

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

In the Matter of the Reclassification)	
of Shellfish Beds of Erlands Point:)	Docket No. 97-06-C-1001SF
)	
A & K TRUST,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND FINAL ORDER
_____)	

A hearing was held before Senior Health Law Judge Eric B. Schmidt, Presiding Officer for the Department of Health (the Department), on July 27 and 28, 1998, at the Department of Health hearing room, Melbourne Tower, 1511 Third Avenue, Seattle, Washington. Tal Price, as trustee for A & K Trust, appeared on behalf of A & K Trust (the Respondent). Peter H. Dykstra, Assistant Attorney General, represented the Office of Shellfish Programs of the Department of Health (the Program). The proceedings were recorded by Lorraine Millay and Keri Aspelund, certified court reporters. Having considered the evidence and the arguments of the parties, the Presiding Officer now issues the following:

I. PROCEDURAL HISTORY

1.1 On April 22, 1996, the Program issued a Sanitary Survey of Erlands Point, Dyes Inlet (Sanitary Survey). In that Sanitary Survey, the Program concluded an upgrade in classification for the north and east shorelines of Erlands Point from its current classification as "prohibited" should be denied.

1.2 On May 6, 1996, the Respondent appealed the Program's decision not to reclassify the Erlands Point tract.

1.3 On July 12, 1996, a Scheduling Order was issued by the Office of Professional Standards, which scheduled a prehearing conference for October 8, 1996, and the hearing for November 19, 1996.

1.4 A prehearing conference was held on October 8, 1996, before Health Law Judge Brian D. Peyton. On October 21, 1996, Judge Peyton issued Prehearing Order No. 1: Order Defining Conduct of Hearing, which contained the results of the prehearing conference.

1.5 On November 7, 1996, the Respondent filed a motion for a six-month continuance to allow time to hire an attorney to represent the Respondent in this proceeding. On November 14, 1996, Judge Peyton issued Prehearing Order No. 2: Order Setting Prehearing Conference and Continuing Hearing, which scheduled an additional prehearing conference for January 21, 1997, and continued the hearing to May 20 and 21, 1997.

1.6 On January 17, 1997, a telephonic prehearing conference was held by Judge Peyton. On January 30, 1997, Judge Peyton issued Prehearing Order No. 4: Order Setting Status Conference, which scheduled a status conference for April 21, 1997.

1.7 On May 12, 1997, the Program filed a motion to continue the hearing while testing of shellfish occurred at Erlands Point. The Respondent agreed to the motion. On May 21, 1997, Judge Peyton issued Prehearing Order No. 5: Order Continuing Hearing, which continued the status conference to August 21, 1997, and the hearing to September 23 and 24, 1997.

1.8 On May 27, 1997, Judge Peyton issued Prehearing Order No. 6: Order on Motion to Amend, which granted the Program's motion to add a witness and an exhibit to those designated in Prehearing Order No. 1.

1.9 During the status conference on August 21, 1997, the Respondent moved to continue the hearing while the shellfish testing was concluded. The Program did not object to the motion. On August 26, 1997, Senior Health Law Judge Eric B. Schmidt, having been substituted for Judge Peyton as the Presiding Officer, issued Prehearing Order No. 7: Order Continuing Prehearing Conference and Hearing, which continued the prehearing conference to January 20, 1998, and the hearing to February 24, 25 and 26, 1998.

1.10 A telephonic prehearing conference was held on January 20, 1998. The Presiding Officer granted the Program's motion to add another exhibit, the Respondent's motion to add two witnesses, and granted the Program's motion in limine regarding classification actions involving shellfish areas hydrographically and geographically removed from Erlands Point. On January 30, 1998, the Presiding Officer issued Prehearing Order No. 8: Order Following Prehearing Conference, which contained the above rulings.

