and data material concerning water quality studies and surveys (nine pages).

1.3 On October 21, 1994, a Scheduling Order/ Notice of Hearing was issued by the Office of Professional Standards. On January 17, 1995, an Amended Scheduling Order/ Notice of Hearing was issued scheduling, among other matters, a prehearing conference for February 28, 1995. Discovery and motion completion dates were also set for February 28, 1995.

1.4 At the prehearing conference on February 28, 1995, Mr. Dygert and Mr. Rudd filed prehearing conference statements along with proposed exhibits.

1.5 In Prehearing Order No. 1: Order Defining Conduct at Hearing dated March 10, 1995, the Presiding Officer memorialized prehearing findings and agreements by the parties. The hearing was scheduled to begin on March 28, 1995, and the remainder was scheduled for April 18, 1995.

1.6 On March 28, 1995, Frank H. Meriwether, II, testified for the Program and Mr. James Rudd testified for the Applicant. On April 18, 1995, Donald Melvin and Jack Lilja testified for the Program. Mr. Stan Rudd testified and made a statement on his own behalf.

II. EXHIBITS

Based upon the agreements of the parties and rulings by the Presiding Officer at the hearing, the exhibits admitted in this matter are as follows:

2.1 Program Exhibits A through L:

Exhibit A: August 1994 Sanitary Survey of Samish Bay, including Sedro Woolley rainfall data, shoreline survey of Samish Island, Skagit County's sanitary surveys of Blanchard and Edison and Tables 1 and 2 which summarize water quality data in Samish Bay for all tides and ebb tides respectively (pages a-1 to a-39).

- Exhibit B: Map showing Rudd Beds in relation to sampling stations (one page).
- Exhibit C: Blown up map showing Rudd Beds in relation to classification designations (one page).
- Exhibit D: Updated Samish Bay water quality data summary for all tides (Marine Water Data (SRS)) (one page).
- Exhibit E: Updated Samish Bay water quality data summary for ebb tides only (Marine Water Data (SRS)) (one page).
- Exhibit F: Data for each day DOH has sampled since establishment of new Skagit Bay water sampling stations (pages f-1 to f-13).
- Exhibit G: United States Food and Drug Administration's Sanitary Survey of Shellfish Waters, Samish Bay, Washington, December 1982 (pages g-1 to g-79).
- Exhibit H: Water-Supply Bulletin No. 6, Monthly and Yearly Summary of Hydrographic Data, September 1953, cover page, 393, 397 (pages h-1 to h-3).
- Exhibit I: Washington Department of Ecology's map of Samish watershed and "Quarterly Data Summary--Six Year Average" (pages i-1 to i-2).
- Exhibit J: May 12, 1994 Samish Bay Illness Investigation Report (pages j-1 to j-5).
- Exhibit K: May 11, 1994 Oyster-Associated Outbreaks of Gastroenteritis, Samish Bay, Washington State Department of Health (pages k-1 to k-7).
- Exhibit L: United States Food and Drug Administration National Shellfish Sanitation Program Manual of Operations, 1993 Revision, Part I, Section C, "Growing Area Survey and Classification" (pages l-1 to l-35).

2.2 Applicant's Exhibits 1 through 14 (excluding Exhibit 3):

- Exhibit 1: Map of Samish Bay showing a low tide of 1.8 (one page).
- Exhibit 2: Map of Samish Bay showing two hours before a low tide of 1.8 (one page).

The Parties stipulated that the blue areas in Exhibit 1 and Exhibit 2 show an approximation of the water location, but that Exhibit 1 shows that the Applicant's shellfish growing area, the Rudd Beds, are out of the water at a low tide of 1.8.

