

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 13 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER
DEC Case No.
CO 2-20190128-41

-by-

HUA LI FISH HOUSE INC.,

Respondent.

This administrative enforcement proceeding concerns alleged violations of ECL article 13 and 6 NYCRR part 42 at a shellfish receiving, packing, storage and shipping facility (facility) operated by respondent Hua Li Fish House Inc. The facility is located at 33-59 Farrington Street, Flushing, New York.

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding by notice of hearing and complaint, dated June 26, 2019. In its complaint, Department staff sets forth a single cause of action, alleging that respondent Hua Li Fish House Inc. received and stored shellfish without a permit in violation of ECL 13-0315(1), 6 NYCRR 42.4(a) and Order on Consent No. CO2-20170524-198.

Based upon these alleged violations, Department staff is seeking that I: (a) hold respondent in violation of ECL 13-0315(1), 6 NYCRR 42.4(a), and Order on Consent No. CO2-20170524-198; and (b) assess a civil penalty in the amount of \$13,300.

On October 25, 2019, Department staff filed and served a notice of motion for order without hearing and supporting papers with respect to the alleged violations (*see* Affirmation of Anne Haas dated October 25, 2019 [Haas Affirmation] [incorporating the motion for order without hearing]).¹ Respondent, which did not answer staff's earlier complaint, did not file or serve a response to staff's motion papers.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who prepared the attached summary report. I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

¹ As noted by the Administrative Law Judge, Department staff also served and filed a motion for a default judgment. Because Department staff's motion for order without hearing may be granted in its entirety, staff's motion for a default judgment is denied as unnecessary.

Liability

As noted, Department staff's complaint and motion for order without hearing states a single cause of action alleging respondent violated ECL 13-0315(1), 6 NYCRR 42.4(a) and Order on Consent No. CO2-20170524-198² by receiving and storing shellfish without a permit.

The motion makes a prima facie showing on the violations alleged in the complaint.

The ALJ addresses the importance of shellfish regulation in protecting human health (*see* Summary Report at 6; *see also* Senate Mem in Support of L 2004, ch 284, 2004 McKinney's Session Laws of NY at 1806 [State regulation of all aspects of commercial shellfish harvesting, handling, transportation, sale and shipment to protect the public health]; *Matter of Frisina*, Decision of the Assistant Commissioner, November 8, 2010, at 2-3). Furthermore, the express regulatory intent of 6 NYCRR part 42 is to provide adequate sanitary controls (*see* 6 NYCRR 42.1 [(i)t is the intent of this Part to provide adequate sanitary control over all noncommercially sterile shellfish in wholesale commerce in the State of New York]).

I concur with the ALJ's determination that Department staff is entitled to a finding of liability on seven violations of receiving and storing shellfish without a permit as set forth in the first cause of action charged in the complaint. As noted in the summary report, these violations occurred from December 20, 2018 through January 25, 2019 (*see* Summary Report at 5).

Penalty

Pursuant to ECL 71-0925(1), the civil penalty for a violation of ECL 13-0101 and any regulations promulgated pursuant thereto, shall be "two hundred dollars and an additional penalty of one hundred dollars for each fish . . . or part thereof, other than shellfish or crustacea, involved in the violation; an additional penalty of one hundred dollars for each bushel of shellfish or each crustacean . . . or part thereof, plus an amount equal to the market value or actual price paid, whichever is greater, of the shellfish or crustacea involved in the violation."

Department staff has requested a civil penalty in the amount of thirteen thousand three hundred dollars (\$13,300). An overview of the penalty calculation appears in the summary report (*see* Summary Report at 5-6; *see also* Haas Affirmation ¶¶ 28-37; Affidavit of Susan Ritchie dated October 15, 2019, ¶¶ 10-21).

However, as explained by the ALJ, the violation of the order on consent is multiplicative of the violation of the ECL and the cited regulation (*see* Summary Report at 5). Because respondent's obligation under the consent order is multiplicative of ECL 13-0315(1) and 6 NYCRR 42.4(a), multiple penalties may not be assessed.

Accordingly, the ALJ reduced the requested penalty of \$13,300 by \$1,400 (the amount staff attributed to violation of the order on consent). The ALJ concluded that a total penalty of

² The order on consent, effective as of August 21, 2017, referenced numerous violations of shellfish-related regulations (*see* Order on Consent No. CO2-20170524-198 attached as Exhibit C to the Haas Affirmation, unnumbered pages 2-5).

eleven thousand nine hundred dollars (\$11,900) is supported by the record (*see* Summary Report at 6), and I concur. I also note, as did the ALJ, that the record reflects respondent's history of noncompliance (*see* Exhibit C to Haas Affirmation).