1.11 A telephonic prehearing conference was held on February 17, 1998, during which the parties requested a continuance of the hearing because the shellfish testing had not been completed. On February 27, 1998, the Presiding Officer issued Prehearing Order No. 9: Order Striking Hearing Dates, which struck the February 24, 25 and 26, 1998, hearing dates until the testing was completed.

1.12 On March 24, 1998, following the completion of the shellfish testing, the Program filed a letter indicating it was withdrawing the issue of toxic contamination as one of the bases for the “prohibited” classification of Erlands Point.

1.13 A telephonic prehearing conference was held on May 5, 1998, to discuss rescheduling the hearing. On May 11, 1998, the Presiding Officer issued Prehearing Order No. 10: Order Setting Hearing Dates, which set July 27 and 28, 1998, as hearing dates.

1.14 On July 15, 1998, the Presiding Officer issued Prehearing Order No. 11: Order Issuing Subpoenas, which issued subpoenas on behalf of the Respondent to Kathleen Cahall and Keith Grellner.

1.15 A hearing was held on July 27 and 28, 1998. Maryanne Guichard, Bob Woolrich and Frank Meriwether testified on behalf of the Program. Kathleen Cahall and Keith Grellner testified on behalf of the Respondent.

1.16 The following exhibits were offered by the Program and were admitted into evidence:

Exhibit P-A: Letter from Tim Sample, Food and Drug Administration, to Maryanne Guichard, dated May 3, 1996.

Exhibit P-B: Articles entitled “Chapter 4: Human Enteric Pathogenic Viruses”, “Viruses”, and “Public Health Concerns and Control of Risks from Shellfish.”

Exhibit P-C: Sanitary Survey of Erlands Point, Dyes Inlet, dated April 22, 1996.

Exhibit P-D: City of Bremerton Combined Sewer Outflow Annual Report for 1995.

Exhibit P-E: City of Bremerton Combined Sewer Outflow Annual Report for 1996.

Exhibit P-F: Chapters 2, 4 and 5 of Bremerton Comprehensive Sewage System Improvement Plan.

Exhibit P-G: Bremerton Sewage Treatment Plant Malfunction Reports.

- Exhibit P-H: Department of Ecology Order on Consent, No. DE 93WQ-150, dated March 15, 1993, and accompanying City of Bremerton Combined Sewer Outflow Reduction Plan.
- Exhibit P-I Dyes Inlet Drogue Study Results.
- Exhibit P-J: 1990 Current and Tide Tables.
- Exhibit P-K: Puget Sound Current Guide, Second Edition.
- Exhibit P-L: Atlas of the Pacific Northwest, Seventh Edition.
- Exhibit P-M: Tide Prints, Surface Tidal Currents in Puget Sound.
- Exhibit P-N: Map of Dyes Inlet and Bremerton area (enlarged).

1.17 The following exhibits were offered by the Respondent and were admitted into evidence:

- Exhibit R-A: Request for Shellfish Harvest Certification of Chico Bay, Phinney Bay, and the East Side of Erland [sic] Point, dated June 16, 1992.
- Exhibit R-B: Letter from Jack Lilja to Charles B. Roe, Jr., dated July 9, 1992.
- Exhibit R-C: Letter from Charles B. Roe, Jr., to Frank Cox, dated June 24, 1992.
- Exhibit R-D: Progress Report Regarding the Blackstone Oyster Company's Request for Shellfish Harvest Certification of Tidelands in Chico Bay and Adjacent to Erlands Point, dated November 19, 1993.
- Exhibit R-E: Letter from Kenn Brooks to Kristine Gebbie, dated July 15, 1992.
- Exhibit R-F: Letter from Kristine Gebbie to Tad Shimazu, dated November 16, 1992.
- Exhibit R-G: Findings of Fact, Conclusions of Law, and Final Order in the Matter of the Shellfish Permit of Blackstone Oyster Company, OPS No. 92-12-11-305SF, dated August 2, 1995.
- Exhibit R-H: Letter from Keith Grellner to Tal Price, dated April 29, 1996.
- Exhibit R-I: Letter from Tal Price to Maryanne Guichard, dated May 15, 1996.
- Exhibit R-J: Map, 1995 Annual Inventory of Commercial & Recreational Shellfish Areas.
- Exhibit R-K: Marine Water Data, dated July 20, 1998.

