



1.4 During a prehearing conference on October 19, 2001, the Presiding Officer continued the hearing and set a briefing schedule for a summary judgment motion. Prehearing Order No. 1.

1.5 From December 3, 2001 to January 3, 2002, the parties filed their briefing, motions, declarations and exhibits regarding the Respondent's summary judgment motion. The filings included the National Shellfish Sanitation Program (NSSP), Guide for the Control of Molluscan Shellfish, Interstate Shellfish Sanitation Conference, 1997.

1.6 On January 10, 2002, the Presiding Officer issued an order continuing the prehearing conference and the hearing dates. Prehearing Order No. 2.

1.7 On February 20, 2002, the Presiding Officer issued an order denying the Respondent's motion for summary judgment and scheduled a prehearing conference. Prehearing Order No. 3.

1.8 On March 25, 2002, the Presiding Officer conducted a prehearing conference and scheduled the hearing for June 17-18, 2002. The Presiding Officer reviewed the parties' witnesses and exhibits and set completion dates for identifying any additional witnesses and exhibits. Prehearing Order No. 4. On May 28, 2002, the Presiding Officer issued an order on review of filings regarding witnesses and exhibits. Prehearing Order No. 5.

1.9 On June 18, 2002, the Presiding Officer granted the Program's motion and continued the hearing to July 29-30, 2002. Prehearing Order No. 6.

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## II. HEARING AND EXHIBITS

2.1 In support of its case in chief, the Program called the following witnesses: Helen Seyferlich; Judy A. Dowell, D.V.M.; Jennifer Tabaldi; Jessie DeLoach; and Marlena Nash. On rebuttal, the Program called: Helen Seyferlich and Jennifer Tabaldi.

2.2 In support of its case in chief, the Respondent called the following witnesses: Richard Sheldon; Ruth Sheldon; and Bryan Roy Sheldon. In rebuttal, Richard Sheldon testified.

2.3 The parties stipulated to the exhibits, Exhibits 1-85, which were admitted. The exhibits were identified in the Exhibit Notebook, pages 1-4. In addition to those exhibits, the parties stipulated that the following documents should be part of the record:

(1) The Model Ordinance of the National Shellfish Sanitation Program (NSSP), Guide for the Control of Molluscan Shellfish, Interstate Shellfish Sanitation Conference, 1997.

(2) Portions of the depositions taken of Helen Seyferlich and Judy Dowell for the following pages: Deposition of Helen Seyferlich pages: 42, 43, 45, 48-49, 50, 63, 66, 67-69, 71, 97-99, 100, 100-102, 103-104, 115, and 119. Deposition of Judy Dowell pages: 16-17, 20-26, 34, 49, 60-61, and 70.

2.4 During the hearing, the Program offered Exhibit 86, but its admission was denied. Exhibit 86 was Daily Unloading Records from Wiegardts & Sons, for dates in 1996 and 1998 (eleven pages).

2.5 Finally, the parties arranged that the Presiding Officer would have a copy of the transcript taken from the first two days of the hearing, July 29-30, 2002. The transcripts were received on September 16, 2002.

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FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND FINAL ORDER - Page 3 of 38

Docket No. 01-06-C-1007SF

**III. ARGUMENT OF THE PARTIES**

3.1 The Program argued that the Initial Order Assessing Penalties should be affirmed. The Program maintained that it acted within its authorities and responsibilities when it assessed civil penalties against the Respondent. Specifically, the Program maintained (1) that the Respondent was licensed as a shellstock shipper, was required to keep records and failed to do so; (2) that the Respondent made material misrepresentations to the Program about shellfish operations and how its shellfish were harvested; and (3) that the Respondent engaged in shellfish operations without a license. Finally, the Program maintained that it provided notice to the Respondent that it was required to keep records. The Program maintained that a notice of correction was not required, because the violations had a probability of placing a person in danger of death or bodily harm.

3.2 Opposing the assessment of civil penalties, the Respondent argued (1) that it made no misrepresentations to the Program; (2) that it did keep records even though it had no duty to do so, because it was acting as a shellfish harvester; and (3) that it was not operating without a license, because it had timely mailed in its license renewal form. In addition, the Respondent moved that the Initial Notice Assessing Penalties be dismissed, because the Program failed to issue a notice of correction required by the rules.

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**IV. FINDINGS OF FACT**

A. Introduction.

4.1 Richard Sheldon, the Respondent, has been the president and principal shareholder of Northern Oyster Company, Inc. (Northern Oyster Company) a business located next to Willapa Bay, Washington. From 1968 to 1971, Richard Sheldon had a license to harvest oysters. Then he closed his business for about 10 years. In the early 1980s, he again obtained a license and re-entered the oyster business. Since then, he has renewed his license annually. He owns two large harvest vessels, the “Northern” and the “May West.”

4.2 The Respondent owns many acres of shellfish beds located in Willapa Bay. His harvest beds are intermixed in a checkerboard pattern with the oyster beds of another Willapa Bay oyster grower, Wiegardt Brothers (Wiegardts). After the Respondent began harvesting oysters in the early 1980s, he made an agreement with Wiegardts for them to do all the harvesting. This would allow the Respondent to use his boats to go crabbing. In March 2000, Brian Sheldon, Richard Sheldon’s son, became the manager of Northern Oyster Company.

4.3 The Program has licensed the Respondent for about twenty (20) years. The Program would annually conduct inspections of the Respondent’s operations. According to the Program’s records, the Respondent was being licensed as a “shellstock shipper.”

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B. Record Keeping Agreement and the 1999 Inspection.

4.4 The Respondent and the Program had an agreement about recordkeeping. Since the Respondent did not do any harvesting and since Wiegardts was their sole customer, the Respondent and the Program agreed that the Program would obtain the harvest activity records from Wiegardts, because their records would be accurate and up to date, and it would be a duplication to obtain records from both companies. The Respondent tended the oyster beds, planted seed, and graveled the beds. The Respondent regularly received bills of lading from Wiegardts for the oysters it harvested.

4.5 Since shellstock shippers were required to keep records, the issue of Wiegardts keeping the records for the Respondent has come up over the years. Once this agreement was explained to each new Program inspector, the Program was satisfied with it and recordkeeping was not an issue.

