

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 Part 42 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER
DEC Case No.
CO 2-20170301-91

-by-

METROPOLITAN FISH MARKET, 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 Metropolitan Fish Market, Inc. The facility is located at 635 Metropolitan Avenue, Brooklyn, New York.

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding by notice of hearing and complaint, dated January 23, 2018. In its complaint, Department staff sets forth the following five causes of action, alleging that respondent Metropolitan Fish Market, Inc.:

- First Cause of Action: Stored and processed shellfish without a permit in violation of ECL 13-0315(1) and 6 NYCRR 42.4(e);¹
- Second Cause of Action: Received shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit in violation of 6 NYCRR 42.3(e);
- Third Cause of Action: Failed to make records of all shellfish transactions available for inspection in violation of 6 NYCRR 42.7(a)(2),² failed to maintain complete and accurate records of shellfish transactions in violation of 6 NYCRR 42.7(a)(1), and failed to maintain receiving records that include required information in violation of 6 NYCRR 42.7(c)(3);

¹ As discussed and corrected by the Administrative Law Judge, the reference to 6 NYCRR 42.4(e) should read 6 NYCRR 42.4(a) (see Summary Report at 4).

² Staff did not include 6 NYCRR 42.7(a)(2) in its summary list of violations under the third cause of action (see Complaint ¶ 31), but this was corrected in staff's motion for order without hearing that was subsequently filed (see Summary Report at 2).

- Fourth Cause of Action: Failed to maintain complete and accurate shellfish shipping records, by failing to include (i) the area of harvest, (ii) the date of harvest, and (iii) the original shipper's permit number, in violation of 6 NYCRR 42.7(c)(4). Staff also alleged that these shipping records were not available for inspection; and
- Fifth Cause of Action: Failed to retain shellfish shipper and harvester tags in an orderly manner by date in violation of 6 NYCRR 42.11(a)(1)(iii).

Based upon these alleged violations, Department staff is seeking that I: (a) hold respondent in violation of ECL 13-0315(1) and 6 NYCRR 42.4(a), 42.3(e), 42.7(a)(1), 42.7(a)(2), 42.7 (c)(3), 42.7(c)(4), and 42.11(a)(1)(iii); (b) assess a civil penalty in the amount of \$1,600; and (c) direct respondent to not engage in any activities described in 6 NYCRR part 42 without a valid and appropriate permit.

On August 8, 2018, 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 in Support of a Motion for Order Without Hearing dated August 8, 2018 [Haas Affirmation] [incorporating the motion for order without hearing]). 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.

Liability

As noted, Department staff's complaint alleges five causes of action which encompasses a number of violations.

Staff's motion for order without hearing lists six causes of action. As discussed by the ALJ, staff split the third cause of action of the complaint into a third and fourth cause of action in the motion (see Summary Report at 2). The motion makes a prima facie showing on each of the causes of action charged in the complaint, but is organized slightly differently than the complaint.

The ALJ appropriately notes 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). Furthermore, the express regulatory intent of 6 NYCRR part 42 is to provide adequate sanitary controls (see 6 NYCRR 42.1).

I concur with the ALJ's determination that Department staff is entitled to a finding of liability on eight violations set forth in the five causes of action charged in the complaint. As set forth in the summary report, these violations include:

- storing and processing shellfish without a permit (First Cause of Action);
- receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit (Second Cause of Action);
- failing to make records of all shellfish transactions available for inspection (Third Cause of Action);
- failing to maintain complete and accurate records of shellfish transactions and failing to maintain receiving records that include required information (Third Cause of Action);
- failing to maintain complete and accurate shellfish shipping records by failing to include the area of harvest (Fourth Cause of Action);
- failing to maintain complete and accurate shellfish shipping records by failing to include the date of harvest (Fourth Cause of Action);
- failing to maintain complete and accurate shellfish shipping records by failing to include the original shipper's permit number (Fourth Cause of Action); and
- failing to retain shellfish shipper and harvester tags in an orderly manner by date (Fifth Cause of Action) (see Summary Report at 5-6).