- Exhibit 4: Map of Samish Bay courtesy of First American Title Company (one page).
- Exhibit 5: Map of Samish Bay, Blau Oyster Co., Inc. (one page).
- Exhibit 6: Enlarged Map of Samish Bay, Scott's Samish Bay Oyster Land Tracts, Skagit County, Washington (one page).
- Exhibit 7: Map of Oyster Lands in Samish Bay, Combined Recorded Plats, May 1944 (one page).
- Exhibit 8: Samish Bay Classification Review, May 1994, Washington Department of Health, Office of Shellfish Programs (pages 8-a to 8-t).
- Exhibit 9: Bacteriological Summary of Shellfish Growing Areas Water Quality Study, February 13, 1995 (pages 9-a to 9-nn).
- Exhibit 10: Chart of Daily Precipitation (inches) and Record of River and Climatological Observations (pages 10-a to 10-h).
- Exhibit 11: Washington State Department of Fisheries, Quarterly Aquaculture Production Report, First Quarter 1993, Section A, Company Name Stan Rudd (pages 11-a to 11-h).
- Exhibit 12: Washington State Department of Fisheries, March 2, 1995, Stat. Summary - Monthly Breakdown (pages 12-a to 12-c).
- Exhibit 13: Shellfish Area Bacteriological Water Quality Survey, dated February 22, 1995 (pages 13-a to 13-b) and Seattle Times, March 1, 1995, Cal/Regional News, February 1995 weather wrap-up (page 13-c).
- Exhibit 14: Water Quality Study of Samish Bay, Skagit County, Washington, February 1987, Shellfish Section, Washington State Department of Social & Health Services, Office of Environmental Health Programs.

Exhibit 14 was marked and admitted at the hearing and this document was paginated pages 1-42.

Applicant's Exhibit 3, which was a map of Samish Bay with a hand written notation, was not admitted, but was allowed for illustrative purpose only.

III. ISSUE AND ARGUMENT OF PARTIES

3.1 Should the Office of Shellfish Programs' decision in downgrading the classification of the Applicant's shellfish growing area from "Approved" to "Prohibited" be affirmed?

3.2 Mr. Dygert argued that the August 19, 1994, reclassification of Samish Bay was correct and should be affirmed by the Presiding Officer. Mr. Rudd argued that the data does not support the decision to place his shellfish beds in a prohibited area. Mr. Rudd seeks an order that would allow his shellfish beds to be conditionally approved for a period of four months each year, June through September.

IV. FINDINGS OF FACTS

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

4.1 A crucial part in the sanitary control of shellfish is identifying growing areas of acceptable sanitary quality. Exhibit L, L-2. Shellfish growing areas are categorized into various classifications which determine whether, and under what conditions, shellfish may be harvested in an area. The Program follows the guidelines and the shellfish growing area classification system outlined in Part I of the United States Food and Drug Administration's National Shellfish Sanitation Program Manual of Operations (the FDA Manual). Exhibit L. In this system distinctions are made between acceptable and unacceptable areas based on the results of a sanitary survey of the area. Exhibit L, L-2.

4.2 A sanitary survey must include (1) a shoreline survey; (2) an evaluation of the meteorological effects, hydrographic influences and geographic characteristics that may affect the distribution of pollutants over the growing area; and (3) a bacteriological water sampling survey. Exhibit L, L-3. Based on the results of the sanitary survey, a shellfish growing area is classified as one of the following: "Approved," "Conditionally Approved," "Restricted," "Conditionally Restricted," and "Prohibited." Exhibit L, L-3.

4.3 A growing area may be designated as "Approved" when no dangerous concentrations of fecal material, pathogenic microorganisms, poisonous, and deleterious substances are present in the area. Exhibit L, L-9. In addition, water quality for the area must meet a two-part standard and the area must not be subject to contamination from human or animal fecal matter in amounts that, in the judgment of the state shellfish control authority, may present an actual or potential health hazard. Exhibit L, L-10.

4.4 Growing areas that are subject to intermittent microbiological pollution may be classified as "Conditionally Approved" when the area meets the criteria for the "Approved" classification for a reasonable period of time and the factors determining these periods of time are known, predictable, and do not preclude a reasonable management approach. Exhibit L, L-13. This classification may require a substantial public resource investment because of the need for routine monitoring of sources of pollution and performance standards to ensure immediate and effective emergency closure measures. Exhibit L, L-17.

