

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

|                                |   |                        |
|--------------------------------|---|------------------------|
| In the Matter of the Shellfish | ) | OPS No. 96-05-06-359 S |
| Permit of:                     | ) | Prog. No. 95-09-0003MA |
|                                | ) |                        |
| MORRIS SHELLFISH,              | ) | FINDINGS OF FACT,      |
|                                | ) | CONCLUSIONS OF LAW,    |
| Respondent.                    | ) | AND FINAL ORDER        |
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A hearing was held on May 21, 1996, before Health Law Judge Brian D. Peyton, Presiding Officer for the Department of Health, at the Department of Health conference room, 2413 Pacific Avenue, Olympia, Washington. Noel R. Treat, Assistant Attorney General, represented the Office of Shellfish Programs of the Department of Health (the Shellfish Program). Thomas R. Bjorgen, Attorney at Law, represented Respondent Morris Shellfish. Having heard the testimony and considered the evidence and the arguments of the parties, the Presiding Officer enters the following:

**I. PROCEDURAL HISTORY**

1.1 By letter dated April 23, 1996, the Office of Shellfish Programs summarily suspended Morris Shellfish's shellfish shellstock shipper license and certificate of approval for alleged violations of chapter 69.30 RCW and chapter 246-282 WAC. The letter of summary suspension notified Morris Shellfish of its right to request a prompt hearing to contest the decision.

1.2 On May 3, 1996, Morris Shellfish filed its request for a prompt hearing. Morris Shellfish requested reinstatement of its license and certificate of approval. A prehearing conference was held on May 13, 1996.

1.3 A hearing was held on May 21, 1996. Prior to the hearing, the parties filed an Agreed Statement of Facts. Maryanne Guichard, Duane Makoviney, Elsie Lomax, Bill Clelland, Nathan Morris, and Wendy Ervin testified. Exhibits 1 through 14 were admitted into evidence.

## **II. FINDINGS OF FACT**

2.1 Nathan Morris owns and operates Morris Shellfish, which operates under Department of Health shellstock shipper license WA-1113-SS. Agreed Statement of Facts, paragraph 1; Exhibit 1. Morris Shellfish is certified to harvest shellfish from the Patricia Beach area of Hood Canal #7 and Peale Passage, in south Puget Sound. Agreed Statement of Facts, paragraph 1; Exhibit 2.

2.2 On March 30, 31, and April 2, 1996, Morris Shellfish employees harvested commercial quantities of market-size oysters from a beach owned by Bessie Hale near Hoodspout, Washington. That beach is classified as “prohibited,” i.e. harvest of shellfish from those waters is not allowed. Neither Mr. Morris nor Morris Shellfish is certified to harvest shellfish from Bessie Hale’s beach. Agreed Statement of Facts, paragraphs 2 and 3; Exhibit 3.

2.3 On March 19 and 20, 1996, Mr. Morris harvested commercial quantities of market-size clams and oysters from a beach owned by Neal Mitchell located on Sunset Beach in the Lynch Cove area at the east end of Hood Canal. That beach is classified as “restricted, “ i.e. shellfish can be harvested from that area only if harvest is approved by the Shellfish Program and the shellfish are subject to a cleansing process. Neither Mr. Morris nor Morris Shellfish is certified to harvest shellfish from Neal Mitchell’s beach. Agreed Statement of Facts, paragraphs 4 and 5; Exhibits 4, 5, and 6.

2.4 “Relaying” is the transfer of shellfish from a restricted area to an approved area, where the shellfish cleanse themselves in the water of the approved area. Shellfish that have been relayed to an approved area pursuant to a plan approved by the Shellfish Program may be harvested after sufficient time for purification in the approved area. The Shellfish Program must approve a proposed relay area and relaying procedure and grant a permit before shellfish may be legally relayed. The Shellfish Program will not authorize the relay of shellfish from an area classified as “prohibited.”

2.5 Mr. Morris had been told by another shellfish harvester that shellfish could be harvested from an unapproved area, relayed, and then sold. He intended to relay the shellfish harvested from the Hale and Mitchell beaches to another site, and allow the shellfish to remain there for purification before selling them. Morris Shellfish did not have Shellfish Program approval to relay shellfish harvested from the Hale or Mitchell beaches. Mr. Morris testified that he was unaware that he needed Shellfish Program approval to relay shellfish. However, in March 1996 he did submit an application for permission to relay shellfish from Dyes Inlet, Kitsap County to Hartstene Island.

2.6 Elsie Lomax contacted Mr. Morris in April 1996 regarding the harvest of shellfish from her beach, located in the Sunset Beach area. That area is classified as “restricted.” On April 8, 1996, Mr. Morris gave the Lomaxes a tidelands harvest agreement for the harvest of shellfish from their beach. Exhibit 7. Neither Mr. Morris nor Morris Shellfish is certified to harvest or relay shellfish from the Lomax beach. Ms. Lomax testified that Mr. Morris told her that the harvest of her beach could begin as soon as it was convenient for her. Mr. Morris denied that he agreed to harvest the Lomax beach as soon as convenient. He testified that he told Ms. Lomax that he would

harvest their beach when he had obtained the necessary Shellfish Program approval for harvest from their beach.