- Exhibit R-L: Letter from Keith Grellner to Tal Price, dated July 16, 1998.
- Exhibit R-M: Memorandum from Frank Meriwether to Maryanne Guichard, dated September 16, 1992.
- Exhibit R-N: National Pollutant Discharge Elimination System (NPDES) Waste Discharge Permit for the City of Bremerton, dated June 21, 1996.
- Exhibit R-O: Final Report, Combined Sewer Overflow Water Quality Characterization Study, City of Bremerton, dated October 23, 1997.

1.18 On July 30, 1998 and August 3, 1998, the Respondent filed additional documents with the Presiding Officer. On July 30, 1998, and August 3, 1998, the Program filed letters objecting to the consideration of any documents submitted after the close of the hearing. On August 10, 1998, the Presiding Officer conducted a telephone conference with the parties to inform them that he would not be considering any information filed after the close of the hearing on July 28, 1998, in making his decision.

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II. FINDINGS OF FACT

A. The Proposed Erlands Point Growing Area.

2.1 In June 1992, the Respondent submitted a request for shellfish harvest certification for three areas within Dyes Inlet in Kitsap County: Chico Bay, Phinney Bay, and Erlands Point. Exhibit R-A. Commercial harvest of shellfish has been prohibited in the entire Dyes Inlet area since the 1960's, due to water pollution levels caused by Bremerton Naval Shipyard activities, sewage treatment plants, combined sewer

overflows, and failing on-site sewage treatment systems. Exhibit R-A, p.16. The Respondent contended that reductions in these sources of pollution had resulted in sufficiently improved water quality to allow for shellfish harvesting. Exhibits R-A and R-C.

2.2 In November 1992, the Program reviewed the Respondent's request for reclassification and concluded the Phinney Bay and Erlands Point tracts were appropriately classified as prohibited and did not warrant further study, but the Chico Bay tract did warrant further study to determine whether a restricted classification was appropriate. Exhibit R-F. Blackstone Oyster Company appealed the denial of reclassification of the Erlands Point tract, but not the denial of reclassification of the Phinney Bay tract. Exhibit R-G, paragraph 1.3. The parties agreed to remand reclassification of the Erlands Point tract to the Program for further study. Exhibit R-G, paragraphs 1.6 and 1.11. The study of the Chico Bay tract resulted in it being reclassified as restricted. Blackstone appealed, requesting that the Chico Bay tract be reclassified as approved or conditionally approved. Exhibit R-G, paragraph 1.4. After a hearing, Judge Peyton dismissed Blackstone's appeal and affirmed the reclassification of Chico Bay as restricted. Exhibit R-G.

2.3 Following the further study of the Erlands Point tract, the Program issued its Sanitary Survey of Erlands Point, Dyes Inlet (Sanitary Survey) on April 22, 1996. Exhibit P-C. The Sanitary Survey concluded the eastern shoreline of Erlands Point should remain prohibited from commercial shellfish harvesting for the following reasons:

1. Frequent and unpredictable discharge of large amounts of stormwater and raw sewage from any of eleven combined sewer overflows located in Port Washington Narrows.
2. Stormwater runoff from the Bremerton and Silverdale watersheds.

3. Potential chemical contamination from the US Navy Jackson Park Superfund cleanup site.

Exhibit P-C, p. 8. On May 3, 1996, the Food and Drug Administration reviewed and concurred with the Sanitary Survey. Exhibit P-A.