4.5 A growing area may be classified as "Restricted" when a sanitary survey indicates a limited degree of pollution. Exhibit L, L-19. The FDA Manual states that a

restricted area classification is appropriate when, among other things, the area is not so contaminated that the consumption of shellfish might be hazardous after depuration or relaying. Exhibit L, L-20.

4.6 Approximately 2,000 acres of commercial shellfish beds are located in Samish Bay, Skagit County, Washington. Prior to August 1994, all commercial shellfish beds in Samish Bay had been classified as "Approved" under the growing area classification system outlined in the FDA Manual.

4.7 In April 1994, oysters commercially harvested from Samish Bay were implicated in an outbreak of gastrointestinal illness affecting as many as 50 people. Shellfish growers in Samish Bay voluntarily discontinued commercial harvest after being notified of the disease outbreak by the Department of Health.

4.8 The Program responded to the illness outbreak by conducting a sanitary survey of Samish Bay. The results of the survey are found in the document entitled Sanitary Survey of Samish Bay, August 1994 (the Sanitary Survey). Exhibit A. The sanitary survey included an analysis of upland pollution sources and of water quality in Samish Bay. The survey showed that a portion of Samish Bay does not meet the FDA Manual's criteria for an "Approved" classification. Exhibit A, A-3. The survey also identified the primary sources of pollution in Samish Bay as the Samish River, Edison Slough, and Colony Creek. Exhibit A, A-4. These waterways carry animal and/or human fecal matter into Samish Bay from the surrounding uplands. This fecal matter is contaminating tidelands in the southern portion of Samish Bay, including those owned and licensed for commercial harvest by Applicant Stan Rudd (the Rudd Beds). In the

judgment of the Program, the amount of contamination may present a hazard to public health.

4.9 Based on these contamination concerns and on water quality data, the Program reclassified the shellfish growing areas in Samish Bay to establish "Prohibited," "Restricted," and "Approved" zones. Exhibit A, A-22. The Sanitary Survey's executive summary states the following:

A sanitary survey of Samish Bay conducted from April through June 1994 has shown that portions of the bay do not meet the criteria for an Approved classification. Water quality data and pollution source surveys indicate that fecal contamination reaches parts of the growing area in amounts that are of public concern. A Restricted classification for parts of the bay that would allow for relay of shellfish is appropriate. The southernmost portion of the bay, which receives the greatest pollution loading from freshwater sources, is classified as Prohibited. Exhibit A, A-3.

4.10 By letter dated August 19, 1994, the Program notified Mr. Rudd of the Department's decision to reclassify certain portions of the commercial shellfish growing area in Samish Bay from "Approved" to "Restricted" and "Prohibited" zones as indicated in the Sanitary Survey. Mr. Rudd's shellfish beds (the Rudd Beds) are within the "Prohibited" zone. Mr. Rudd filed an Application For Adjudicative Proceeding to challenge the Program's reclassification of the Rudd Beds.

Frank H. Meriwether, II:

4.11 Frank H. Meriwether, II, testified at the hearing. Mr. Meriwether is employed by the Washington State Department of Health and has been so employed since 1990. He has a Bachelor's Degree in fisheries and a Master's Degree in both Fisheries and Aqua Culture and in Civil Engineering. His current position with the

Department is environmental engineer. As part of his job duties, Mr. Meriwether performs hydrographic assessments of shellfish growing areas near pollution sources.

4.12 Mr. Meriwether assisted in the preparation of the hydrographic and meteorological aspects of the sanitary survey of Samish Bay in 1994. Exhibit A, A-5 to A-12. He was asked to evaluate from a hydrographic view, the factors which affect water quality, such as the fresh water inputs that run into Samish Bay. Mr. Meriwether concluded that fecal coliform bacteria generated inland and upland were reaching Samish Bay via three significant tributaries: Samish River, Edison Slough, and Colony Creek Drainage. Further, Mr. Meriwether concluded that the probable source of fecal coliform bacteria carried by the Samish river derive from non-point sources such as agricultural practices. The fecal coliform bacteria carried by Colony Creek and Edison Slough derive from both non-point sources and human sources.