Penalty

Pursuant to ECL 71-0925(1), the civil penalty for a violation of ECL 13-0101 et seq. 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 one thousand six hundred dollars (\$1,600), seeking a two hundred dollar (\$200) civil penalty for the above-referenced eight violations alleged in the five causes of action in the complaint. An overview of the penalty calculation appears in the summary report (see Summary Report at 6; see also Haas Affirmation ¶ 52). The ALJ concluded that a total penalty of one thousand six hundred dollars (\$1,600) is supported by the record (see id. at 6), and I concur.

I hereby impose a civil penalty in the amount of one thousand six hundred dollars (\$1,600), as requested by staff and recommended by the ALJ, and direct that respondent submit payment of that amount to the Department within twenty (20) days of the service of this order upon it.

Department staff's request that I order respondent to not engage in any activities described in 6 NYCRR part 42 without a valid and appropriate permit issued by the Department is unnecessary. Respondent, however, is already required to comply with the ECL and the applicable regulations and further language to that effect is not needed (see, e.g., Matter of Miguel Sosa Estates, L.P., Order of the Acting Commissioner, January 22, 2016, at 2). I note that Department staff for approximately one year sought to engage respondent to resolve this matter but respondent failed to do so (see Haas Affirmation ¶¶ 8-14). In the event that

respondent continues to operate without obtaining the permit required for its facility³ and fails to address and correct all other violations at the facility, respondent will continue to incur liabilities that would justify further proceedings and the imposition of substantial additional penalties.

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

- I. Department staff's motion for order without hearing, pursuant to 6 NYCRR 622.12, is granted.
- II. Based on record evidence, respondent Metropolitan Fish Market, Inc. is adjudged to have violated the following:
 - A. ECL 13-0315(1) and 6 NYCRR 42.4(a), by storing and processing shellfish without a permit;
 - B. 6 NYCRR 42.3(e), by receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit issued by the Department;
 - C. 6 NYCRR 42.7(a)(2), by failing to make records of all shellfish transactions available for inspection;
 - D. 6 NYCRR 42.7(a)(1) and 42.7(c)(3), by failing to maintain complete and accurate records of shellfish transactions and failing to maintain receiving records that include required information for the period from November 9, 2016 to January 31, 2017;
 - E. 6 NYCRR 42.7(c)(3), by failing to include the area of harvest in shellfish shipping records;
 - F. 6 NYCRR 42.7(c)(3), by failing to include the harvest date in shellfish shipping records;
 - G. 6 NYCRR 42.7(c)(3), by failing to include the original shipper's permit number in shellfish shipping records; and
 - H. 6 NYCRR 42.11(a)(1)(iii), by failing to retain shellfish shipper and harvester tags in an orderly manner by date.
- III. Respondent Metropolitan Fish Market, Inc. is hereby assessed a civil penalty of one thousand six hundred dollars (\$1,600) for the violations referenced in paragraph II of this order.

³ As noted in the record, respondent's shellfish shipper permit no. 846 expired on December 31, 2016 (see Haas Affirmation ¶ 7).

IV. Within twenty (20) days of service of this order on respondent Metropolitan Fish Market, Inc., respondent shall pay the civil penalty referenced in paragraph III in the amount of one thousand six hundred dollars (\$1,600) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

V. Respondent Metropolitan Fish Market, 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 Metropolitan Fish Market, 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: Albany, New York
September 24, 2018

**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 Part 612 of 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 2-20170301-91

METROPOLITAN FISH MARKET, INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent Metropolitan Fish Market, Inc. (respondent) with a notice of hearing and complaint, dated January 23, 2018. The complaint alleges that respondent violated:

(1) ECL 13-0315(1) and 6 NYCRR 42.4(e)[sic] by storing and processing shellfish without a permit;

(2) 6 NYCRR 42.3(e) by receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit;