I hereby impose a civil penalty in the amount of eleven thousand nine hundred dollars (\$11,900), as recommended by the ALJ, and direct that respondent submit payment of that amount to the Department within thirty (30) days of the service of this order upon it.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for order without hearing, on that portion of staff's first cause of action for violation of ECL 13-0315(1), 6 NYCRR 42.4(a), and Consent Order CO2-20170524-198 pursuant to 6 NYCRR 622.12, is granted.
- II. Based on record evidence, respondent Hua Li Fish House Inc. is adjudged to have violated ECL 13-0315(1), 6 NYCRR 42.4(a), and Consent Order CO2-20170524-198, by receiving and storing shellfish without a permit.
- III. Respondent Hua Li Fish House Inc. is hereby assessed a civil penalty of eleven thousand nine hundred dollars (\$11,900) for the violations referenced in paragraph II of this order.
- IV. Within thirty (30) days of service of this order on respondent Hua Li Fish House Inc., respondent shall pay the civil penalty referenced in paragraph III in the amount of eleven thousand nine hundred dollars (\$11,900) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. Respondent Hua Li Fish House Inc. shall submit the penalty payment to:

Anne Haas, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500

- VI. The provisions, terms and conditions of this Order shall bind respondent Hua Li Fish House Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: December 13, 2019
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 13, Title 3 of the
Environmental Conservation Law (ECL) of the State of New
York and Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of New York
(6 NYCRR),

**SUMMARY
REPORT**

-by-

DEC Case Number:
CO 2-20190128-41

HUA LI FISH HOUSE INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent Hua Li Fish House Inc. (respondent) with a notice of hearing and complaint, dated June 26, 2019. The complaint alleges that respondent violated ECL 13-0315(1), 6 NYCRR 42.4(a) and Order on Consent No. CO2-20170524-198 by receiving and storing shellfish without a permit.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 13-0315(1), 6 NYCRR 42.4(a) and Order on Consent No. CO2-20170524-198; (2) assessing a civil penalty in the amount of \$13,300; and (3) granting such other relief as the Commissioner may deem appropriate.

Department staff served the notice of hearing and complaint on respondent by certified mail on June 26, 2019. Respondent received the notice of hearing and complaint on June 27, 2019. Respondent did not answer the complaint.

Department staff filed a notice of motion for order without hearing dated October 25, 2019 and supporting papers addressed to the alleged violations.¹ In support of its motion for order without hearing, Department staff provided the affirmation of Anne Haas, Esq. (Haas Affirmation), dated October 25, 2019, attaching seven exhibits; the affidavit of Environmental Conservation Officer Waldemar Auguscinski (Auguscinski Affidavit), sworn to October 9, 2019,

¹ Department staff also filed and served a motion for default judgment dated October 25, 2019 with supporting papers. Because I conclude staff is entitled to judgment on the motion for order without hearing, staff's motion for a default judgment is unnecessary. Accordingly, the motion for default judgment is denied.

attaching six exhibits; and the affidavit of Susan Ritchie (Ritchie Affidavit), sworn to October 15, 2019, attaching one exhibit. (*See* Appendix A attached hereto.)

Department staff served the notice of motion and supporting papers on respondent by first class mail on October 25, 2019. Respondent has not responded to staff's motion papers, although a response was due by November 19, 2019. (*See* 6 NYCRR 622.12[c] [twenty days to respond], CPLR 2103[b][2] [five days added to the prescribed period when mailed by first class mail]).

Department staff's motion alleges respondent violated ECL 13-0315(1), 6 NYCRR 42.4(a) and Order on Consent No. CO2-20170524-198 by receiving and storing shellfish without a permit.

Staff requests that the Commissioner issue an order: (i) finding that respondent committed the alleged violations identified in the complaint; (ii) assessing a civil penalty in the amount of \$13,300; and (iii) granting such other relief as the Commissioner may deem appropriate. *See* Haas Affirmation at 9, Wherefore Clause. Accordingly, this summary report reviews the violations as alleged in the complaint.