4.13 In Mr. Meriwether's professional opinion, fecal coliform bacteria generated upland and/or inland reach the area of the Rudd Beds. His opinion is specifically based upon (1) the United States Food and Drug Administration's 1982 Sanitary Survey of Shellfish Waters of Samish Bay (1982 FDA Study) which examined the distribution of fresh water flow in Samish Bay, and (2) upon actual water quality data that was collected at sampling stations in Samish Bay. The bacteriological water sampling and sentiment studies from the 1982 FDA report indicated that fecal coliform bacteria derived from the upland sources are relatively abundant in the vicinity of the Rudd Beds and are much less abundant as one moves farther north from the upland sources. Further, Mr. Meriwether stated although there may be times when the hydrographical pattern will change based upon winds, tides, and other meteorological events, the

distribution trend will remain the same regardless of the season. Finally, according to Mr. Meriwether, there is not a good correlation between actual rainfall and the amount of fecal coliform being transported to Samish Bay.

4.14 Mr. Meriwether stated fecal coliform contaminants would reach the Rudd Beds even though the Rudd Beds are located on higher tidelands slightly south of the Samish River channel. This is because a portion of the water that is over the Rudd Beds for extended periods of time is derived from upland sources that include pollution sources. According to Mr. Meriwether, the impact of fecal coliform on the deeper waters in the north area of Samish Bay is decreased due to water dilution and dispersion factors.

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Donald Melvin:

4.15 Donald Melvin testified at the hearing. Mr. Melvin is and has been employed by the Department of Health, Office of Shellfish Programs for about eight years as an environmental specialist. Mr. Melvin has a Bachelor of Science degree in biology from Western Washington University. He oversees the collection of water quality data accumulated for the Program and evaluates the collected data. Prior to working for the Department, Mr. Melvin worked for approximately nine years with the Department of Natural Resources as a research technician for an aqua research development project.

4.16 The Office of Shellfish Programs regulates most species of mollusks and shellfish, including clams and oysters which, for the most part, reside in tidal and sub tidal areas. Because shellfish are filter feeders and obtain their food from the microscopic organisms in the seawater, shellfish are subject to contamination when living in polluted waters. In turn, the contamination is passed on to those who eat the contaminated shellfish.

4.17 In regulating shellfish, the Program follows guidelines established by the Food and Drug Administration as set forth in the FDA Manual. The Program uses a fecal coliform bacteria count as an indicator of pollution and collects water quality data from designated sample stations in shellfish growing areas. According to Mr. Melvin, a minimum of thirty samples must be collected from each station under a variety of weather conditions and in both adverse and non-adverse pollution conditions. Sample stations are chosen to reflect pollution data for a shellfish growing area or to assess sources of pollution. A sample station is in a physical location which is defined by some shoreline structure or a set of coordinates to insure consistent collection from the same location. There are set procedures for the collection of the water samples.

4.18 Once collected, the water samples are sent to state health laboratories for analysis. Mr. Melvin evaluates the water quality data returned from the laboratories and compares it with the two-part water quality standard for an "Approved" classification. If water quality data does not meet the "Approved" classification, Mr. Melvin reviews the data to determine if it can meet the "Conditionally Approved" classification criteria.

4.19 Mr. Melvin testified that part of the criteria for conditional approval is that conditions must be identifiable and predictable, i.e., the same conditions result in the

same water quality. According to Mr. Melvin, a predictable relationship requires an understanding of the poor water quality readings. Pollution from certain weather conditions could result in an area being classified as "Conditionally Approved" if one can show a predictable relationship between rainfall and pollution levels, i.e., that a specific amount of rainfall results in a certain amount of runoff and pollution. However, according to Mr. Melvin, even if a predictable relationship is found, a "Conditionally Approved" classification also depends upon shoreline conditions. A known shoreline pollution source greatly influences the decision to give conditional approval of a site.