4.6 Helen Seyferlich, an inspector for the Program, first inspected Northern Oyster Company in July 1999. During this inspection Richard Sheldon informed her that Northern Oyster Company did not harvest any shellfish, because Wiegardts harvested for them. Nevertheless, Ms. Seyferlich informed Richard Sheldon that he should provide those records at the inspection.

4.7 In July 1999, Richard Sheldon knew that Ms. Seyferlich was asking for records, but he assumed that this was a new inspector and that he had explained the agreement before. Based upon prior experience, he assumed that the Program would accept the agreement that he would not need to keep records, because Wiegardts

would have their records. He thought the new Program inspector was in error about this issue.

4.8 The inspection report, dated July 14, 1999, identified the Respondent's two boats stating that they are used to transport seed to its beds and that "Wiegardts harvest for this company – Oysters only – at present time." Regarding the records, the inspection report stated that "Wiegardts harvest records and payments for oyster harvested are the records." The report stated that no Hazard Analysis Critical Control Points Plan (HACCP) was required. Richard Sheldon signed the inspection report. Exhibit 10.

4.9 Judy A. Dowell, D.V.M., is the Section Manager for Licensing and Certification, Office of Food Safety and Shellfish Program's of the Department of Health. Dr. Dowell considered it inappropriate not to require Northern Oyster Company to produce harvest records at the inspection. She testified "[t]hat was our Department being a little bit lax, and they [the Northern Oyster Company] should have been required to keep records for many years."

C. The February 2000 Inspection of Northern Oyster Company.

4.10 The Program was required to conduct two inspections each year, the first at the beginning of the year and the second within 120 days of the license renewal date of September 30<sup>th</sup> of each year. In February 2000, Ms. Seyferlich attempted, but was unable to set up an appointment to inspect the Respondent's premises and boats. When she called Richard Sheldon and attempted to schedule an inspection, Richard Sheldon represented to her that Northern Oyster Company does not harvest any

shellstock, and therefore, there were no premises to inspect.

4.11 Ms. Seyferlich agreed that the inspection for February 2000 could be completed by telephone and followed-up with an inspection report. When she talked on the telephone with Richard Sheldon about her inspection, Ms. Seyferlich asked him for his records. She informed him that if he could fax his records to her, then she could complete the inspection.

4.12 Ms. Seyferlich completed her inspection report and mailed it to Richard Sheldon for his signature. The report was dated February 9, 2000. The inspection report stated: "Your operation doesn't directly harvest any shellstock. It is all done by Wiegardts. They harvest, open, and give you receipts for your product." On the inspection report, Ms. Seyferlich requested that Richard Sheldon fax her the records for the first half of this year and that would suffice for the first inspection. In addition, on the inspection report was a note by Ms. Seyferlich dated March 2, 2000, and it stated that she called Wiegardts and confirmed that the records were there and that this was the first inspection for the year. Exhibit 14.

4.13 Ruth Sheldon, Richard Sheldon's spouse, does the books and paperwork for Northern Oyster Company. When she received the February 2000 inspection report, she wrote on it that "Wiegardts harvest our oysters & deliver to their dock. They have records." Exhibit 14. She sent the inspection report back to the Program. Richard Sheldon did not fax any harvest records to Ms. Seyferlich.

4.14 Although the Program maintained that the Respondent should have been keeping records all along, the Program did not enforce the rules requiring record

keeping. During the hearing, Dr. Dowell testified that the Program was trying to maintain a positive and cooperate working relationship with the Respondent. Since the Respondent was not harvesting, it was appropriate at the February 2000 inspection to give the Respondent more time to produce the records.

D. The Renewal Application Period.

4.15 On July 10, 2000, and on August 9, 2000, the Program sent out renewal applications to the Respondent to renew their license before the current license expired on September 30, 2000.

4.16 Ruth Sheldon received the July 10, 2000 license renewal application. The standard practice was that every year she would complete the forms and her husband would sign them. While she was filling out the forms for her husband to sign, she noticed that the paperwork was different, so she gave it to him to look at.

4.17 Richard Sheldon did not sign the renewal application on July 25, 2000, which is the date that Ruth Sheldon wrote. Exhibit 34. When Richard Sheldon reviewed the renewal application, he noticed that it had harvest area records attached and noticed that the descriptions for the harvest beds were not accurate. To correct the harvest records, Richard Sheldon had to go out and take a look at the beds. It took a few days, because he could only do so much with one tide run. He also added acreage for the anticipated clam business his son was planning. He kept a copy of his harvest records and his application.

4.18 Richard Sheldon wrote the check for the renewal application, but he did not record the check in the check registrar. Ruth Sheldon wrote in the check registrar

the check number (check no. 12332), the amount (\$440.00), the date (July 25, 2000), and to whom the check was written (Department of Health). Exhibit 22. The check has not been cashed.

4.19 Richard Sheldon mailed the renewal application, the check and the harvest area records. He mailed it at the Ocean Park Post Office. It was stamped. He has no doubt that he mailed it. The license renewal application with materials has not been returned by the post office. Richard Sheldon did not do anything with the Program's renewal notice and reminder sent August 9, 2000, because he had already sent in his application.

4.20 Between August 9, 2000 and September 20, 2000, Richard Sheldon was not contacted for an inspection. He was available for an inspection and has an open invitation for the state inspectors to come on board his boat at anytime, whether he was there or not.

4.21 There was conflicting testimony regarding a telephone conversation between Jennifer Talbaldi and Richard Sheldon. Jennifer Talbaldi is the director of Food and Safety Program, Department of Health. Richard Sheldon testified that on September 20, 2000, he called Ms. Tabaldi and asked her about the status of his license renewal. At that time, he had not yet been inspected. She informed him that it might hold up his license. He responded that he had already sent the application in and he was not going to hold up his harvesting.

4.22 In contrast to Richard Sheldon's testimony, Ms. Talbaldi testified that she talked to Richard Sheldon about his licensing issue not in September 2000, but in

October 2000. She testified that he understood he did not have a license at that point. She told him the Program would look into it. She remembered Richard Sheldon telling her that he had given his son, Brian Sheldon, instructions to keep on with the business, even though they did not have a license in hand. She informed him that this was his choice. Ms. Talbaldi could not recall if Richard Sheldon told her he mailed in his application to the Program.