FINDINGS OF FACT

1. Respondent Hua Li Fish House Inc. (respondent) operates a facility for the receiving, packing, storage and shipping of shellfish located at 33-59 Farrington Street, Flushing, New York. (*See* Haas Affirmation ¶ 6, Exhibits B and G ¶ 5.)
2. Respondent Hua Li Fish House Inc. is an active domestic business corporation. (*See* Haas Affirmation ¶ 5, Exhibit A.)
3. The Department issued respondent 2017 Shellfish Shipper - A Permit Number 890, which expired on December 31, 2017. (*See* Haas Affirmation ¶ 7, Exhibit B.)
4. Respondent entered into Order on Consent No. CO2-20170524-198 with the Department on August 21, 2017 to resolve multiple violations at respondent's facility. (*See* Haas Affirmation 8, Exhibit C; Ritchie Affidavit ¶ 7.)
5. Respondent applied for a 2018 Shellfish Shipper-A Permit, but the application was denied based on respondent's continuing noncompliance with the ECL and regulations. (*See* Haas Affirmation ¶ 9, Exhibit D.)
6. Waldemar Auguscinski is an Environmental Conservation Officer (ECO) in the Marine Enforcement Unit of the Department's Division of Law Enforcement, who as part of his duties conducts inspections of wholesale shellfish dealers' facilities for compliance with State requirements. (*See* Auguscinski Affidavit ¶¶ 1-2.)

7. On January 25, 2019, ECO Auguscinski conducted an inspection of respondent's facility along with National Oceanic and Atmospheric Administration (NOAA) Enforcement Officer Samuel Adams. (*See Auguscinski Affidavit ¶ 3, Exhibit 1.*)
8. During the January 25, 2019 inspection, ECO Auguscinski observed several empty boxes of geoduck clams, labeled with December 2018 and January 2019 harvest dates located in the back of respondent's facility. (*See Auguscinski Affidavit ¶ 4, Exhibit 1.*)
9. ECO Auguscinski also discovered five 40- and 45-pound containers of geoduck clams, two 36-count containers of Pacific oysters, one 60-count container of kumamoto oysters, one plastic bag containing oysters and several shellfish tags from December 2018 and January 2019, hidden at the facility. (*See Auguscinski Affidavit ¶ 5, Exhibits 1-2.*)
10. Upon discovery of the clams and oysters, respondent acknowledged that respondent received, stored and sold shellfish. (*See Auguscinski Affidavit ¶ 6, Exhibits 1-2.*)
11. Respondent provided seven invoices to ECO Auguscinski, which detail shellfish deliveries from Element Seafood and W&T Seafood to respondent's facility between December 20, 2018 and January 25, 2019. The invoices are addressed to "Taiyo Seafood (Queens)," respondent's sister company, but the billing and delivery addresses are respondent's address. Taiyo Seafoods is located in Brooklyn, New York. (*See Auguscinski Affidavit ¶ 7, Exhibits 3 and 4.*)
12. ECO Auguscinski confiscated the five containers of geoduck clams, two containers of Pacific oysters, one container of kumamoto oysters and one bag of oysters observed at respondent's facility for later destruction. (*See Auguscinski Affidavit ¶ 8, Exhibit 5.*)
13. As a result of the inspection, ECO Auguscinski issued a notice of violation to respondent. (*See Auguscinski Affidavit ¶ 9, Exhibit 6.*)
14. As of January 25, 2019, respondent had not obtained a 2018 or 2019 Shellfish Shipper – A Permit. (*See Auguscinski Affidavit ¶ 3.*)
15. Susan Ritchie is a Food Inspector 2 in the Shellfish Inspection Unit, Bureau of Shellfisheries, in the Department's Division of Marine Resources and supervises the Department's Shellfish Inspection Unit, which conducts sanitary inspections of shellfish processing and wholesale shellfish dealers' facilities to ensure compliance with the ECL and regulations. (*See Ritchie Affidavit ¶¶ 1 and 3-4.*)
16. Ms. Ritchie reviewed ECO Auguscinski's inspection report, photographs and invoices. (*See Ritchie Affidavit ¶ 5.*)