(3) 6 NYCRR 42.7(a)(1), 6 NYCRR 42.7(a)(2) and 42.7(c)(3) by failing to make records of all shellfish transactions available for inspection, failing to maintain complete and accurate records of shellfish transactions, and failing to maintain receiving records that include required information;

(4) 6 NYCRR 42.7(c)(4) by failing to maintain complete and accurate shellfish shipping records; and

(5) 6 NYCRR 42.11(a)(1)(iii) by failing to retain shellfish shipper and harvester tags in an orderly manner by date.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 13-0315(1) and 6 NYCRR 42.4(e), 42.3(e), 42.7(a)(1), 42.7(a)(2), 42.7(c)(3), 42.7(c)(4) and 42.11(a)(1)(iii); (2) assessing a civil penalty in the amount of \$1,600; (3) directing respondent to not engage in any activities described in 6 NYCRR part 42 without a valid and appropriate permit; and (4) granting such other relief as the Commissioner may deem appropriate.

Inasmuch as respondent is a domestic business corporation, service of the notice of hearing and complaint was made on January 23, 2018, by personally delivering duplicate copies of a cover letter, notice of hearing and complaint to an authorized representative of the Secretary of State at the office of the Department of State in Albany. Respondent did not answer the complaint.

Department staff filed a notice of motion for order without hearing dated August 8, 2018 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 August 8, 2018, attaching six exhibits and the Affidavit of Frank S. Thorp III (Thorp Affidavit), sworn to November 9, 2017, attaching three exhibits. *See* Appendix A attached hereto.

Department staff served the notice of motion and supporting papers on respondent by first class mail on August 8, 2018. Respondent has not responded to staff's motion papers, although a response was due by September 4, 2018. *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) and General Construction Law § 25-a (when period of time ends on a Sunday or a public holiday, such act must be done on the next succeeding business day).

Department staff's motion alleges respondent violated the following:

- (1) ECL 13-0315(1) and 6 NYCRR 42.4(e)[sic] by storing and processing shellfish without a permit;
- (2) 6 NYCRR 42.3(e) by receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit;
- (3) 6 NYCRR 42.7(a)(2) by failing to make records of all shellfish transactions available for inspection;
- (4) 6 NYCRR 42.7(a)(1) and 42.7(c)(3) by failing to maintain complete and accurate records of shellfish transactions and failing to maintain receiving records that include required information;
- (5) 6 NYCRR 42.7(c)(4) by failing to maintain complete and accurate shellfish shipping records; and
- (6) 6 NYCRR 42.11(a)(1)(iii) by failing to retain shellfish shipper and harvester tags in an orderly manner by date.

The third and fourth causes of action pleaded in staff's motion were pleaded in the third cause of action of the complaint. The difference being that the third cause of action in the complaint failed to allege that respondent violated 6 NYCRR 42.7(a)(2) even though the underlying facts were alleged.

¹ Department staff also filed and served a motion for default judgment dated August 8, 2018 with supporting papers. Because I conclude staff is entitled to judgment on the motion for order without hearing, I do not consider staff's motion for a default judgment.

Staff requests that the Commissioner issue an order: (i) finding that respondent committed the alleged violations identified in the complaint; (ii) directing respondent not to engage in any activities described in 6 NYCRR part 42 without a valid and appropriate permit issued by the Department; (iii) assessing a civil penalty in the amount of \$1,600; and (iv) granting such other relief as the Commissioner may deem appropriate. See Haas Affirmation at 12, Wherefore Clause. Accordingly, this summary report reviews the causes of action as alleged in the complaint.