2.7 Morris Shellfish has not sold the shellfish harvested from the Hale and Mitchell beaches. They remain at the site to which they were relayed after they were harvested.

### **III. CONCLUSIONS OF LAW**

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

3.2 RCW 69.30.050 provides that shellfish growing areas from which commercial quantities of shellfish are removed shall be certified by the Department as safe and sanitary. That statute further provides that “any person desiring to remove shellfish in a commercial quantity for sale or human consumption from a growing area shall first apply to the Department for a certificate of approval of the growing area.”

RCW 69.30.050. As set forth in Findings of Fact 2.2 through 2.5, Morris Shellfish removed commercial quantities of shellfish from growing areas for which it had not applied for a certificate of approval, and which had not been approved, in violation of RCW 69.30.050.

3.3 RCW 69.30.110 provides that it is unlawful to possess a commercial quantity of shellfish which has not been grown, shucked, packed, or shipped in accordance with the provisions of chapter 69.30 RCW. As set forth in Conclusion of Law 3.2, and Findings of Fact 2.2 through 2.5, Morris Shellfish’s violation of RCW 69.30.050 also constituted a violation of RCW 69.30.110.

3.4 WAC 246-282-020(3) provides that no commercial quantities of shellfish

shall be harvested from unapproved growing areas, unless permission is granted to relay shellfish to an approved growing area under the conditions set forth in WAC 246-282-020(3)(a)-(c). As set forth in Findings of Fact 2.2 through 2.5, Morris Shellfish harvested commercial quantities from unapproved growing areas, and without permission to relay the shellfish, in violation of WAC 246-282-020(3).

3.5 WAC 246-282-090(2) provides that no person shall possess a commercial quantity of shellfish which has not been grown or harvested in accordance with chapter 246-282 WAC or chapter 69.30 RCW. The violations set forth in Conclusions of Law 3.2, 3.3, and 3.4 also constitute violations of WAC 246-282-090(2).

3.6 RCW 69.30.080 provides that the Department may revoke or suspend a certificate of approval or license in any case in which it determines there has been a failure to comply with chapter 69.30 RCW or chapter 246-282 WAC. In this case, the record indicates that Morris Shellfish has harvested and relayed shellfish from unapproved growing areas, without the required Shellfish Program approval. As a licensed shellstock shipper, Mr. Morris knew or should have known that he could not harvest and relay shellfish without Shellfish Program approval. In fact, he did file an application for one proposed relaying operation, which indicates that he was aware that Shellfish Program approval was necessary. The Morris Shellfish license and certification should be suspended.

3.7 The Morris Shellfish license and certification have been suspended since April 23, 1996. The Shellfish Program has requested suspension of the license and certification until October 17, 1997, for a total suspension of approximately 18 months. The Presiding Officer concludes that while a suspension is warranted, the record indicates that Morris Shellfish has not sold any of the illegally harvested shellfish. Thus,

the public was not actually exposed to the danger of consuming the contaminated shellfish.

3.8 To insure that that the public will not be placed at risk, Morris Shellfish and the Shellfish Program should take necessary steps to prevent the illegally harvested shellfish from being sold, up to and including disposal, if necessary. See RCW 69.30.110. Twelve months of the proposed 18 month suspension will be stayed, so long as Morris Shellfish takes all steps required by the Shellfish Program to dispose of the contaminated shellfish.

#### **IV. ORDER**

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

4.1 The shellstock shipper license and certificate of approval of Morris Shellfish is hereby SUSPENDED for 18 months, or until October 23, 1997.

4.2 All but six months of the suspension shall be STAYED so long as Morris Shellfish complies with the following conditions:

4.2.1 No later than October 23, 1996, Morris Shellfish, at its own expense, shall take all steps required by the Office of Shellfish Programs to dispose of the shellfish illegally harvested from the Hale and Mitchell beaches.

4.2.2 Morris Shellfish shall obey all laws and regulations governing the growing, harvesting, packing, and sale of shellfish in the state of Washington

4.3 Failure to comply with the conditions set forth in paragraphs 4.2.1 and 4.2.2 shall be grounds for summary suspension of the Morris Shellfish license and certificate of approval.

THE PARTIES ARE FURTHER ADVISED:

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 days of service of this Order with the Office of Professional Standards, 2413 Pacific Avenue, PO Box 47872, Olympia WA 98504-7872. 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 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 24th DAY OF JUNE, 1996.

S/S

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BRIAN D. PEYTON, Health Law Judge  
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record: **THOMAS R. BJORGEN, NATHAN MORRIS, NOEL R. TREAT** by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 25th DAY OF JUNE, 1996.

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Office of Professional Standards

cc: **MARYANNE GUICHARD**