2.4 On April 29, 1996, Keith Grellner of the Bremerton-Kitsap County Health District issued a letter stating that all the failing on-site sewage systems affecting the Erlands Point tract had been repaired. Exhibit R-H. On March 24, 1998, following the completion of the shellfish testing, the Program withdrew the issue of toxic contamination as one of the bases for the “prohibited” classification of Erlands Point. See paragraph 1.10 above. The Program acknowledges that the sole remaining basis for classifying the Erlands Point tract as “prohibited” is the impact of the combined sewer overflows by the City of Bremerton into Port Washington Narrows. Ms. Guichard, Mr. Woolrich and Mr. Meriwether, the Program officials who made the determination that Erlands Point should remain classified as “prohibited,” testified that the impact of the combined sewer overflows alone was sufficient to justify the “prohibited” classification.

B. The Classification of Shellfish Growing Areas.

2.5 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, industrial or natural toxins, recreational use, or other sources of pollutants which may have a detrimental influence on the water quality of the shellfish growing beds and subsequent hazards to the human consumers of shellfish.” WAC 246-282-020(2).

2.6 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, 1995 Revision (the NSSP Manual). The NSSP Manual "satisfactory compliance" standards have incorporated into the WAC rules governing shellfish sanitation. WAC 246-282-005(1).

2.7 Under the NSSP Manual classification scheme, a shellfish growing area is classified as one of the following: "approved," "conditionally approved," "restricted," or "prohibited." NSSP Manual, Section C.2.a. An "approved" area is an area in which shellfish may be grown and harvested for direct marketing. NSSP Manual, Section C.3. 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. NSSP Manual, Section C.4. A "restricted" area is an area in which shellfish may be harvested only if subjected to "a suitable and effective cleansing process," such relating to an "approved" area, prior to marketing. NSSP Manual, Section C.5. Taking of shellfish for human food purposes is forbidden in an area classified "prohibited." NSSP Manual, Section C.7.

2.8 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. NSSP Manual, Section C.1. The sanitary survey for Erlands Point appears in the record as Exhibit P-C.

2.9 At issue in this proceeding is the appropriate classification of the proposed Erlands Point growing area. To be classified as “approved,” the area must be “not subject to contamination from human and/or animal fecal matter in amounts that in the judgement of the [State Shellfish Control Agency] may present an actual or potential hazard to public health.” The area must also meet the following standard for water quality of all sampling stations, based on a minimum of thirty samples from each sampling station:

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.

NSSP Manual, Section C.3. To be classified as “conditionally approved,” the proposed area 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.” NSSP Manual, Section C.4.a. To be classified as “restricted,” the proposed area must be “not so contaminated with fecal material, poisonous or deleterious substances that consumption of shellfish might be hazardous after depuration or relaying.” NSSP Manual, Section C.5. Finally, if a sanitary survey indicates that “pollution sources may unpredictably contaminate the shellfish,” then the area must be classified “prohibited.” NSSP Manual, Section C.7.b.

C. The Sanitary Survey of the Proposed Erlands Point Growing Area.

2.10 In its analysis of the meteorologic and hydrographic conditions at Erlands Point, the Sanitary Survey made the following findings:

Within the city of Bremerton, stormwater is drained to the municipal sewage distribution system where it frequently overloads the carrying capacity of

the collection system resulting in the bypass of stormwater and raw sewage directly into Port Washington Narrows. Bypass events are frequent, unpredictable, and involve large volumes of stormwater and raw sewage. The total amount discharged in 1995 from the eleven combined sewer overflows [CSO's] located in Port Washington Narrows was in excess of fifty-eight million gallons

Contaminants entering Port Washington Narrows on a flood tide are transported rapidly into Dyes Inlet. Dispersion of contaminants within Dyes Inlet is influenced by a combination of physical factors which include tidal stage and magnitude, wind direction and speed, and the volume and duration of contaminant discharge.

The proximity of Erlands Point eastern shoreline to the northern entrance of Port Washington Narrows places the area at a high risk of contamination from sewage discharged from CSO's into the Port Washington Narrows. This conclusion is reinforced by the following:

A 1974 Kramer, Chin and Mayo study demonstrated that submerged discharges of sewage into the Narrows can rise quickly to the surface and remain relatively undiluted and undispersed for long transport distances through the Narrows during an active tidal cycle.