4.23 Telephone records verify that on September 20, 2000, there were two phone calls (AT&T) from Richard Sheldon's house to Olympia, at Ms. Talbaldi's telephone number (for 8 minutes 54 seconds) and at Ms. Seyferlich's number (for 2 minutes and 22 seconds). Exhibit 84. These records corroborate Richard Sheldon's testimony that on September 20, 2000, he called Ms. Seyferlich, about not having the inspection. He testified that Ms. Seyferlich informed him that there were new regulations and that they needed to have better records for the oyster beds that he owned.

4.24 On October 2, 2000, the Program mailed a third renewal notice informing the Respondent that he would be in violation of RCW 69.30 if he continued to operate after September 30, 2000, because he has not renewed his license and he would be operating without a valid license.

4.25 On October 10, 2000, the Program received a renewal application from the Respondent, letter dated October 4, 2000. Richard Sheldon included a copy of the original application. He kept a duplicate, because of all the changes he had made on the harvest records. He wanted to be sure he was harvesting the correct beds.

4.26 Marlena Nash is the Revenue Supervisor for the Department of Health. She described how checks are received by the Program. She explained that the checks and slips are run through a remittance processor. There is a program called Caprsice that can search for a specific check amount, etc. There is another program called Crystal Reports that can do searches as well. Using the two programs together, the Program can double check on its method to verify whether a check is received.

4.27 In this case, Ms. Nash searched for the Respondent's check. She found only one check from the Respondent and it was submitted in October 2000. The Program found a check dated October 5, 2000, written to Department of Health for the amount of \$440, and signed by Ruth Sheldon, Check No. 12492. The Program also reviewed the checks that came in without use of the remittance processor. There was no payment from the Respondent from July through September 2000. Marlena Nash testified her program did not process a check from Northern Oyster Company. She opined that the Program did not receive the check.

4.28 Between October 16, 2000 and November 13, 2000, there were attempted communications between Richard Sheldon and Ms. Seyferlich. On October 16, 2000, Ms. Seyferlich left a message to meet with him at a time when she could review the Respondent's records. On October 17, 2000, Richard Sheldon called her back and left a message. During the hearing, both parties maintained that the other party was not properly returning calls.

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E. The November 15, 2000 Inspection.

4.29 Brian Sheldon's first involvement with the Program's inspector was November 14, 2000, when he returned a phone call from Ms. Seyferlich. During this telephone discussion, Ms. Seyferlich informed him that she needed to conduct an inspection and to review the harvest records. She explained to him the reason for the records. In response, Brian Sheldon had informed Ms. Seyferlich that he had started harvesting and that he wanted to know what he could do about this situation. Brian Sheldon agreed to an inspection of Northern Oyster Company's premises for November 15, 2000.

4.30 Ms. Seyferlich informed Brian Sheldon that he should make a full disclosure of all their activities. When they discussed enforcement, Ms. Seyferlich mentioned a notice of correction and explained what it was. It could be used when there was a misunderstanding in communications. Ms. Seyferlich wanted to see a harvest tag that he would be using. She also wanted a letter from Richard Sheldon that Brian Sheldon was now the contact person for the Program.

4.31 Brian Sheldon told Ms. Seyferlich that he did not have the harvest records from Wiegardts, that he would write a position letter describing their activities, and that he would provide a summary in the form she described. Brian Sheldon told her that the appointment should be early as possible in the morning, because he was going to be harvesting that late morning. He testified that Ms. Seyferlich did not object if the records did not include the Wiegardts records. The next morning he faxed the letter to Ms. Seyferlich and called to make sure that he had everything for his license inspection.

4.32 Brian Sheldon started harvesting in March 2000, because there was a surplus in their beds that Wiegardts could not use. Brian Sheldon kept records of all shellfish harvested and sold; that is, he recorded the harvest dates, the purchasers, and beds harvested from. He used a Daytimer, which was a calendar, for his records and he recorded the harvests at the time it occurred. Exhibit 16.

4.33 The inspection occurred on November 15, 2000, and it took about two and one-half hours. As agreed, Brian Sheldon provided at the inspection, a position letter, a copy of a harvest tag, and a summary of his harvest activities (the Summary). He also had a letter from Richard Sheldon that Brian Sheldon was now the contact person for Northern Oyster Company.

4.34 In his position letter to the Program dated November 15, 2000, Brian Sheldon restated Northern Oyster Company's understanding:

It has been our understanding for these many years that Northern was not required to maintain records of these harvests [to Wiegardts], as this would effectively result in double reporting. Additionally, since we have not been harvesting and are not required to have a HACCP, our vessels have been exempt from inspection.

Exhibit 41. After he stated the previous understanding between Northern Oyster Company and the Program, he disclosed in the next paragraph of this letter his company's new activities:

This past year we began shipping a limited quantity of shellfish to other customers. In preparation for this I reviewed the Model Ordinance and found that I did need to track these harvests using harvest records as well as a shipping tag. I am delivering a summary of these records to you, along with a sample of our harvest tags for your records.

Exhibit 41.

4.35 The letter to the Program dated November 15, 2000 was representing that not only was the Respondent harvesting at the time of the inspection, but also that the Respondent had been harvesting. In fact, the conversation at the inspection stopped, because the crew showed up so the boat could go out and harvest.

4.36 In addition to the letter dated November 15, 2000, Brian Sheldon also provided on an Excel spreadsheet a description of his harvest activities for the past six months, from March 16, 2000 through October 2, 2000 (the Summary). There were 21 sales of shellfish to operators other than Wiegardts. Exhibit 41.

4.37 After receiving the two letters along with the Summary, Ms. Seyferlich completed her inspection of the Northern and the Mae West and completed her inspection report. On the report, Ms. Seyferlich stated that she reviewed harvest records and stated that there were no deficiencies. It also stated:

The new manager agrees that the Model Ordinance requires the company to possess a license before harvesting each year. And understands there is (2) inspections a year for a SS license and the review of all harvest and sales records are a part of the requirements for licensure.

. . .

Inspector will provide the new manager with a vessel septic maintenance agreement and SSOP forms.