4.20 The Rudd Beds are located more or less between Stations 11 and 12. Station 11 is located just to the west or northwest of the Rudd Beds and Station 12 is located just east or northeast of the Rudd Beds. The Samish River wraps around the Rudd Beds. Exhibit B, Exhibit 5. Stations 11 and 12 are in the Samish River channel while the Rudd Beds are on higher ground. Mr. Melvin testified that although Stations 11 and 12 are in the Samish River channel, water samples from those stations are taken when there is a fairly thorough mixing of river water and marine water.

4.21 In accordance with FDA guidelines, Mr. Melvin reviewed the water quality data collected in Samish Bay since August 1990 under all tide conditions and under ebb tide conditions. According to Mr. Melvin, the data indicated that during all tide conditions, Stations 11 and 12 failed to meet FDA Standards for an "Approved" classification. Exhibit D. Furthermore, under ebb tide conditions, Stations 11, 12, and 13 failed to meet FDA Standards for an "Approved" classification. Exhibit E. Mr. Melvin testified that even if one looks at water quality in a way most favorable to Mr. Rudd, the water quality for Station 12 fails. According to Mr. Melvin, the Rudd Beds are directly

impacted by the upland pollutants. The fecal coliform count is consistently higher than other stations farther out in the bay. Mr. Melvin testified that even under the lowest rainfall conditions, Station 12 failed to meet water quality standards.

4.22 Mr. Melvin attempted to look at rainfall to see if a consistent relationship existed between water quality and rainfall. Mr. Melvin testified that there was not a sufficient variety of rainfall conditions when water samples were collected to be able to determine if a consistent relationship existed between water quality and rainfall. Additional water samples are needed to reflect different rainfall conditions.

4.23 The Program established additional sample stations in the area, Stations 17 through 22, to more accurately assess and define shellfish beds in Samish Bay. See, Exhibit A, A-22. However, Mr. Melvin testified that there has not been a sufficient number of water samples collected from the new stations to make an evaluation or to draw conclusions from the new data.

4.24 Mr. Melvin is familiar with the Rudd Beds and has personally collected water samples from Samish Bay. According to Mr. Melvin, even with the lowest of high tide conditions, the Rudd Beds are covered with water for some period of time every day. In almost all tide cycles, the Rudd Beds are covered twice a day. At extreme low tide, the shellfish growing areas are exposed; however, as the tide comes in there is a gradual mixture of sea water with channel water from Edison Slough and Samish River that covers the Rudd Beds.

4.25 Mr. Melvin testified that generally speaking, rainfall related pollution does not have an equal impact on all parts of the bay. Runoff enters the bay via the streams

and rivers. In areas further removed from the shoreline, the contamination is more diluted and there is a greater opportunity for bacteria to die off.

4.26 Mr. Melvin stated that there is a relationship between rainfall runoff and water quality. However, according to Mr. Melvin, even though one can point out specific days of rainfall with a resultant higher bacterial count in the bay, one can also point out specific days of dry weather conditions and find an elevated bacterial count. Mr. Melvin testified that management plans are not based on single day samples but rather on established and predictable conditions. At this time in Samish Bay, the Program does not have enough information to show a predictable relationship between rainfall runoff and water quality. Therefore, according to Mr. Melvin, a "Conditionally Approved" management plan cannot be developed.

Mr. Jack Lilja:

4.27 Jack Lilja testified at the hearing. Mr. Lilja has been employed by the state Shellfish program for 17 years. For approximately five years he was employed as a technical expert for the Office of Shellfish Programs and he is currently a technical specialist assisting the tribes of Western Washington in developing and implementing a shellfish program. Mr. Lilja's primary duties are to assist the Program on technical issues related to shellfish sanitation including growing area classifications, shellfish microbiology, and water quality issues. Mr. Lilja earned a Bachelor of Science Degree in microbiology from Washington State University in 1967 and a Master in Public Health Degree from the University of Michigan in 1971.

4.28 Mr. Lilja has been involved in the Interstate Shellfish Sanitation Conference (ISSC) which was founded in the early 1980's to revise and update the National Shellfish Sanitation Program manuals of operation including the FDA Manual. The ISSC is composed of shellfish producing states, some shellfish receiving states, and the FDA. Mr. Lilja served on the ISSC executive board as a representative from the west coast states and was vice chair of the ISSC for two years.