A drogue (float) study was conducted by DOH on March 3, 1994, during the early portion of a flood tide. The potential for waters in the Narrows to approach the eastern shoreline of Erlands Point on a single tidal phase was demonstrated in this DOH study, although dispersal of the drogues also occurred.

The Puget Sound physical model at the University of Washington predicts that a clockwise gyre would occur in the southern portion of Dyes Inlet during the middle portions of a large flood tide. This predicted gyre would transport waters from the northern mouth of the Narrows in a general westerly direction; more rapid currents would be directed to the WNW, while slower currents would go to the west and south (to Ostrich Bay). It should be noted that the physical model does not take winds into account, which can also affect the direction of surface currents.

Exhibit P-C, pp. 7-8.

2.11 The Presiding Officer finds that the findings of the Sanitary Survey are supported by the record. While the combined sewer overflows from the city of Bremerton are being reduced pursuant to the Department of Ecology Order on Consent

(Exhibit P-H), the City of Bremerton Combined Sewer Overflow Annual Reports for 1995 and 1996 (Exhibits P-D and P-E) show that the combined sewer overflows into Port Washington harbor exceeded 50 million gallons in 1994, 55 million gallons in 1995 and 35 million gallons in 1996. A recent study of the water quality characteristics of the combined sewer overflows, conducted by the city of Bremerton, determined that the concentrations of fecal coliforms in grab samples from the combined sewer overflows ranged between 3,825 to 160,000 cfu/100 ml. Exhibit R-O, pp. 19-21. Therefore, there are still tens of millions of gallons of combined sewer overflows with high concentrations of fecal coliforms being discharged into Port Washington Narrows. This is undisputed by the Respondent. The question is how much of the contamination in these overflows reaches the Erlands Point growing area.

2.12 According to tide tables and current guides for the Port Washington Narrows (Exhibits P-J and P-K), the current at the northern terminus of Port Washington Narrows into Dyes Inlet on a flood tide is typically 2.2 knots but can be as high as four knots. This is undisputed by the Respondent.

2.13 In 1973, the City of Bremerton engaged Kramer, Chin and Mayo to prepare a comprehensive sewage system improvement plan. Part of the Kramer, Chin and Mayo report included a dye study conducted at the Manette sewage treatment plant in Port Washington Narrows to study the diffusion and dilution of effluent from the sewage treatment plant. The dye study demonstrated that little mixing occurred at the point where the effluent was discharged, and that the effluent rose to the surface in a largely undiluted form, where it was dispersed horizontally. Exhibit P-F, p. 2.15. The Program relied on this study to conclude that the combined sewer overflows into Port

Washington Narrows are still largely undiluted as they travel on flood tide currents into Dyes Inlet. The Respondent did not present any evidence to challenge the methodology or results of the dye study. It relies instead on an analysis by Dr. Lincoln Loehr, in which he stated “Because the currents are strong in Port Washington Narrows, I assume there is complete mixing of the CSO discharged water and the tidal flow.” Exhibit R-A, Enclosure 4, p. 2. The Presiding Officer finds the Program did not err in employing the results of the Kramer, Chin and Mayo dye study rather than relying on the assumption made by Dr. Loehr in support of the Respondent’s request for reclassification.

2.14 In March 1994, the Program conducted a drogoue study of the water currents leaving the northern terminus of Port Washington Narrows and entering Dyes Inlet. Three shallow drogues (set to measure the currents at two feet below the surface) and three deep drogues (set to measure the currents at fifteen feet below the surface) were released at Rocky Point and tracked using a global positioning system. The charts of the travel of the drogues are contained in the record as Exhibit P-I. While some of the drogues traveled northwest into the middle of Dyes Inlet, three of the drogues traveled predominantly westerly toward Erlands Point. One of the drogues traveled to within 1,200 feet of the northern edge of the Erlands Point growing area.

