

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

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.

PCHB No. 18-073

JOINT MOTION TO DISMISS

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

NORTHWEST RESOURCE LAW PLLC



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

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

Dated: 10/15/2019

Dated: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

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

Attorney for Appellant
Willapa-Grays Harbor Oyster Growers
Association
206-971-1567

Dated: _____

Dated: 10/15/19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

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.

PCHB NO. 18-073

SETTLEMENT AGREEMENT

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.

1 **I. PROCEDURAL STIPULATIONS**

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

7 2. On February 10, 2016, Ecology requested additional information regarding the
8 2016 NPDES permit application, including two applications for sediment impact zone
9 authorizations for Willapa Bay and Grays Harbor.

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

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

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

19 6. Ecology conducted a Supplemental Environmental Impact Statement (2018
20 SEIS) specific to the 2016 NPDES application and sediment impact zone authorization
21 applications. A public comment period was held on the draft 2018 SEIS from September 18,
22 2017, through November 1, 2017. Two public meetings were held in October 2017. Ecology
23 issued the Final 2018 SEIS on January 5, 2018.

24 7. On April 9, 2018, upon making a “tentative staff determination” to deny the 2016
25 NPDES permit application, Ecology issued a Notice of Intent to Deny NPDES Permit for public
26 review and comment. The comment period last from April 9, 2018, through May 14, 2018. Upon

1 completion of the public comment period and review of comments received, Ecology issued a
2 Final Determination to Deny NPDES permit on September 27, 2018.

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

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

7 II. SETTLEMENT AGREEMENT

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

10 A. RESOLUTION OF APPEAL

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

- 14 • A coordinated decision-making and action process that uses the most appropriate pest
15 control methods and strategy in an environmentally and economically sound manner
16 to meet the objective of controlling burrowing shrimp populations in Willapa Bay
17 and Grays Harbor to facilitate continued shellfish cultivation on tidelands. The
18 elements of this IPM plan are anticipated to include:
 - 19 ○ Identifying ways to prevent burrowing shrimp problems in Willapa Bay and
20 Grays Harbor.
 - 21 ○ Monitoring of the presence of burrowing shrimp on shellfish beds in Willapa Bay
22 and Grays Harbor.
 - 23 ○ Quantifying the damage caused to shellfish beds by burrowing shrimp in Willapa
24 Bay and Grays Harbor.
 - 25 ○ Establishing acceptable densities of burrowing shrimp that can be tolerated
26 without treatment.

- 1 ○ Treatment to reduce populations of burrowing shrimp on shellfish beds to below
2 established thresholds using biological, cultural, mechanical, and chemical
3 control methods that consider human health, ecological impact, feasibility, and
4 cost-effectiveness.
- 5 ○ Evaluating the environmental effects and efficacy of burrowing shrimp
6 treatments.

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

- 9 • Participate in a Working Group and work cooperatively to, as expeditiously as
10 possible, identify an Integrated Pest Management plan approach to control and
11 manage the burrowing shrimp infestation that is affecting WGHOGA oyster beds in
12 Willapa Bay and Grays Harbor. The parties agree that such a plan will include
13 chemical and non-chemical controls, with the goal of minimizing chemical use and
14 maximizing its effectiveness. Any plan developed pursuant to this Settlement
15 Agreement or using funds obtained by the parties pursuant to this Agreement will not
16 include the use of imidacloprid. Laboratory studies comparing imidacloprid to other
17 possible chemical control methods may be a part of the research conducted pursuant
18 to this Agreement.
- 19 ○ Ecology commits to support research projects required to develop the IPM plan.
20 The agency's support will include providing technical advice and assistance,
21 including advice on the necessity of obtaining permit(s) or approval(s). Ecology's
22 presence on the Working Group does not imply endorsement or approval by
23 Ecology of any application(s) to be submitted by WGHOGA for permit(s) or
24 approval(s) which may be required to implement any aspect of an Integrated Pest
25 Management plan. Both parties shall bear their own costs of staff time in
26 participating in the Working Group and development of the IPM plan.