4.29 Mr. Lilja explained that the FDA Manual is the basis for shellfish regulations adopted by states. The FDA Manual establishes minimum compliance standards and the FDA monitors state programs for compliance with these standards. Of the FDA Manual's five classifications for shellfish growing areas, only the "Approved" and "Prohibited" classifications are required. The other classifications are optional because they may require more intensive monitoring resulting in a substantial public resource investment. Washington State's shellfish growing area classifications are "Approved," "Conditionally Approved," "Restricted," and "Prohibited." The criteria for each classification follows those set forth in the FDA Manual.

4.30 Mr. Lilja's role in the Samish Bay classification process was to assemble and review the information for the sanitary survey and to make final classification recommendations based on that information. His recommendations were generally adopted by the Department. Mr. Lilja stated that the establishment of sanitary classification lines is done with the health of the public in mind and, if anything, they err on the side of safety in establishing those lines. According to Mr. Lilja, classification lines are established to eliminate any areas that are subject to contaminants from sources found in the shoreline survey and to eliminate stations that do not meet water

quality standards. The decision as to where to draw the classification lines in Samish Bay was a decision based on the Sanitary Survey which included an evaluation of pollution sources, water quality data, and hydrographic data, all of which are of equal importance in the evaluation.

4.31 Mr. Lilja testified that the major consideration in establishing the classification lines in Samish Bay was the impact of the Samish River and the Edison Slough. These waterways carry human and animal waste into the bay that could reach portions of the growing area in levels of health concern. Mr. Lilja testified that the Sanitary Survey shows that Edison Slough has severe problems with human waste. Because the general direction of water travel in the bay is northwest, these contaminants are carried northwest from Edison Slough across the bay and deposited in that area in a very direct manner.

4.32 According to Mr. Lilja, Stations 11 and 12 represent the quality of water to be dispersed in the portion of the bay where those stations are located. Water samples from Stations 11 and 12 did not meet water quality standards for an "Approved" classification during all tides and, during ebb tides, water samples from Stations 11, 12, and 13 did not meet water quality standards for an "Approved" Classification. Exhibits D and E.

4.33 Mr. Lilja testified that initially as a result of their review, Samish Bay was divided into two classifications - "Approved" and "Prohibited." However, after requests for reevaluations were received from shellfish growers, including Mr. Rudd, it was determined that a portion of the area could be classified as "Restricted" because it was not so grossly contaminated that the shellfish could not be cleansed through a relay

process. When the "Restricted" classification line was drawn, it was believed that the Rudd Beds were within the "Restricted" zone.

4.34 Mr. Lilja stated that in his professional opinion the growing area where the Rudd Beds are located is not appropriate for a classification of "Conditionally Approved." According to Mr. Lilja, a "Conditionally Approved" classification cannot be based on data that shows average conditions such as average dry weather. Because the pollution event must be predictable to meet the criteria of a "Conditionally Approved" classification, the data must show a direct cause and effect relationship between the pollution event and poor water quality. According to Mr. Lilja, a pollution event cannot be predicted from data based on averages.

4.35 Mr. Lilja testified that at this time a consistent and predictable relationship between rainfall and water quality in Samish Bay has not been established. Additional data is needed to establish a correlation or relationship between rainfall and water quality. Mr. Lilja testified that although additional stations have been added to get a better idea of the water quality in the area, there has not been enough data collected to be able to fully evaluate water quality from samples taken at those stations.

4.36 Furthermore, according to Mr. Lilja, a "Conditionally Approved" classification cannot be established in the disputed area because of the direct impact of contaminants from both the Samish River and the Edison Slough. According to Mr. Lilja, the data shows that even in dry months the area is subject to these two direct pollutant sources and some stations do not meet water quality standards.

4.37 Mr. Lilja stated that when he drew the classification line establishing the "Restricted" area he thought that the Rudd Beds were within the "Restricted"

classification. Mr. Lilja did not see a problem in reevaluating the "Restricted" line to determine if the Rudd Beds could be included in that zone. However, Mr. Lilja has not received such a request from Mr. Rudd.

