WILLAPA-GRAYS HARBOR
OYSTER GROWERS
ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

and

AD HOC COALITION FOR
WILLAPA BAY, CENTER FOR
FOOD SAFETY, CENTER FOR
BIOLOGICAL DIVERSITY, and
COALITION TO PROTECT PUGET
SOUND,

Respondent-Intervenors.

Respondent State of Washington, Department of Ecology, represented by Robert W. Ferguson, Attorney General, and Ivy Anderson, Assistant Attorney General, and Appellant, Willapa-Grays Harbor Oyster Growers Association (WGHOGA), represented by Doug Steding, Northwest Resource Law PLLC, hereby submit this Joint Motion to Dismiss.
I. MOTION TO DISMISS

Based upon the attached Settlement Agreement, hereby incorporated by reference, the parties move the Pollution Control Hearings Board for an Order to dismiss this appeal with prejudice.

RESPECTFULLY SUBMITTED this 15th day of October 2019.

ROBERT W. FERGUSON
Attorney General

IVY M. ANDERSON, WSBA #30652
Assistant Attorney General
Attorneys for Respondent
State of Washington
Department of Ecology
360-586-4619

Dated: 10/15/2019

DOUGLAS J. STEDING, WSBA #37020
Attorney for Appellant
Willapa-Grays Harbor Oyster Growers Association
206-971-1567

Dated: ______________________
I. MOTION TO DISMISS

Based upon the attached Settlement Agreement, hereby incorporated by reference, the parties move the Pollution Control Hearings Board for an Order to dismiss this appeal with prejudice.

RESPECTFULLY SUBMITTED this day of October 2019.

ROBERT W. FERGUSON
Attorney General

NORTHWEST RESOURCE LAW PLLC

DOUGLAS J. STEDING, WSBA #37020
Attorney for Appellant
Willapa-Grays Harbor Oyster Growers Association
206-971-1567
Dated: 10/15/19

IVY M. ANDERSON, WSBA #30652
Assistant Attorney General
Attorneys for Respondent
State of Washington
Department of Ecology
360-586-4619
Dated: ______________________

JOINT MOTION TO DISMISS
The State of Washington, Department of Ecology, represented by Robert W. Ferguson, Attorney General, and Ivy Anderson, Assistant Attorney General, and Appellant, Willapa-Grays Harbor Oyster Growers Association (WGHOGA), represented by Douglas Steding, Northwest Resource Law PLLC, hereby submit this Settlement Agreement to the Pollution Control Hearings Board (Board) as a full and final settlement of the above-referenced appeal, and request that the Board dismiss the appeal with prejudice.
I. PROCEDURAL STIPULATIONS

1. On January 8, 2016, the WGHOGA transmitted an application package to Ecology seeking an NPDES permit for the discharge of imidacloprid in Willapa Bay and Grays Harbor via ground applications and applications from boat. As used in this document, WGHOGA refers exclusively to the subset of members of WGHOGA that have pursued this January 8, 2016 NPDES permit.

2. On February 10, 2016, Ecology requested additional information regarding the 2016 NPDES permit application, including two applications for sediment impact zone authorizations for Willapa Bay and Grays Harbor.

3. On March 17, 2016, WGHOGA provided additional information to Ecology for the 2016 NPDES permit application along with sediment impact zone authorization applications for both Willapa Bay and Grays Harbor.

4. Ecology determined the WGHOGA 2016 NPDES permit application and sediment impact zone authorization applications were complete on June 23, 2017.

5. On May 24, 2016, Ecology issued a State Environmental Policy Act (SEPA) Determination of Significance regarding the NPDES permit application and adopted and incorporated by reference the 2015 Final Environmental Impact Statement, which was issued for a 2013 NPDES application to discharge imidacloprid in Willapa Bay and Grays Harbor.

6. Ecology conducted a Supplemental Environmental Impact Statement (2018 SEIS) specific to the 2016 NPDES application and sediment impact zone authorization applications. A public comment period was held on the draft 2018 SEIS from September 18, 2017, through November 1, 2017. Two public meetings were held in October 2017. Ecology issued the Final 2018 SEIS on January 5, 2018.

7. On April 9, 2018, upon making a “tentative staff determination” to deny the 2016 NPDES permit application, Ecology issued a Notice of Intent to Deny NPDES Permit for public review and comment. The comment period last from April 9, 2018, through May 14, 2018. Upon
completion of the public comment period and review of comments received, Ecology issued a
Final Determination to Deny NPDES permit on September 27, 2018.

8. On October 26, 2018, WGHOGA filed an appeal of Ecology's 2016 NPDES permit application decision.

9. Ecology and WGHOGA have agreed to fully resolve the appeal of Ecology's denial of the NPDES permit application through the settlement outlined below.