Exhibit 40. Brian Sheldon signed the inspection report, dated November 15, 2000, in the presence of Ms. Seyferlich.

4.38 There was conflicting testimony regarding what occurred at the end of the inspection. Brian Sheldon testified that Ms. Seyferlich told him that everything looked fine, and that she would fax his license that afternoon or the next morning. In contrast, Ms. Seyferlich testified that she told Brian Sheldon that she wanted to complete the

inspection as soon as possible. She denied that she told him that she had the authority to actually issue to him the license. Richard Sheldon also talked with Ms. Seyferlich at the end of the inspection. He testified that Ms. Seyferlich said everything was fine and told him that they would get their license almost immediately.

4.39 When Ms. Seyferlich returned to her office after the inspection on November 15, 2000, she realized that the Respondent needed a Plan of Operation to cover his new activities on his license. On November 17, 2000, Ms. Seyferlich faxed to Brian Sheldon a Plan Of Operation form. When she received it back, Ms. Seyferlich noticed some discrepancies, such as the Mae West being used for harvesting. She discussed with Judy Dowell about doing a Notice of Correction.

4.40 On November 17, 2000, Brian Sheldon received and completed the Plan of Operation form and faxed it back that day. During the inspection on November 15, 2000, Ms. Seyferlich had not mentioned that he needed to submit a Plan of Operation form. Since they were using their vessels for harvesting, he learned that he needed to update their forms to include a Plan of Operation.

4.41 On November 29, 2000, Brian Sheldon called Ms. Seyferlich to inquire why he had not received his license. On November 29, 2000, he received a fax to complete a Standard Sanitary Operating Procedures (SSOP). It was confusing, because he did not get a form, but a copy of someone else's SSOP. There were no instructions. It was presented as if the Respondent should have such a procedure in place for his crew. He completed a SSOP and returned it on November 29, 2000.

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4.42 On December 5, 2000 and after Brian Sheldon called the Program, the Program issued to the Respondent a Shellfish Operation License and Certificate of Approval.

F. The Program's Investigation and the Initial Order Assessing Penalties.

4.43 In December 2000, the Program conducted a quarterly inspection of Wiegardts, who has a shucker packer license. During this inspection, Ms. Seyferlich found a tag on a pallet of Northern Oyster Company's product harvested on November 29, 2000. Ms. Seyferlich was informed that it was brought in my Northern Oyster Company. She reviewed Wiegardts harvest and sales records, which showed that the Mae West delivered and unloaded two loads of product on November 29, 2000. Exhibit 46. The records also revealed that on May 17, 2000, the Mae West unloaded 400 bushels of product from the Respondent's beds. Exhibit 17.

4.44 The Program conducted an investigation and obtained records that the Respondent had been delivering oysters to Wiegardts, to Nisbet Oyster Company (Nisbet), to Pacific Oyster Company (Pacific), and to National Shellfish Company (National). Some of these oyster sales were not on the Summary provided by Brian Sheldon on November 15, 2000.

4.45 As a result of its investigation, the Program in its Initial Order Assessing Penalties stated that it had received documentation that Northern Oyster Company failed to produce complete and accurate records of harvest activities for the following dates:

- |    |              |                       |
|----|--------------|-----------------------|
| 1. | May 17, 2000 | delivery to Wiegardts |
| 2. | May 18, 2000 | delivery to Nisbet    |

- |    |                    |                       |
|----|--------------------|-----------------------|
| 3. | May 24, 2000       | delivery to Wiegardts |
| 4. | June 1, 2000       | delivery to Wiegardts |
| 5. | June 8, 2000       | delivery to Wiegardts |
| 6. | September 8, 2000  | delivery to Nisbet    |
| 7. | September 14, 2000 | delivery to Wiegardts |
| 8. | October 31, 2000   | delivery to National  |
| 9. | November 13, 2000  | delivery to Nisbet    |

Initial Order Assessing Penalties, Paragraph 1.24. Since the Brian Sheldon did not include these deliveries in his Summary, the Program alleged that the Respondent failed to keep adequate records.

4.46 The harvest dates in the Summary were from Brian Sheldon's Daytimer. Brian Sheldon explained how he completed his Summary. At the time, he had told Ms. Seyferlich that he would provide a summary of sales to customers other than Wiegardts. Ms. Seyferlich did not ask him to see the original records. Brian Sheldon stated that Ms. Seyferlich was comfortable to go along with the past history that Wiegardts kept the harvests delivered to them and there would be no need to report those harvests. In fact, Brian Sheldon had the deliveries to Wiegardts in his Daytimer, even though there was a one-day discrepancy in his Daytimer. The deliveries to Nisbet were also in the Daytimer.

4.47 Brian Sheldon explained the omission from his Summary of the delivery to National Oyster Company on October 31, 2000. This delivery was in his Daytimer, but it was not in the Summary, because he must have overlooked it. It was an error on his part. However, when he discovered it, he notified the Program by email. Exhibit 51.

4.48 Brian Sheldon also explained the two date errors in the Summary. The Summary was on an Excel Spreadsheet. The last two harvest entry dates should have

been 11/9/00 and 11/12/00 instead of 10/9/00 and 10/12/00. The error seemed obvious, because one of the October dates had already been stated. When he noticed the discrepancy during a conference call with Ms. Seyferlich and Jessie DeLoach, he informed them of the two date errors.

4.49 On March 30, 2001, Brian Sheldon sent a memo to the Program. Attached to this memo was a complete and detailed account of Northern Oyster Company's harvest and deliveries (the March 2001 Harvest Record). The March 2001 Harvest Record included harvests by Northern Oyster Company and by Wiegardts to companies identified as Nisbet, Pacific and National. The harvest dates were from March 16, 2000 to January 31, 2001. The Program requested this report. In this March 2001 Harvest Record, Brian Sheldon added a shipping date column in addition to the harvest date. Exhibit 51. This March 2001 Harvest Record was more detailed than the Summary. After the Program inspected Northern Oyster Company and reviewed his records on March 29, 2001, there were no deficiencies noted. Exhibit 50.

4.50 Brian Sheldon developed with Fritz Wiegardts a method to record all its harvests of Northern Oyster Company beds. In the past he received an accounting from Wiegardts by number, but it did not give the dates of the harvests.