17. As of October 15, 2019, respondent had not obtained a shellfish shipper's or processor's permit for 2018 and 2019. (*See Ritchie Affidavit ¶ 8; Haas Affirmation ¶ 10.*)
18. Ms. Ritchie reviewed the invoices provided by respondent to determine how many bushels of shellfish were received and stored by respondent without a permit. (*See Ritchie Affidavit ¶¶ 13-20.*)
19. Respondent received 440 pounds, or approximately 5.5 bushels, of geoduck clams without a permit. (*See Ritchie Affidavit ¶ 18, Exhibit 1; Auguscinski Affidavit Exhibits 2-3.*)
20. Respondent received 2,292 pieces, or approximately 11.5 bushels, of kumamoto, Pacific and gigacup oysters without a permit. (*See Ritchie Affidavit ¶ 19, Exhibit 1; Auguscinski Affidavit Exhibits 2-3.*)
21. Respondent received a total of approximately 17 bushels of shellfish without a permit. (*See Ritchie Affidavit ¶ 20, Exhibit 1; Auguscinski Affidavit Exhibits 2-3.*)
22. As shown by the affidavit of service of Lisa Kranick, respondent was served with the notice of hearing and complaint on June 27, 2019. Respondent failed to answer the complaint. (*See Haas Affirmation ¶ 12, Exhibit G.*)
23. As shown by the affidavit of service of Melissa Evans, respondent was served with the notice of motion for order without hearing and accompanying papers on October 25, 2019. (*See Affidavit of Service of Melissa Evans, sworn to October 25, 2019.*) Respondent failed to respond to the motion.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report.)

CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (*Matter of Locaparra*, Commissioner's Decision and Order, June 16, 2003.)

Respondent has not submitted any response to the Department staff's motion and therefore has failed to provide any material fact that would require a hearing. On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged. (*See Matter of Edelstein*, Order of the Commissioner, July 18, 2014, at 2; *see also Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2.)

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affidavit of Environmental Conservation Officer Waldemar Auguscinski, who inspected respondent's facility on January 25, 2019 and described the violations of the ECL and 6 NYCRR part 42 regulations; and with the affidavit of Susan Ritchie, who reviewed ECO Auguscinski's inspection narrative and photographs and the invoices obtained from respondent. Ms. Ritchie also reviewed the records maintained by the Department and explained Department staff's requested penalty calculation.

Based on review of the affirmation, affidavits and the exhibits attached thereto, I conclude that Department staff's proof presents a prima facie showing that respondent received and stored shellfish without a permit in violation of ECL 13-0315(1) and 6 NYCRR 42.4(a) (*see Findings of Fact Nos. 9-11, 14 and 17*). Department staff's proof also presents a prima facie showing that respondent violated Order on Consent No. CO2-20170524-198, which required respondent to "not engage in any activities described in 6 NYCRR § 42 without a valid and appropriate permit issued by the Department. When, and if, Respondent may conduct any permitted shellfish activities in New York State, Respondent shall be in strict conformance with all Federal and New York State laws and regulations." Staff's complaint states a single cause of action for violations of ECL 13-0315(1), 6 NYCRR 42.4(a) and the order on consent, but seeks a separate penalty for violations of the ECL and regulation and a separate penalty for the violation of the order on consent. Because respondent is required by law and regulation to obtain a shellfish shipper's permit in the first instance and did not do so for 2018 and 2019, I conclude that staff's allegations that respondent also violated the order on consent for failing to comply with the law and regulations is multiplicative. Accordingly, I conclude that that portion of staff's complaint alleging a violation of the order on consent does not provide a separate and independent basis for awarding a separate penalty.

Department staff seeks a civil penalty in the amount of thirteen thousand three hundred dollars (\$13,300). For violations of ECL 13-0101 et seq. or the regulations promulgated pursuant thereto, ECL 71-0925(1) provides that the civil penalty shall be "two hundred dollars and an additional penalty of one hundred dollars for each fish, bird or animal or part thereof, other than shellfish or crustacea, involved in the violation; an additional penalty of one hundred dollars for each bushel of shellfish or each crustacean, including lobster, or part thereof, plus an amount equal to the market value or actual price paid, whichever is greater, of the shellfish or crustacea involved in the violation."

Department staff's proof demonstrates that respondent received and stored shellfish on seven different dates from December 20, 2018 through January 25, 2019 without a permit. Accordingly, staff seeks a \$200 penalty for each of the seven violations alleged in the complaint as follows: (i) \$1,400 (\$200 x 7) for receiving and storing shellfish without a permit in violation of ECL 13-0315(1) and 6 NYCRR 42.4(a); and (ii) \$1,400 (\$200 x 7) for receiving and storing

shellfish without a permit in violation of Order on Consent No. CO2-20170524-198. As discussed above, staff's allegation that respondent violated the order on consent is multiplicative of the violation of ECL 13-0315(1) and 6 NYCRR 42.4(a), therefore I do not assign a base penalty to that violation. I conclude that a base penalty of \$1,400 is supported and appropriate.