FINDINGS OF FACT

1. Respondent Metropolitan Fish Market, Inc. (respondent) operates a facility for the receiving, packing, storage and shipping of shellfish located at 635 Metropolitan Avenue, Brooklyn, New York. *See* Haas Affirmation ¶ 6; Thorp Affidavit ¶ 7.
2. Respondent Metropolitan Fish Market, Inc. is an active domestic business corporation. *See* Haas Affirmation ¶ 5, Exhibit A.
3. Frank S. Thorp III is a Food Inspector 1 in the Department's Division of Marine Resources, Bureau of Shellfisheries, Shellfish Inspection Unit, who conducts sanitary inspections of shellfish processing and wholesale shellfish dealers' facilities for compliance with State requirements. *See* Thorp Affidavit ¶¶ 1-4.
4. On February 2, 2017, Mr. Thorp conducted an inspection of respondent's facility and observed respondent had received and was storing, packing and reshipping shellfish without a 2017 Shellfish Shipper Permit. *See* Thorp Affidavit ¶ 7, Exhibit 1 (Reference 1).
5. During the February 2, 2017 inspection, respondent was unable to provide respondent's shellfish receiving and shipping records. *See* Thorp Affidavit ¶ 8, Exhibit 1 (Reference 4a).
6. On February 2, 2017, Mr. Thorp also observed shellfish shipper tags in various locations in respondent's facility and observed that the tags were not kept in order by date. *See* Thorp Affidavit ¶ 9, Exhibit 1 (Reference 27).
7. On February 8, 2017, Mr. Thorp conducted a follow-up inspection of respondent's facility. *See* Thorp Affidavit ¶ 11, Exhibit 3.
8. During the February 8, 2017 inspection, Mr. Thorp reviewed respondent's shellfish receiving records and discovered:
 - a. respondent had not maintained log sheets of shellfish received from November 9, 2016 to January 31, 2017;
 - b. respondent's receiving records did not always include the area of harvest, harvest date, and/or the original shipper's permit number;

- c. respondent's receiving records included a January 13, 2017 invoice demonstrating the respondent had received New Zealand clams or "cockles" from Universal Seafood, an unapproved source which did not hold a 2017 Shellfish Shipper Permit from the Department. *See* Thorp Affidavit ¶¶ 12 a – c, Exhibits 2 and 3 (Reference 4a).
9. During the February 8, 2017 inspection Mr. Thorp reviewed respondent's shellfish shipping records and discovered that the records did not include:
 - a. the area of harvest;
 - b. the date of harvest; and
 - c. the original shipper's permit number. *See* Thorp Affidavit ¶ 13, Exhibit 3 (Reference 27).
10. Following the February 2 and 8, 2017 inspections, Department staff sent a March 9, 2017 notice of violation to respondent. *See* Haas Affirmation ¶ 8, Exhibit B.
11. As of November 9, 2017, respondent had not obtained a 2017 Shellfish Shipper – A Permit. *See* Thorp Affidavit ¶ 15.
12. As shown by the Affidavit of Service of Drew Wellette, respondent was served with the notice of hearing and complaint on January 23, 2018. Respondent failed to answer the complaint. *See* Haas Affirmation ¶ 11, Exhibit E.

DISCUSSION

Department staff's complaint and the Haas Affirmation quote the language of 6 NYCRR 42.4(a), but reference the subdivision as 42.4(e) throughout the complaint and affirmation (*see* Haas Affirmation ¶¶ 17, 25, 29, and 52[a], Exhibit D, Complaint ¶¶ 9, 18, and 20). Subdivision 42.4(e), however, does not exist. I conclude that the reference to subdivision 42.4(e) is a clerical error, and that staff's complaint and affirmation provided respondent with adequate notice of the factual basis for and the actual nature of the violation, namely engaging in the storage and processing of shellfish without a permit, in violation of 6 NYCRR 42.4(a).

CLPR 2001 authorizes the court to disregard or correct, sua sponte, any defect, provided any substantial right of a party is not prejudiced (*see Albilis v Hillcrest Gen. Hosp.*, 124 AD2d 499, 500 [1st Dept 1986]). In this matter, correction of the pleadings is appropriate to ensure the correct regulatory subdivision is used in any Commissioner's order issued in this matter. Respondent is not prejudiced by this correction because the complaint, affirmation and proof quote the correct language and state the underlying facts. Accordingly, I hereby deem the pleadings to be amended to correct all references to 6 NYCRR 42.4(e) to 6 NYCRR 42.4(a) as reflected in this summary report.