II. SETTLEMENT AGREEMENT

The parties desire to resolve the dispute herein and avoid the cost and time associated with further litigation. The parties therefore stipulate and agree as follows:

A. RESOLUTION OF APPEAL

This Settlement Agreement constitutes the entire agreement between the parties to this appeal, and settles all issues raised by WGHOGA's appeal filed on October 26, 2018. As used in this Settlement Agreement "Integrated Pest Management" or "IPM" shall mean the following:

• A coordinated decision-making and action process that uses the most appropriate pest control methods and strategy in an environmentally and economically sound manner to meet the objective of controlling burrowing shrimp populations in Willapa Bay and Grays Harbor to facilitate continued shellfish cultivation on tidelands. The elements of this IPM plan are anticipated to include:
  o Identifying ways to prevent burrowing shrimp problems in Willapa Bay and Grays Harbor.
  o Monitoring of the presence of burrowing shrimp on shellfish beds in Willapa Bay and Grays Harbor.
  o Quantifying the damage caused to shellfish beds by burrowing shrimp in Willapa Bay and Grays Harbor.
  o Establishing acceptable densities of burrowing shrimp that can be tolerated without treatment.
Treatment to reduce populations of burrowing shrimp on shellfish beds to below established thresholds using biological, cultural, mechanical, and chemical control methods that consider human health, ecological impact, feasibility, and cost-effectiveness.

Evaluating the environmental effects and efficacy of burrowing shrimp treatments.

Under terms of this Settlement Agreement, the parties will undertake the following activities:

- Participate in a Working Group and work cooperatively to, as expeditiously as possible, identify an Integrated Pest Management plan approach to control and manage the burrowing shrimp infestation that is affecting WGHOGA oyster beds in Willapa Bay and Grays Harbor. The parties agree that such a plan will include chemical and non-chemical controls, with the goal of minimizing chemical use and maximizing its effectiveness. Any plan developed pursuant to this Settlement Agreement or using funds obtained by the parties pursuant to this Agreement will not include the use of imidacloprid. Laboratory studies comparing imidacloprid to other possible chemical control methods may be a part of the research conducted pursuant to this Agreement.

- Ecology commits to support research projects required to develop the IPM plan. The agency's support will include providing technical advice and assistance, including advice on the necessity of obtaining permit(s) or approval(s). Ecology's presence on the Working Group does not imply endorsement or approval by Ecology of any application(s) to be submitted by WGHOGA for permit(s) or approval(s) which may be required to implement any aspect of an Integrated Pest Management plan. Both parties shall bear their own costs of staff time in participating in the Working Group and development of the IPM plan.
To the extent practicable and provided funding is available, the Working Group will seek to conduct research project(s) on the following topics in the 2019–2020 research season:

- Development of a burrowing shrimp monitoring program in Willapa Bay and Grays Harbor to assess impacts to shellfish beds and population trends.
- Assessment of past research regarding acceptable shrimp densities on a variety of shellfish beds.
- Laboratory studies designed to evaluate the efficacy and possible impacts of alternative chemicals to imidacloprid to be used as chemical controls for burrowing shrimp in an IPM plan.
- Assessment of non-chemical control options for burrowing shrimp and shellfish beds (e.g., including the work of Department of Natural Resources).
- Provided the laboratory studies identify chemical(s) that may be promising in terms of efficacy in controlling burrowing shrimp, and low impact to non-target organisms, the parties will work towards development of a 2020 field study protocol that will include: (a) field trials of alternative chemical(s) that may be used to control burrowing shrimp in conjunction with non-chemical methods; (b) further exploration of mechanical methods such as spike wheel injectors; and (c) continued dye studies to understand movement of water in the bay to help develop strategies that will minimize the use and impacts of chemicals.
- Additional project(s) as mutually agreed to by the Working Group.

- Identify at least one representative to participate in the Working Group regarding development of an Integrated Pest Management plan to address burrowing shrimp in Willapa Bay and Grays Harbor. Ecology's representative will have authority to represent both the Water Quality and Toxic Cleanup Programs at Ecology, and to
make commitments of staff time and resources from the Department as necessary to fully support the Working Group. WGHOGA’s representative will have authority to represent the Growers and to make commitments of time and resources as necessary to fully support the Working Group.

- The Working Group will meet for a period of at least one year, dating from the effective date of this Agreement. The Working Group may be extended by mutual agreement of the parties.

- Ecology will host a Working Group meeting every other month for the one-year time period in Lacey, Washington. WGHOGA will host a Working Group meeting every other alternate month for the one-year time period in Pacific County, Washington.

- The parties will jointly invite representatives from the Departments of Agriculture, Natural Resources, Commerce, and the Conservation Commission, and a mutually agreed to environmental interest to participate in the Working Group.

- Ecology will engage with WGHOGA or its representatives as the Growers seek to obtain funding through legislative appropriation request in the Supplemental Legislative Session beginning in January 2020. The appropriation request to be submitted by WGHOGA will seek the following:
  
  - An appropriation of $650,000 to be used exclusively to fund research related to development of the IPM plan. As detailed above, IPM plan research projects may include investigation of chemical controls as one aspect of the plan, but will not include use of imidacloprid as a chemical control. To the extent permitted by law, research projects to be funded from this appropriation would be identified and mutually agreed to as part of the Working Group activities.