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James Allen Rudd:

4.38 James Allen Rudd testified at the hearing. James Rudd is 23 years old and has worked with his father, Stan Rudd, on the Rudd Beds for the past eight to ten years. He testified to the accuracy of the Applicant's darkened blue area on Exhibits 1 and 2. The darkened blue area on Exhibit 1 shows a low tide of 1.8 and on Exhibit 2 shows two hours before low tide. James Rudd stated that every day when the tide comes in the Rudd Beds are completely covered.

Stan E. Rudd (Applicant):

4.39 Stan E. Rudd also testified at the hearing. Mr. Rudd is the owner of the Rudd Beds which lies in the southern portion of Samish Bay. Mr. Rudd testified that he is very familiar with Samish Bay because he has harvested clams in that area for many years and has more experience on the bay than anyone else testifying at the hearing.

4.40 Mr. Rudd testified that the winds in the area can vary within 3 - 4 hours which, depending on the direction, can result in either good or bad quality water. According to Mr. Rudd, water quality readings can vary significantly within hours depending on the winds, rain, and tides. In addition, Mr. Rudd testified that while one

station can have a very poor water quality reading, the station right next to it can have an average reading.

4.41 Mr. Rudd feels that in the summer months there is less rainfall and, therefore, less runoff from the land into the river. In addition, the flow of water into the bay from the river and slough is reduced. As a result, Mr. Rudd believes that water quality is acceptable for harvesting in the months of June through September. He has not seen signs of poor water quality during these months. Mr. Rudd offered rainfall and water quality data collected between 1990 and 1994 to show that when there is a significant amount of rainfall the bacteriological counts at some of the stations are elevated. Exhibits 8 and 9.

4.42 Mr. Rudd requests that his shellfish growing beds be classified as "Conditionally Approved" so that he may harvest clams during the months of June through September. Mr. Rudd is not requesting a "Restricted" classification because he is a small business owner and does not have the resources to establish a relay system to transport his clams to other waters for cleansing.

4.43 At the hearing, Mr. Rudd stated that he does not have the resources to be able to present an expert witness or scientific data to support his position. In addition, he states that he did not ask the right questions from the Program witnesses to elicit the responses that would support his position. However, Mr. Rudd stated that the information to support his position is in the data that is before the tribunal.

4.44 Mr. Rudd believes that if the water quality in the bay is poor, the whole bay is affected and should be restricted, not just his corner. Mr. Rudd stated that he is the only harvester in the prohibited area. He harvests less than 1% of the shellfish

harvested in Samish Bay. Mr. Rudd believes that if the big companies in the area were affected by restrictions, the problem would be resolved.

4.45 Mr. Rudd points out that the effects of rainfall on water quality in Samish Bay have been an issue for over 15 years. As evidence of this long-standing problem, Mr. Rudd referenced the 1982 FDA Study. Exhibit G. This study was conducted from December 6, 1982, through December 15, 1992, to determine the degree of pollution in the bay during the rainy season and to determine if management procedures were needed to insure that only safe shellfish are harvested. The study concluded, among other things, that rainfall of .5 inch, and possibly less, in a 24-hour period can result in the pollution of bay waters and shellfish with unacceptable levels of fecal waste. Recovery of bay water, after rainfall cessation, occurs in approximately seven days. Exhibit G, G-3. The study concludes that given the limited number of samples taken during the study, additional wet weather data needed to be obtained. Exhibit G, G-56. Mr. Rudd questions why the State has not done more to evaluate the effects of rainfall on water quality in Samish Bay.

V. CONCLUSIONS OF LAW

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

5.1 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. In this

case, the Program has the burden of proving that there is a preponderance of the evidence to support its decision to reclassify the Applicant's shellfish growing area in Samish Bay. WAC 246-10-606.