2.15 The Respondent did not present any evidence challenging the methodology or results of the Program’s drogoue study. Rather, the Respondent asserts the Program should have relied on a drogoue study conducted by Dr. Loehr in 1974, which found that the flow from the Port Washington Narrows traveled predominantly northerly, then along the eastern shore of Dyes Inlet toward Windy Point, and then into

Dyes Inlet, where it divided into two eddies, one clockwise to the north toward Silverdale, and the other counterclockwise to the south toward Chico Bay. Exhibit R-A, Enclosure 4, pp. 2-3.

2.16 The Presiding Officer finds the Respondent has presented no reason why the 1994 drogoue study should be ignored in favor of the 1974 drogoue study. Given the variability of hydrology, both drogoue studies could be valid measurements of the flow from Port Washington Narrows into Dyes Inlet on the days the measurements were taken. The Presiding Officer finds no error in the Program's use of the 1994 drogoue study in making its findings regarding Erlands Point.

2.17 Finally, the University of Washington's physical model of Puget Sound has generated a set of charts of surface tidal currents in Puget Sound. The charts for the Dyes Inlet area indicate that at the mid-point of a flood tide, the current travels in a clockwise gyre from Rocky Point northwesterly toward Erlands Point, northerly into Dyes Inlet, and then southeasterly toward Tracyton. Exhibit P-M, p. 315. The Respondent has not presented any evidence to challenge the results of the University's modeling.

2.18 In summary, the Presiding Officer finds that the Program's Sanitary Survey findings are supported by the evidence. Tens of millions of gallons of combined sewer overflows are discharged into Port Washington Narrows each year. Those combined sewer overflows contain high concentrations of fecal coliforms. The effluent discharged into Port Washington Narrows travels to the surface in a largely undiluted form and disperses with the current. On a flood tide, the current travels past the northern terminus of Port Washington Narrows into Dyes Inlet at a speed of two to four

knots. The University of Washington's physical model shows that the current leaving Port Washington Narrows on a flood tide travels in a clockwise gyre that approaches Erlands Point before entering the main body of Dyes Inlet. While one drogue study showed the current in Dyes Inlet on a flood tide traveling in a counterclockwise gyre away from Erlands Point, another drogue study showed the current traveling in a clockwise gyre toward Erlands Point and showed one drogue coming within 1,200 feet of the Erlands Point growing area. The Presiding Officer finds that this evidence is sufficient to support the Program's conclusion that the combined sewer overflows into Port Washington Narrows have the potential for contaminating the shellfish beds at the Erlands Point growing area.

2.19 The Respondent's first major argument is that the potential for contamination noted above should be ignored in favor of the water quality sampling results, all of which have shown the water at sampling stations at Erlands Point meet the NSSP Manual water quality standard that "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."

2.20 The Program concedes that the water quality sampling results from testing stations 34, 45 and 46 off the eastern shoreline of Erlands Point, contained in Exhibit P-C, p. 11, and Exhibit R-K, have fallen within the NSSP Manual water quality standard. The Program also acknowledges that testing by the Bremerton-Kitsap County Health Department has shown that samples taken at its stations DY17 and DY18 have generally fallen within the NSSP Manual water quality standards.

Exhibit R-L. However, the Program contends that the results of water quality sampling cannot overrule the presence of potential sources of contamination, because the contamination could occur at times when no sampling was occurring. Thus, the Program contends that the presence of potential sources of contamination is sufficient to classify a growing area as “prohibited” even when the water quality standards are met.