4.51 On June 20, 2001, the Program served upon the Respondent the Initial Order Assessing Penalties. Ms. Talbaldi testified that the Program's general approach to compliance and enforcement has been education first and enforcement second. However, in this situation, the Program pointed out that the penalty was issued, because the Respondent knew he did not have a license, the Respondent did not

accurately submit records and the Respondent misrepresented what he was doing. Dr. Dowell, however, admitted that there was no regulation or provision in the model code or any requirement that puts a duty on the Respondent to notify the Program when it started to actively harvest.

4.52 Further, in a situation when a license has lapsed, when the operator thought it had been sent in and when Program had not received it, Ms. Talbaldi testified that the Program would normally respond with a Notice of Correction. There was data to substantiate the normal response by the Program. For the license year 1998-1999, the Program had 100 late shellfish operation license renewals. For the license year 1999-2000, the Program had 89 late shellfish license renewals. For the license year 2000-2001, the Program had 68 late shellfish license renewals, which included Northern Oyster Company. Exhibit 57. In spite of the high number of late shellfish license renewals, this has been the only penalty assessment given by the Program in the last six years to a licensee for harvesting in a period between when the license expired and their license was renewed.

4.53 The Program presented testimony that in this situation they could issue a notice of penalty without first issuing a notice of correction, because of the significant health concerns. The Program relies on accurate recordkeeping, because it is important to know where the product comes from in case of a paralytic shellfish poisoning (PSP). A PSP closure is due to a potent toxin and it is a danger to the public, with health consequences ranging from a mild gastroenteritis to death. In Washington, Program sees PSP levels high enough to cause people to die. There was a PSP

closure in 1997 and for a period the entire Willapa Bay was closed. There is also the public health concern of domoic acid in the water when it warms up or a vibrio parahaemolyticus (a marine bacteria) outbreak.

4.54 The Program maintained that the Respondent operated without a license between October 9, 2000 and November 29, 2000. The Program maintained that if a PSP closure were to occur in Willapa Bay, the Program would not have been able to notify the Respondent about the closure after September 30, 2000, because Northern Oyster Company was not licensed.

4.55 In response, the Respondent presented testimony that the Program would have known to notify the Respondent, because Ms. Tabaldi, Dr. Dowell and Ms. Seyferlich, each personally knew that the Respondent was continuing to harvest and were anticipating that their license would be renewed. Further, Wiegardts participates in a monitoring program to deliver product to the Department for PSP testing. This is product from the Stackpole area of Willapa Bay, where the Respondent has its oyster beds. If a PSP poisoning were disclosed, then Wiegardts would be the first to be notified. Finally, the Respondent's oyster beds were on the harvest area records kept by the Program.

## **V CONCLUSIONS OF LAW**

### **A. Jurisdiction.**

5.1 The Department of Health, Office of Food Safety and Shellfish Programs, has jurisdiction over the Respondent, Northern Oyster Company.

5.2 The Program issued an Initial Order Assessing Penalties against the Respondent for violations under chapter 69.30 RCW and chapter 246-282 WAC. The rules cited in this order were pursuant to chapter 246-282 WAC effective on October 1, 1998. New rules for Chapter 246-282 WAC, which were adopted and became effective March 8, 2001, were not applied to the conclusions in this Order.

5.3 Shellfish licensees are also required to comply with the 1997 National Shellfish Sanitation Program (1997 NSSP) Model Ordinance, published by the United States Department of Health and Human Services, Public Health Service, Food and Drug Administration. WAC 246-282-005(1)(a).

5.4 The Program has the burden to prove the alleged factual basis of the Initial Order Assessing Penalties by a preponderance of the evidence.

WAC 246-10-606.

B. Issue of Failure to Maintain or Produce Records.

5.5 The Initial Order Assessing Penalties, paragraph 2.4, alleged that the respondent failed to maintain and produce adequate records of shellfish operations over the past six months in violation of RCW 69.30.110 and WAC 246-282-080(4) and (5). The Initial Order Assessing Penalties referenced two inspection times and alleged that the Respondent failed to provide adequate records. The inspection dates were February 8, 2000 and November 15, 2000.

5.6 The Program argued that the Respondent failed to keep adequate records. The Program argued that the Respondent was regulated as a shellstock-shipper and was required to keep records. However, for a period of time, the Program

allowed the Respondent to rely on Wiegardts to keep the records of shellfish harvests from the Respondent's beds based upon the understanding that the Respondent did nothing but grow shellfish.

5.7 The Respondent argued that the Program regulated the Respondent as a shellfish “harvester” and as such it had no duty to keep records. The definition of harvester is in the Model Ordinance Rules. Further, the Respondent asserted that it did keep records and turned over only a summary of the records to the Program, because that was what the Program requested. The Respondent argued that the Program in fact never did ask for the underlying records, which it kept.

5.8 Shellstock shippers are required to keep records:

All shippers, reshippers, packers, repackers, and wholesalers shall keep an accurate record of all lots of shellfish received, shipped and sold. Retailers shall keep a record of all lots received. Such records shall be kept on file for a minimum of six months.

WAC 246-282-080(4) (Emphasis added). In addition, harvester-shippers are required to keep records:

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

WAC 246-282-080(5) (Emphasis added).

5.9 The shellstock shipper and the harvester-shipper are required to keep records. In this case, the Program was regulating the Respondent as a shellstock shipper. The Respondent was aware of this status, because it was referring the Program to Wiegardts to check its records. The Respondent was paying fees and the inspection reports identified Northern Oyster Company as a shellstock shipper.

5.10 The Program has rules regarding compliance and deficiencies with shellfish operations. In particular, the rules provide for a written order for correcting a violation.

If, after the inspection of a shellfish operation, the director finds such operation fails to comply with the requirements of the law, rules and regulations, he or she shall issue to the person in charge of the shellfish operation a written order specifying the manner in which the operation fails to comply with the law, rules and regulations and which sets out a specific and reasonable period of time for correction of the violations.

WAC 246-282-110(2)(b) (Emphasis added). The word "shall" in a statute is an imperative and creates a duty. State v. Dodd, 120 Wn. 2d 1, 14, 838 P.2d 86 (1992).