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 n2.)

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affidavit of Frank S. Thorp III, who inspected respondent’s facility on February 2 and 8, 2017, reviewed the Marine Resources Permitting System records maintained by the Department and described the violations of the ECL and 6 NYCRR part 42 regulations.

Based on review of the affirmation, affidavit and the exhibits attached thereto, I conclude that Department staff’s proof presents a prima facie showing that respondent:

(1) stored and processed shellfish without a permit in violation of ECL 13-0315(1) and 6 NYCRR 42.4(a) (*see* Findings of Fact Nos. 4 and 11) (First Cause of Action);

(2) received shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit in violation of 6 NYCRR 42.3(e) (*see* Finding of Fact No. 8[c]) (Second Cause of Action);

(3) failed to make records of all shellfish transactions available for inspection in violation of 6 NYCRR 42.7(a)(2) (*see* Finding of Fact No. 5); failed to maintain complete and accurate records of shellfish transactions in violation of 6 NYCRR 42.7(a)(1) (*see* Finding of Fact No. 8[a], [b]); and failed to maintain receiving records that included the required information such as harvest locations, dates and/or the original shipper’s permit number in violation of 6 NYCRR 42.7(c)(3) (*see* Finding of Fact No. 8[b]) (Third Cause of Action);²

(4) failed to maintain complete and accurate shellfish shipping records by failing to include: (i) the area of harvest, (ii) the date of harvest, and (iii) the original shipper’s permit number, in violation of 6 NYCRR 42.7(c)(4) (*see* Finding of Fact No. 9 [a], [b] and [c]) (Fourth Cause of Action); and

² As discussed below, staff only seeks a penalty on two counts of the third cause of action although violation of three counts were proven.

(5) failed to retain shellfish shipper and harvester tags in an orderly manner by date in violation of 6 NYCRR 42.11(a)(1)(iii) (*see* Finding of Fact No. 6) (Fifth Cause of Action).

Department staff seeks a civil penalty in the amount of one thousand six hundred dollars (\$1,600). For violation of ECL 13-0101 et seq. or the regulations promulgated pursuant thereto, ECL 71-0925(1) provides that the civil penalty shall be \$200 plus an additional penalty based on the number of fish, birds or animals, or bushel of shellfish or each crustacean involved in the violation. Department staff seeks a \$200 penalty for each of eight violations alleged in the complaint as follows:

First Cause of Action	\$200 for storing and processing shellfish without a permit;
Second Cause of Action	\$200 for receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit;
Third Cause of Action	\$400 as follows - \$200 for failing to make records of shellfish transactions available for inspection, and \$200 for failing to maintain complete and accurate shellfish receiving records;
Fourth Cause of Action	\$600 as follows - \$200 for failing to include the area of harvest in shellfish shipping records, \$200 for failing to include the harvest date in shellfish shipping records, and \$200 for failing to include the original shipper permit number in shellfish shipping record; and
Fifth Cause of Action	\$200 for failing to maintain shellfish tags in an orderly manner (<i>see</i> Haas Affirmation ¶ 52).

Department staff did not provide any further analysis in support of the requested penalty. I note, however, the importance of shellfish regulation in protecting human health. (*See e.g. Matter of Frisina*, Decision of Assistant Commissioner, November 8, 2010; *Matter of Frisina*, Decision of the Assistant Commissioner, September 12, 2013.) Selling shellfish from unreported harvest areas and with unreported harvest dates raises serious health concerns because the Department cannot determine if the shellfish originated from an area that is open for shellfishing or whether the shellfish were harvested at a time that area was open. Moreover, Department staff demonstrated that respondent did not obtain a shellfish shippers permit after the inspections (*see* Finding of Fact No. 11).

Accordingly, I find staff's penalty request of \$1,600 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 twenty (20) days of respondent's receipt of the Commissioner's order.