2.21 The Presiding Officer finds that the Program’s interpretation is correct. In essence, what the Respondent asks is that the Department ignore the potential source of contamination from the Bremerton combined sewer overflow and allow shellfish harvesting at Erlands Point until such time as the water quality sampling violates the NSSP Manual standard. The Presiding Officer finds this approach of assuming clean water until samples demonstrate otherwise is contrary to the NSSP Manual “satisfactory compliance” standards. As noted in Finding 2.9, for Erlands Point to be classified as “approved,” it must be “not subject to contamination from human and/or animal fecal matter in amounts that in the judgement of the [State Shellfish Control Agency] may present an actual or potential hazard to public health” and must meet the NSSP Manual standard for water quality of all sampling stations. The NSSP Manual “satisfactory compliance” standards do not allow the first element to be ignored when the second element is satisfied. As found above, the evidence supports the Program’s judgment that “contamination from human and/or animal fecal matter” from the Bremerton combined sewer overflows presents a “potential hazard to public health” at the Erlands Point growing area. Because the Erlands Point growing area does not comply with the first element of the NSSP Manual standard for an “approved” classification, the

Presiding Officer finds that the Erlands Point growing area's compliance with the second element is not sufficient for the area to be classified "approved." The Presiding Officer finds the Program did not err in refusing to reclassify the Erlands Point growing area as "approved."

2.22 The Respondent's second major argument is that even if the Erlands Point growing area cannot be classified as "approved" because of the presence of the Bremerton combined sewer overflows, the area should be reclassified as "conditionally approved" because the combined sewer overflow events are predictable. The Respondent bases its argument on a regression analysis by Dr. Kenn Brooks that shows a 0.77 correlation between rainfall and combined sewer overflows.

Exhibit R-A, p. 4-5.

2.23 The Program responds that the Bremerton combined sewer overflows are not sufficiently predictable to reclassify the Erlands Point growing area as "conditionally approved." The Program relies on the regression analysis performed by the City of Bremerton in its 1996 Combined Sewer Overflow Annual Report (Exhibit P-E) that indicated the correlation between rainfall and combined sewer overflows was not sufficiently high for use in managing shellfish harvesting. The Program discounts the regression analysis by Dr. Brooks because it did not account for combined sewer overflows which occur on days without rainfall, which overflows are documented in Exhibit P-D. The Program contends combined sewer overflows occur with such frequency, as often as 176 days in 1995 from site OF-4, that the Erlands Point area cannot be managed reasonably under a "conditionally approved" classification. Finally, the Program notes the predictability of combined sewer overflows is further reduced by

overflows that occur because of problems in operations of the Bremerton sewage treatment plants, as documented in Exhibit P-G.

2.24 As noted in Finding 2.9, for the Erlands Point growing area to be classified as “conditionally approved,” the proposed area 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.” The evidence supports the Program’s determination that the pollution factor of the Bremerton combined sewer overflows are not predictable, and that the frequency and unpredictability of the combined sewer overflows are so complex as to preclude a reasonable management approach. The Program did not err in discounting Dr. Brooks’ regression analysis because it did not account for combined sewer overflows that occur in the absence of rainfall or that occur because of operational problems in the sewage treatment system. The Presiding Officer finds the Program did not err in declining to reclassify the Erlands Point growing area as “conditionally approved.”

2.25 The Respondent’s final argument is that the NSSP Manual classification standards are discretionary, not mandatory, and that the Program has failed to exercise its discretion in accordance with the evidence presented. The Respondent does not cite to any authority in any Washington statute, rule or regulation, or any authority within the NSSP Manual, indicating that compliance with the “satisfactory compliance” criteria for classification in the NSSP Manual are discretionary. Rather, the Respondent contends that the Program has selectively enforced the NSSP Manual in other settings, thereby indicating that compliance with the NSSP Manual is discretionary. The

Respondent asserts that the Program has granted seven-day relay permits to another shellfish company, which the Respondent asserts violates WAC 246-282-030(3)(a) requiring the relay period to be at least two weeks.

2.26 The Program responds that WAC 246-282-005(1) provides “every person engaged in a shellfish operation shall comply with and shall be subject to: (a) the ‘satisfactory compliance’ standards of [the NSSP Manual]. . . .” The Program denies there is any authority making the “satisfactory compliance” standards discretionary. Finally, the Program contends that its actions regarding relay permits for another shellfish company in another area are not relevant to its decision not to reclassify the Erlands Point growing area.