5.11 After the July 1999 inspection, there was no written order regarding record deficiencies. For the inspection in February 2000, the Respondent understood that he did not need to keep records, while the inspector was asking for his harvest records. The inspection for February 2000 was completed by telephone and there was a follow-up report dated February 9, 2000. In this report, the Program asked to see the Respondent's records. In response, the Respondent wrote on the report that "Wiegardts harvest our oysters + deliver to their dock. They have the records." Thus, the verbal misunderstanding between the parties manifested itself again on the inspection reports; that is, the inspection reports pointed out that the Respondent and Ms. Seyferlich were in disagreement on the requirement whether he had to keep harvest records.

5.12 The verbal requests from the inspector or the notes on the inspection report without more did not constitute notification under WAC 246-282-110(2)(b) that the Respondent had to provide records different than his previous practice accepted by

the Program. If the Program were to rely on its inspection report as written order pursuant to WAC 246-282-110(2)(b), then it should have completed its own inspection forms by (1) stating the rule being violated (the deficiency), by (2) designating the “plan” for completion (plan of correction), and by (3) providing a “date” of completion for the non-compliance (date of completion). See Exhibits 10 and 14. Thus, the Program failed in February 2000 inspection reports to provide a written order in compliance with WAC 246-282-110(2)(b).

5.13 The fact that the Program failed to provide the Respondent a written order both in July 1999 and in February 2000 regarding record deficiencies pursuant to WAC 246-282-110(2)(b) was significant. For the November 2000 inspection, the Respondent did not have sufficient notice that he had to make changes regarding the keeping of harvest records. When Brian Sheldon was asked to produce the company’s records, he produced a summary of his records to comply with the Program’s verbal request. For the November 2000 inspection, the Program during a telephone call a day before the inspection asked Brian Sheldon to produce the Northern Oyster Company’s harvest records.

5.14 Although the Summary was incomplete, Brian Sheldon provided adequate explanation for the errors, discrepancies and omissions. The Summary did not include harvests to Wiegardts, because based upon the prior understanding regarding the records. That is, Wiegardts had the harvest records, and the Respondent did not need to keep them. Some of the discrepancies in the Summary were due to typographical errors in the Excel Spreadsheet. There were also discrepancies of one day between

harvest date and shipping date, because of the tide conditions. The harvesting was completed the night before and the packer picked up the oysters the next morning. When Brian Sheldon discovered the errors or omissions, he promptly reported it to the Program.

5.15 Not only was the Summary of harvest record sufficient at the time, but also the Respondent's Daytimer was in compliance with WAC 246-282-080(4). Brian Sheldon recorded the harvest dates, recorded who bought the harvest, recorded the beds that were harvested. He kept records of all shellfish harvested and sold. The evidence showed that the Daytimer contained the harvest activities to Wiegardts, to Nisbet and to National. These were the harvest activities that the Program maintained in its Initial Order Assessing Penalties were absent in the Summary provided to it on November 15, 2000.

5.16 The Program failed to prove by a preponderance of the evidence that under WAC 246-282-080(4) & (5), the respondent failed to maintain and produce adequate records of shellfish operations over the past six months for the February 2000 inspection and the November 2000 inspection. The Initial Order Assessing Penalties assessing penalties in the amount of \$1,800.00 against the Respondent for failing to keep adequate records should be reversed.

C. Issue of Respondent's Alleged Misrepresentations.

5.17 In the Initial Order Assessing Penalties, the Program assessed a penalty for the Respondent materially misrepresenting the nature of its operations both in maintaining its license and during its relicensing in October and November 2000 in

violation of RCW 69.30.080 and WAC 246-282-090(2).

5.18 The Presiding Officer considered the parties' arguments. The Program maintained that the Respondent misled the Program by its statements that Wiegardts had all the records, because only Wiegardts harvested shellfish. The Program presented evidence that the Respondent had been harvesting and delivering the product to Wiegardts' dock and to other shellfish companies. In opposition to the Program's arguments, the Respondent argued that there are no legal grounds for imposing penalties for "misrepresentation." The Respondent also argued that the statements made by him were accurate at the time and were responsive to the questions asked or to the time period referred to.

5.19 The statute, RCW 69.30.080, and the rule, WAC 246-282-090(2), cited by the Program do not specifically reference authority to impose a penalty for misrepresentation. However, chapter 69.30 RCW, does address civil penalties for violation of rules adopted under this chapter:

In addition to any other penalty provided by law, every person who violates standards set forth in this chapter or rules adopted under RCW 69.30.030 is subject to a penalty of not more than five hundred dollars per day for every violation. Every violation is a separate and distinct offense. In case of a continuing violation, every day's continuance is a separate and distinct violation. Every person who, through an act of commission or omission, procures, aids, or abets in the violation is in violation of this section and is subject to the penalty provided in this section.

RCW 69.30.150(1) (Emphasis added). See RCW 69.30.145.

5.20 The Presiding Officer concludes that the Program has the authority to issue civil penalties for violations of rules adopted under RCW 69.30.030. Further, the Presiding Officer concludes that the Program has the authority to issue a civil penalty to

a person for making misrepresentations that violate standards set forth under RCW 69.30. Moreover, depending on the facts, such actions of misrepresentations could be an act of commission or omission, aiding, or abetting in the violation and would be subject to the penalty provided under RCW 69.30.150.

5.21 In this case, the Initial Order Assessing Penalties identified two periods of time for the alleged misrepresentation. First, the Program maintained that that Respondent made misrepresentations during the inspection in February 2000. At that time, the evidence does not indicate that the Respondent was harvesting. The Presiding Officer concludes that there was no misrepresentation, because of the understanding between the parties that Wiegardts had the records and the Program could go to Wiegardts to see them.

5.22 The second period of time for the alleged misrepresentation was in the fall of 2000, specifically from October through November 2000. Prior to scheduling the inspection on November 15, 2000, Brian Sheldon informed Ms. Seyferlich that he had recently been managing the business and that he had been harvesting. Ms. Seyferlich informed him that he should make a full disclosure of what he had been doing and that the Program would probably issue a notice of correction.