Department staff seeks an additional penalty of \$100 per bushel of shellfish involved in the violation. Staff's proof demonstrates that respondent received and stored approximately 17 bushels of shellfish without a permit for an additional penalty of \$1,700 (*see* Findings of Fact Nos. 19-21). I conclude that an additional penalty of \$1,700 is supported and appropriate.

Department staff also seeks an additional penalty of \$8,831.10, the amount respondent paid for the shellfish as demonstrated by the invoices provided to staff. I conclude that an additional penalty of \$8,831.10 is supported and appropriate.

As discussed above, I reduce staff's requested penalty from \$13,300 to \$11,900. Department staff has correctly pointed out that violations of the ECL and shellfish regulations are critical and can result in a threat to the health and safety of consumers. In addition, respondent has a history of noncompliance. Accordingly, a penalty of \$11,900 is supported and appropriate. Department staff's complaint is silent regarding when the penalty must be paid. I recommend that respondent be directed to pay the civil penalty within thirty (30) days of respondent's receipt of the Commissioner's order.

CONCLUSIONS OF LAW

By receiving and storing shellfish without a permit, respondent violated ECL 13-0315(1) and 6 NYCRR 42.4(a).

RECOMMENDATIONS

Based on the foregoing, I recommend that the Commissioner issue an order:

1. granting that portion of Department staff's motion for order without hearing alleging violation of ECL 13-0315(1), 6 NYCRR 42.4(a), and the consent order, pursuant to 6 NYCRR 622.12;
2. holding that respondent Hua Li Fish House Inc. violated ECL 13-0315(1), 6 NYCRR 42.4(a), and the consent order by receiving and storing shellfish without a permit;
3. directing respondent Hua Li Fish House Inc. to pay a civil penalty of eleven thousand, nine hundred dollars (\$11,900) within thirty (30) days of service of the Commissioner's order on respondent;

4. directing respondent Hua Li Fish House Inc. to submit the penalty payment to the following:

Anne Haas, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500

5. directing such other relief as the Commissioner may deem appropriate.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
December 9, 2019

APPENDIX A

Matter of Hua Li Fish House Inc.
DEC File No. CO2-20190128-41
Motion for Order Without Hearing

- Cover letter from Anne Haas, Esq. to Chief Administrative Law Judge James McClymonds, dated October 25, 2019
- Notice of Motion for Order Without Hearing, dated October 25, 2019
- Affirmation of Anne Haas, Esq. in Support of a Motion for Order Without Hearing, dated October 25, 2019, attaching the following exhibits:
 - A. NYS Department of State Entity Information Sheet regarding Hua Li Fish House Inc., current through October 3, 2019
 - B. NYS Marine Permit Certificate, issued to Hua Li Fish House Inc., with expiration date of December 31, 2017
 - C. Matter of Hua Li Fish House Inc., Order on Consent, Index No. CO2-20170524-198, August 21, 2017
 - D. Permit Denial of Shellfish Shipper-A Permit 890 from James Gilmore, Director, Division of Marine Resources to Hua Li Fish House Inc., dated February 14, 2018
 - E. Notice of Violation issued by Environmental Conservation Officer Waldemar Auguscinski to Hua Li Fish House Inc.
 - F. Cover letter, Notice of Hearing and Complaint, dated June 26, 2019
 - G. Affidavit of Service of Lisa Kranick (of notice of hearing and complaint), sworn to July 2, 2019, with USPS delivery confirmation attached
- Affidavit of ECO Waldemar Auguscinski, sworn to October 9, 2019, attaching the following exhibits:
 1. Complaint Form with Inspection Narrative, dated January 28, 2019
 2. Photographs (8) of containers of shellfish
 3. Invoices (7) for shellfish dated December 20, 2018, December 24, 2018, December 26, 2018, December 27, 2018, January 23, 2019, January 24, 2019 and January 25, 2019 from Element Seafood (6) and W&T Seafood (1)

4. NYS Department of State Entity Information Sheet regarding Taiyo Seafood NY Inc, current through October 15, 2019
 5. Evidence and Chain-of-Custody Record for shellfish seized on January 25, 2019
 6. Notice of Violation issued by Environmental Conservation Officer Waldemar Auguscinski to Hua Li Fish House Inc.
- Affidavit of Susan Ritchie, sworn to October 15, 2019, attaching the following exhibit:
 1. Shellfish Factors Conversion Table
 - Affidavit of Service of Melissa Evans (of notice of motion for order without hearing and supporting documents), sworn to October 25, 2019