Department staff also requests that respondent be directed to not engage in any activities described in 6 NYCRR part 42 without a valid and appropriate permit. Respondent is already required to comply with the ECL and regulations. Accordingly, I will not recommend further language to that effect to the Commissioner.

CONCLUSIONS OF LAW

1. By storing and processing shellfish without a permit, respondent violated ECL 13-0315(1) and 6 NYCRR 42.4(a);
2. By receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit, respondent violated 6 NYCRR 42.3(e);
3. By failing to make records of all shellfish transactions available for inspection, failing to maintain complete and accurate records of shellfish transactions, and failing to maintain receiving records that include required information, respondent violated 6 NYCRR 42.7(a)(1), 6 NYCRR 42.7(a)(2) and 42.7(c)(3);
4. By failing to maintain complete and accurate shellfish shipping records, including the areas of harvest, date of harvest and the original shipper's permit number, respondent violated 6 NYCRR 42.7(c)(4); and
5. By failing to retain shellfish shipper and harvester tags in an orderly manner by date, respondent violated 6 NYCRR 42.11(a)(1)(iii).

RECOMMENDATIONS

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

1. granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;
2. holding that respondent Metropolitan Fish Market, Inc. violated the following:
 - a. ECL 13-0315(1) and 6 NYCRR 42.4(a) by storing and processing shellfish without a permit (First Cause of Action – one count);
 - b. 6 NYCRR 42.3(e) by receiving shellfish from a person who had failed to obtain and maintain a valid shellfish shipper permit (Second Cause of Action – one count);
 - c. 6 NYCRR 42.7(a)(2) by failing to make records of all shellfish transactions available for inspection (Third Cause of Action – one count);
 - d. 6 NYCRR 42.7(a)(1) and 42.7(c)(3) by failing to maintain complete and accurate records of shellfish transactions and failing to maintain receiving records that include required information (Third Cause of Action – one count);
 - e. 6 NYCRR 42.7(c)(4) by failing to maintain complete and accurate shellfish shipping records including the area of harvest, harvest date and original shipper's permit number (Fourth Cause of Action – three counts); and
 - f. 6 NYCRR 42.11(a)(1)(iii) by failing to retain shellfish shipper and harvester tags in an orderly manner by date (Fifth Cause of Action – one count).
3. directing respondent Metropolitan Fish Market, Inc. to pay a civil penalty of one thousand, six hundred dollars (\$1,600) within twenty (20) days of service of the Commissioner's order on respondent;

4. directing respondent Metropolitan Fish Market, 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
September 14, 2018

APPENDIX A

Matter of Metropolitan Fish Market, Inc.
DEC File No. CO2-20170301-91
Motion for Order Without Hearing

1. Notice of Motion for Order Without Hearing, dated August 8, 2018
2. Affirmation of Anne Haas in Support of a Motion for Order Without Hearing, dated August 8, 2018, attaching the following exhibits:
 - A. NYS Department of State Entity Information Sheet regarding Metropolitan Fish Market, Inc., current through March 22, 2018
 - B. Notice of Violation dated March 9, 2017 from Debra Barnes to Metropolitan Fish Market, Inc.
 - C. March 16, 2017 correspondence from Anne Haas, Esq. to Metropolitan Fish Market, Inc. with Order on Consent
 - D. Notice of Hearing and Complaint, dated January 23, 2018
 - E. Affidavit of Service of Drew Wellette (of notice of hearing and complaint), sworn to January 24, 2018
 - F. Order on Consent
3. Affidavit of Frank S. Thorpe III, sworn to November 9, 2017, attaching the following exhibits:
 1. Shellfish Inspection Narrative Form, dated February 2, 2017
 2. January 13, 2017 Invoice for cockles from Universal Seafood
 3. Shellfish Inspection Narrative Form, dated February 8, 2017
4. Affidavit of Service of Bonnie Pedone (of notice of motion for order without hearing and supporting documents), sworn to August 8, 2018