5.2 To protect the public health and to assure that commercial shellfish are harvested only from approved growing areas, the legislature enacted chapter 69.30 RCW. RCW 69.30.005. Furthermore, the legislature authorized the adoption of rules and regulations to establish minimum standards for the growing and harvesting of shellfish for human consumption. WAC 246-282-001, RCW 69.30.030.

5.3 All shellfish sold in the state of Washington must be obtained from growing areas that are certified and approved by the Department. RCW 69.30.050, WAC 246-282-020(1). See, RCW 69.30.005. "Approved" is defined as acceptable to the secretary based on his or her determination as to conformance with appropriate standards and good public health practice. WAC 246-282-010(1).

5.4 The Program follows the federal guidelines in the FDA Manual as its source of appropriate standards. The FDA Manual has been incorporated by reference into Department rule. WAC 246-282-005.

5.5 Mr. Rudd urges this tribunal to classify his shellfish growing beds as "Conditionally Approved" so that he may harvest shellfish in the months of June through September. Under shellfish growing area classifications, a "Conditionally Approved" area must meet the requirements of an "Approved" classification for a reasonable period of time and the pollution event must be known and predictable. An "Approved" classification requires, among other things, that water quality meet a two-part prescribed standard and that the area not be subject to contamination from human

and/or animal fecal matter in amounts that in the judgment of the Program may present an actual or potential health hazard.

5.6 The Rudd Beds do not meet the criteria for a "Conditionally Approved" classification. The Rudd Beds are situated more or less between Stations 11 and 12. Bacteriological results from these stations show that water quality standards for an "Approved" classification were not met. In addition, the growing areas in the southern portion of the bay, including the Rudd Beds, are subject to contamination from fecal pollution in amounts that, in the Program's judgment, are of health concern and may present a hazard to public health. Finally, the pollution event is not known and predictable. Although it is undisputed that a relationship exists between rainfall runoff and water quality, a consistent and predictable relationship between rainfall and water quality in Samish Bay has not been established. Additional sample stations have been added to this area to better assess water quality in the areas near the Rudd Beds. However, at this time there is insufficient data from these stations to draw conclusions or to establish a consistent relationship.

5.7 Mr. Rudd submitted documents and data from many sources and testified as to his own thoughts, feelings, and observations of the bay. Although Mr. Rudd raises some interesting issues and questions regarding water pollution in Samish Bay, he has failed to present sufficient evidence to show that the Rudd Beds meet the criteria of a "Conditionally Approved" classification or to rebut the Department's evidence that his beds should be classified as "Prohibited."

5.8 In addition, Mr. Rudd has not presented evidence in a manner that would allow this tribunal to find that the Rudd Beds should be classified as "Conditionally

Approved." Mr. Rudd did not clearly establish how the documents he submitted supported his position nor did he provide a meaningful interpretation of them. The Presiding Officer recognizes that Mr. Rudd operates a relatively small shellfish growing business and that a "Restricted" classification may not afford him the relief he is seeking. However, when public health is an issue, it remains of primary concern.

5.9 The Presiding Officer concludes that there is a preponderance of the evidence to support the decision of the Office of Shellfish Programs to reclassify the Applicant's shellfish growing area, the Rudd Beds, of Samish Bay from "Approved" to "Prohibited" and a preponderance of the evidence to establish that the Rudd Beds should remain classified as "Prohibited," unless upon the request of Mr. Rudd, the Program determines that the Rudd Beds meet the criteria for a "Restricted" classification. An order should be entered affirming the Program's reclassification decision.

VI. ORDER

Based upon the parties' stipulations, the Procedural History, the Exhibits admitted into the record, the Findings of Facts, and the Conclusions of Law, the Presiding Officer ORDERS that the August 19, 1994 decision of the Office of Shellfish Programs, Department of Health, to reclassify the Applicant's shellfish growing area in Samish Bay (the Rudd Beds), from "Approved" to "Prohibited" 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, Washington 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 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 Office of Professional Standards. 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 29th DAY OF JUNE, 1995.

ls
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: **STAN RUDD, HAROLD DYGERT** by mailing a copy properly addressed with postage prepaid.

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

Office of Professional Standards

cc: **MARYANNE GUICHARD**