B. WAIVER OF APPEAL RIGHTS

WGHOGA understands that it has the right to appeal Ecology’s decision to deny the 2016 NPDES permit application by presenting evidence at a Board hearing. WGHOGA
A. WAIVER OF HEARING

The parties, by representatives for WGHOA and Ecology, voluntarily waives its right to a hearing upon signature and acceptance of this Settlement Agreement by representatives for WGHOA and Ecology.

B. DISMISSAL OF APPEAL

The parties consent to the submission of this Settlement Agreement to the Board and request that, based upon a full and final settlement having been reached, the Board dismiss this appeal with prejudice. Both parties further agree to forego all costs and attorneys’ fees associated with this appeal.

C. EFFECTIVE DATE

This Settlement Agreement shall become effective upon the Board’s dismissal of this appeal.

D. SIGNATORIES AUTHORIZED

The undersigned representatives for Ecology and WGHOA certify that they are fully authorized by the party whom they represent to enter into the terms and conditions of this Settlement Agreement and to legally bind such party thereto.

E. EXECUTION

This document may be executed in counterparts and may be executed by facsimile and/or electronically, and each executed counterpart shall have the same force and effect as the original instrument.

STATE OF WASHINGTON

WILLAPA-GRAYS HARBOR OYSTER GROWERS ASSOCIATION

RICH DOENGES
Department of Ecology
Southwest Regional Director

Dated: 10/14/19

KEN WIEGARDT
President
Willapa Grays Harbor Oyster Growers Association

Dated:
voluntarily waives its right to a hearing upon signature and acceptance of this Settlement Agreement by representatives for WGHOGA and Ecology.

C. DISMISSAL OF APPEAL

The parties consent to the submission of this Settlement Agreement to the Board and request that, based upon a full and final settlement having been reached, the Board dismiss this appeal with prejudice. Both parties further agree to forego all costs and attorneys’ fees associated with this appeal.

D. EFFECTIVE DATE

This Settlement Agreement shall become effective upon the Board’s dismissal of this appeal.

E. SIGNATORIES AUTHORIZED

The undersigned representatives for Ecology and WGHOGA certify that they are fully authorized by the party whom they represent to enter into the terms and conditions of this Settlement Agreement and to legally bind such party thereto.

F. EXECUTION

This document may be executed in counterparts and may be executed by facsimile and/or electronically, and each executed counterpart shall have the same force and effect as the original instrument.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

RICH DOENGES
Department of Ecology
Southwest Regional Director

Dated: ________________________

WILLAPA-GRAYS HARBOR OYSTER GROWERS ASSOCIATION

KEN WIEGARDT
President
Willapa Grays Harbor Oyster Growers Association

Dated: 10/15/19
ROBERT W. FERGUSON
Attorney General

IVY M. ANDERSON, WSBA #30652
Assistant Attorney General
Attorneys for Respondent
State of Washington
Department of Ecology
360-586-4619

Dated: ________________

NORTHWEST RESOURCE LAW PLLC

DOUGLAS J. STEDING, WSBA #37020
Attorney for Appellant
Willapa-Grays Harbor Oyster Growers
Association
206-971-1567

Dated: 10/15/19

SETTLEMENT AGREEMENT
ROBERT W. FERGUSON  
Attorney General

IVY M. ANDERSON, WSBA #30652  
Assistant Attorney General  
Attorneys for Respondent  
State of Washington  
Department of Ecology  
360-586-4619

Dated: 01/15/2019

NORTHWEST RESOURCE LAW PLLC

DOUGLAS J. STEDING, WSBA #37020  
Attorney for Appellant  
Willapa-Grays Harbor Oyster Growers  
Association  
206-971-1567

Dated: __________________________

SETTLEMENT AGREEMENT
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

WILLAPA-GRAYS HARBOR OYSTER GROWERS ASSOCIATION, 

Appellant,

v.

STATE OF WASHINGTON, 
DEPARTMENT OF ECOLOGY,

and 

AD HOC COALITION FOR WILLAPA BAY, CENTER FOR FOOD SAFETY, CENTER FOR BIOLOGICAL DIVERSITY, and COALITION TO PROTECT PUGET SOUND,

Respondent-Intervenors.

Pursuant to RCW 9A.72.085, I certify that on the 15th day of October 2019, I caused to be served the Joint Motion to Dismiss in the above-captioned matter upon the parties herein as indicated below:

DOUGLAS J. STEDING
MADELINE ENGEL
NORTHWEST RESOURCE LAW PLLC
101 YESLER WAY, SUITE 205
SEATTLE, WA 98104

[ ] U.S. Mail
[ ] Hand Delivered
[ ] Overnight Express
[x] Email
dsteding@nwresourcelaw.com
mengel@nwresourcelaw.com
ehinkes@nwresourcelaw.com

CERTIFICATE OF SERVICE
the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of October 2019, in Olympia, Washington.

DANIELLE E. FRENCH, Legal Assistant