5.23 The evidence shows that Brian Sheldon attempted to comply with the Program's requests about his harvesting. For the inspection on November 15, 2000, Brian Sheldon provided the Summary describing his harvests and sales. There were errors in the Summary, but once he discovered them, he promptly reported them to the Program. There were no misrepresentations, because of the Respondent's Summary.

5.24 Furthermore, as requested by the Program, Brian Sheldon provided in the March 2001 Harvest Record a complete and detailed account of Northern Oyster Company's harvests, which was more detailed than the Summary provided on November 15, 2000. The March 2001 Harvest Record included harvests not only to Wiegardts, but also to Nisbet, Pacific and National. The harvest dates were from March 16, 2000 to January 31, 2001. In this March 2001 Harvest Record, Brian Sheldon added a shipping date column in addition to the harvest date. This effort was made to clarify any discrepancies between the harvest date and the delivery dates. This discrepancy had been a matter of concern by the Program.

5.25 Brian Sheldon did not make any misrepresentations in his letter to the Respondent dated November 15, 2000. This letter confirmed a conversation he had with Ms. Seyferlich the day before when she suggested that he should make a full disclose of what he had been doing. Brian Sheldon did not materially misrepresent Northern Oyster Company's harvest activities in his letter of November 15, 2000.

5.26 The Program allegations of misrepresentation cannot be based upon its own failure to comply with WAC 246-282-110(2). That is, by failing to properly notify the Respondent of its requirement to have and produce the records, the Program created misunderstandings regarding the recordkeeping requirements. In the meantime, Brian Sheldon had the deliveries to Wiegardts and to other businesses in his Daytimer and, when the Program requested him to produce records of his harvest activities, he attempted to comply.

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5.27 Furthermore, Northern Oyster Company was licensed as a shellstock shipper. The Program admitted that there was no regulation or provision in the model code that put a duty on the Respondent to notify the Program when it started or stopped harvesting. At the November 15, 2000 inspection, Brian Sheldon reported that he was harvesting and his boats were inspected for that purpose. In fact, the day of the inspection on November 15, 2000, Brian Sheldon communicated with the Program's inspector his desire to schedule the inspection as early as possible so that his boats could go out and harvest later that morning.

5.28 The Program failed to prove by a preponderance of the evidence that under RCW 69.30.150 the Respondent materially misrepresented the nature of its operations both in maintaining its license and during its relicensing in October and November 2000. The Initial Order Assessing Penalties assessing penalties in the amount of \$400.00 against the Respondent for materially misrepresenting the nature of its operations should be reversed.

5.29 Furthermore, the Respondent should have been allowed the opportunity to make corrections once notified of a deficiency without the issuance of a penalty. Allowing this opportunity is consistent with legislative findings under Chapter 43.05 RCW, Technical Assistance Programs:

The legislature finds that, due to the volume and complexity of laws and rules it is appropriate for regulatory agencies to adopt programs and policies that encourage voluntary compliance by those affected by specific rules. The legislature recognizes that a cooperative partnership between agencies and regulated parties that emphasizes education and assistance before the imposition of penalties will achieve greater compliance with laws and rules and that most individuals and businesses who are subject to regulation will attempt to comply with the law, particularly if they are given sufficient information. In this

context, enforcement should assure that the majority of a regulated community that complies with the law are not placed at a competitive disadvantage and that a continuing failure to comply that is within the control of a party who has received technical assistance is considered by an agency when it determines the amount of any civil penalty that is issued.

RCW 43.05.005 (Emphasis added).

5.30 The legislative findings and recognition in RCW 43.05.005 support the Respondent's case that he was attempting to comply with the regulatory requirements once he had received sufficient notice about what was required. In this case, the Program failed to provide a written order clarifying the Program's change in its regulatory requirements when it was requesting the Respondent to keep accurate records of harvesting activities. WAC 246-282-110(2)(b).

D. Issue of Notice of Correction.

5.31 The Respondent argued that the Program was required, but failed, to issue a written notice of correction. RCW 43.05.110. Under the statute on Technical Assistance Programs, the agency has the authority to issue a civil penalty without having first issued a notice of correction under certain conditions:

The department of agriculture, fish and wildlife, health, licensing, or natural resources may issue a civil penalty provided for by law without first issuing a notice of correction if: (1) The person has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule or has been given previous notice of the same or similar type of violation of the same statute or rule; or (2) compliance is not achieved by the date established by the department in a previously issued notice of correction, if the department has responded to any request for review of such date by reaffirming the original date or establishing a new date; [or] (3) the violation has a probability of placing a person in danger of death or bodily harm, has a probability of causing more than minor environmental harm, or has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars; or (4) the violation was committed by a business that employed fifty or more employees on at least one day in each of the preceding twelve

months. In addition, the department of fish and wildlife may issue a civil penalty provided for by law without first issuing a notice of correction for a violation of any rule dealing with seasons, catch or bag limits, gear types, or geographical areas for fish or wildlife removal, reporting, or disposal.

This section does not apply to the civil penalties imposed under RCW 82.38.170(13).

RCW 43.05.110 (Emphasis Added).

5.32 In this case, after the inspection on February 9, 2000, and the parties' resulting communications, the Program should have issued a notice of correction. WAC 246-282-110(2). This was not a time when the exception to RCW 43.05.110 would apply. That is, the Respondent's failure to produce its records would not have the probability of placing persons in danger of death or bodily harm. At that time, the Program would have obtained the harvest records from Wiegardts in case of a product recall.

5.33 In December 2000 when the Program discovered oysters harvested by Northern Oyster Company at Wiegardts and at Nisbet, the Program alleged that the Respondent had failed to keep adequate records and had made misrepresentations. The Program's argued that a notice of correction would serve no purpose, because the alleged violations were not a result of an inspection and would have the probability of placing persons in danger of death or bodily harm.

5.34 The Presiding Officer did not find the Program's argument persuasive. In December 2000, the Program knew that the Respondent was harvesting and had been inspected as a shellstock shipper at the license renewal inspection. Moreover, Brian Sheldon had disclosed that he had been harvesting and had provided a Summary. If a product recall were to occur, the Program could have notified the Respondent of the

recall and seek information of its harvests for recall of the product. The Daytimer kept by Brian Sheldon had the necessary information. In addition, Wiegardts had records of harvests it received from the Respondent's oyster beds.