2.27 The Presiding Officer finds that the “satisfactory compliance” standards of the NSSP Manual for classification of shellfish growing areas as “approved”, “conditionally approved”, “restricted” or “prohibited” are mandatory, not discretionary. The “satisfactory compliance” standards are made mandatory in WAC 246-282-005(1). No authority has been presented suggesting the standards can be invoked, ignored or modified in a discretionary manner by the Program. Although it is not entirely clear, the Respondent’s argument appears to be that because the Program has violated WAC 246-202-030(3)(a) by granting seven-day relay permits to another company in another area, the Program has the “discretion” to violate the “satisfactory compliance” standards and reclassify the Erlands Point growing area as “approved” even though it does not meet both elements of the standard for an “approved” growing area. The Presiding Officer rejects this argument. First, the Presiding Officer has no authority to address the granting of relay permits in an unrelated case. Further, even assuming

(without deciding) that the Program violated WAC 246-282-030(3)(a) by granting seven-day relay permits, that action does not make all other provisions of chapter 246-282 WAC or the NSSP Manual “discretionary.” One violation of the law (the granting of seven-day relay permits, assuming it violates the law) does not countenance or require another violation of the law (reclassifying the Erlands Point growing area as “approved” in contravention of the NSSP “satisfactory compliance” standard).

2.28 The Respondent has not demonstrated that the Program has the discretion to modify or ignore the “satisfactory compliance” standards for the classification of shellfish growing areas, as set forth in the NSSP Manual. As found above, the Erlands Point growing area does not satisfy the “satisfactory compliance” standard for a classification of “approved” or “conditionally approved.” Further, the “satisfactory compliance” standards require that a growing area be classified as “prohibited” if a sanitary survey indicates that “pollution sources may unpredictably contaminate the shellfish.” As found above, the evidence is sufficient to support the Program’s determination in the Sanitary Survey that combined sewer overflows from Bremerton into Port Washington Narrows “may unpredictably contaminate the shellfish” in the Erlands Point growing area. Accordingly, the Presiding Officer finds the Program did not err in maintaining the classification of the Erlands Point growing area as “prohibited” or in denying the Respondent’s request to reclassify the Erlands Point growing area as “approved” or “conditionally approved.”

2.29 The Presiding Officer acknowledges the Respondent’s frustrating position of owning potentially lucrative shellfish beds at Erlands Point from which it is prohibited from commercially harvesting because of events beyond its control, the discharge of

combined sewer overflows into Port Washington Narrows by the City of Bremerton. However, the Presiding Officer cannot resolve that frustration by ordering the reclassification of the Erlands Point growing area in contravention of the NSSP Manual standards in light of the evidence presented by the Program, because such a reclassification would, at this time, endanger the public health.

III. CONCLUSIONS OF LAW

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

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

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

3.4 As set forth above in the Findings of Fact, the Shellfish Program’s determination that the proposed Erlands Point growing area should remain classified as “prohibited,” 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 ORDERS:

4.1 The April 22, 1996, decision of the Office of Shellfish Programs, Department of Health, to not reclassify the proposed Erlands Point growing area from its current classification of "prohibited" is hereby AFFIRMED.

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

As provided in RCW 34.05.461(3), 34.05.470, and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed within ten (10) days of service of this Order with the Adjudicative Clerk Office, 2413 Pacific Avenue, PO Box 47879, Olympia, WA 98504-7879. 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 twenty (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.

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Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, 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 3rd DAY OF SEPTEMBER, 1998.

/s/

ERIC B. SCHMIDT, Senior 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:
TAL PRICE AND PETER DYKSTRA, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS ____ DAY OF SEPTEMBER, 1998.

Adjudicative Clerk Office

cc: **JENNIFER TEBALDI**

FOR INTERNAL USE ONLY: (Internal tracking numbers)
OPS No. 96-05-08-0361SF