5.35 These Conclusions of Law do not downplay the potential danger to the public if a PSP outbreak were to occur in Willapa Bay. It is vitally important that the Program be able to respond to protect the public consumer. However, the evidence showed that a notice of correction could have been issued and that there were sufficient safeguards in place if a PSP outbreak had occurred. Finally, during testimony, the Program indicated that except for the misrepresentations, it would have normally issued a notice of correction. Here, there were no misrepresentations, so the normal practice for the Program would have been to issue a notice of correction.

5.36 Thus, the Program failed to prove that it was not required to issue a notice of correction under the exception provided in RCW 43.05.110; that is, a notice of correction pursuant to RCW 43.05.110 and WAC 246-282-110(2) should have been issued, before any penalty assessment.

E. Issue of Respondent Engaging in Shellfish Operations Without a License.

5.37 The Initial Order Assessing Penalties assessed a penalty against the Respondent for continuing to operate its shellfish operations after its license had expired and before it had become recertified in violation of RCW 69.30.060, WAC 246-282-090, and the 1997 NSSP Model Ordinances, Chapter VIII @ .01a and Chapter X @ .04a.

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5.38 The Respondent was required to have a Shellfish Operation License and Certificate of Approval before engaging in any shellfish harvesting activities.

RCW 69.30.060. RCW 69.30.110. Further, the Respondent's is required to have a valid license under the 1997 NSSP Model Ordinances. See 1997 NSSP, Model Ordinance, Chapter VIII @ .1A, and Chapter X @ .04A.

5.39 The Program maintained that the Respondent did not send in its application for renewal until October 10, 2000. It argued that the Respondent illegally harvests shellfish after its license expired on September 30, 2000 and before its license was renewed on December 5, 2000. The Program also argued that even if the Respondent's application were timely, then the Respondent, as a shellstock-shipper, had not made a sufficient application for renewal. Thus, the Program assessed a penalty against the Respondent for 12 incidents of engaging in harvest activities without a license.

5.40 The Revised Code of Washington permits a licensee to continue to engage in an activity of continuing nature if it had made a timely and sufficient application for the renewal:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, an existing full, temporary, or provisional license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

RCW 34.05.422(3). In this case, the Respondent continued to engage in shellfish harvesting activities on the basis that it had made a timely and sufficient application and while it was waiting for the Program to make a final determination on its application.

5.41 Each party argued that the evidence supported a presumption in its favor. The Respondent maintained that since he mailed the renewal application, there is a presumption that in this case the Program had received it. Kaiser Aluminum and Chemical Corp. v. Department of Labor and Industries, 57 Wn. App. 886, 790 P.2d 125 (1990), citing Avgerinon v. First Guar. Bank, 142 Wash. 73, 78, 252 P. 535 (1927). The Program maintained that it provided sufficient evidence to rebut the presumption. Ault v. Interstate Savings & Loan Ass'n., 15 Wash. 627, 47 Pac. 13 (1896). Tossoni v. Department of Retirement Systems, 145 Wn.2d 1030, 42 P. 3d 975, *review denied*, March 5, 2002.

5.42 Although the cases cited by the parties support presumptions in their favor, the evidence supported a presumption here in the Respondent's favor. The Program's evidence that the renewal application was not timely received was insufficient to overcome the Respondent's evidence and the testimony of Richard Sheldon that he personally mailed the renewal application.

5.43 The Respondent's testimony supports his contention that he made a timely application. He stated that he had the application and it took him several days to complete it, because he had to correct the description of the harvest area records identifying his oyster beds. The harvest area records were part of the application. To correct the records, the Respondent, in accordance with the tide conditions, had to physically go out to his oyster beds and confirm their locations. He kept a copy of the harvest area record. The Respondent also identified the post office where he personally mailed the renewal application with the correct addressed letter and stamps.

He knew that he had mailed the license renewal form and fee before the second renewal notice, which he received around August 9, 2000. The second renewal notice notified him to disregard it if he had already submitted his renewal application.

5.44 Richard Sheldon's testimony was credible. RCW 34.05.461(3). His testimony was candid and he showed no hesitancy in his assertions. Further, his credibility was bolstered by the evidence that he had made a phone call to Ms. Tabaldi on September 20, 2000, which was two weeks before he received a letter from the Program notifying him that his license had expired. The telephone records verify that he had this conversation with her. Whether the conversation was for inquiring why he had not received his license or why there has not been an inspection, the discussion concerned his license status. The time and nature of this conversation supports his credibility that he had submitted his renewal application, which he had done annually for the past twenty years.

5.45 The circumstantial evidence also supports the Respondent's contention that he timely mailed in his application. The Respondent has a check register showing that a check, dated July 25, 2000, was made out to the Department of Health for the amount of \$440.00 (check no. 12332). Exhibit 22. The Respondent has been licensed for the past 20 years and the license renewal was part of the business of his company every year.

5.46 The Respondent's conduct after receiving the expiration notice also confirmed that he submitted a timely application. Richard Sheldon sent in a second application and check immediately after he was notified that his license had expired.

After the he received a letter from the Program dated October 2, 2000, he sent a letter dated October 4, 2000 informing the Program that he had already submitted his application, but was submitting another one.

5.47 Finally, the evidence supports the Program's normal practice of issuing a notice of correction when addressing the situation when the licensee maintains that a renewal notice had been sent and the Program records showed that it was not received. In this case, there was no misrepresentation by the Respondent and consistent with this Program's normal practice in this situation, the Program should have issued a notice of correction.

5.48 Overall, the evidence supports the conclusion that under RCW 34.05.422(3), the Respondent filed a timely and sufficient renewal application for a shellstock shipper license, which he renews annually. The Respondent's application was sufficient, because the Respondent submitted the documents required at the time. This evidence provided by the Respondent outweighed the Program's evidence that the renewal application was not timely received. The Respondent's license should not have expired until the Program had finally determined the renewal application.

5.49 The Program failed to prove by a preponderance of the evidence that the Respondent operated its shellfish operations after its license had expired and before it had become re-certified. The Initial Order Assessing Penalties assessing penalties in the amount of \$2,400.00 against the Respondent for continuing to operate after its license had expired should be reversed.

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