- 1 ○ To the extent practicable and provided funding is available, the Working Group
2 will seek to conduct research project(s) on the following topics in the 2019–2020
3 research season:
- 4 ▪ Development of a burrowing shrimp monitoring program in Willapa Bay and
5 Grays Harbor to assess impacts to shellfish beds and population trends.
 - 6 ▪ Assessment of past research regarding acceptable shrimp densities on a
7 variety of shellfish beds.
 - 8 ▪ Laboratory studies designed to evaluate the efficacy and possible impacts of
9 alternative chemicals to imidacloprid to be used as chemical controls for
10 burrowing shrimp in an IPM plan.
 - 11 ▪ Assessment of non-chemical control options for burrowing shrimp and
12 shellfish beds (e.g., including the work of Department of Natural Resources).
 - 13 ▪ Provided the laboratory studies identify chemical(s) that may be promising in
14 terms of efficacy in controlling burrowing shrimp, and low impact to non-
15 target organisms, the parties will work towards development of a 2020 field
16 study protocol that will include: (a) field trials of alternative chemical(s) that
17 may be used to control burrowing shrimp in conjunction with non-chemical
18 methods; (b) further exploration of mechanical methods such as spike wheel
19 injectors; and (c) continued dye studies to understand movement of water in
20 the bay to help develop strategies that will minimize the use and impacts of
21 chemicals.
 - 22 ▪ Additional project(s) as mutually agreed to by the Working Group.
- 23 • Identify at least one representative to participate in the Working Group regarding
24 development of an Integrated Pest Management plan to address burrowing shrimp in
25 Willapa Bay and Grays Harbor. Ecology’s representative will have authority to
26 represent both the Water Quality and Toxic Cleanup Programs at Ecology, and to

1 make commitments of staff time and resources from the Department as necessary to
2 fully support the Working Group. WGHOGA's representative will have authority to
3 represent the Growers and to make commitments of time and resources as necessary
4 to fully support the Working Group.

- 5 • The Working Group will meet for a period of at least one year, dating from the
6 effective date of this Agreement. The Working Group may be extended by mutual
7 agreement of the parties.
- 8 • Ecology will host a Working Group meeting every other month for the one-year time
9 period in Lacey, Washington. WGHOGA will host a Working Group meeting every
10 other alternate month for the one-year time period in Pacific County, Washington.
- 11 • The parties will jointly invite representatives from the Departments of Agriculture,
12 Natural Resources, Commerce, and the Conservation Commission, and a mutually
13 agreed to environmental interest to participate in the Working Group.
- 14 • Ecology will engage with WGHOGA or its representatives as the Growers seek to
15 obtain funding through legislative appropriation request in the Supplemental
16 Legislative Session beginning in January 2020. The appropriation request to be
17 submitted by WGHOGA will seek the following:
 - 18 ○ An appropriation of \$650,000 to be used exclusively to fund research related to
19 development of the IPM plan. As detailed above, IPM plan research projects may
20 include investigation of chemical controls as one aspect of the plan, but will not
21 include use of imidacloprid as a chemical control. To the extent permitted by law,
22 research projects to be funded from this appropriation would be identified and
23 mutually agreed to as part of the Working Group activities.

24 **B. WAIVER OF APPEAL RIGHTS**

25 WGHOGA understands that it has the right to appeal Ecology's decision to deny the
26 2016 NPDES permit application by presenting evidence at a Board hearing. WGHOGA

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

3 **C. DISMISSAL OF APPEAL**

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

8 **D. EFFECTIVE DATE**

9 This Settlement Agreement shall become effective upon the Board's dismissal of this
10 appeal.

11 **E. SIGNATORIES AUTHORIZED**

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

15 **F. EXECUTION**

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

19
20 STATE OF WASHINGTON
21 DEPARTMENT OF ECOLOGY

20 WILLAPA-GRAYS HARBOR OYSTER
21 GROWERS ASSOCIATION

22 

23 _____
24 KEN WIEGARDT
25 President
26 Willapa Grays Harbor Oyster Growers
Association

23 RICH DOENGES
24 Department of Ecology
25 Southwest Regional Director

26 Dated: 10/14/19

Dated: _____

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

3 **C. DISMISSAL OF APPEAL**

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

8 **D. EFFECTIVE DATE**

9 This Settlement Agreement shall become effective upon the Board's dismissal of this
10 appeal.

11 **E. SIGNATORIES AUTHORIZED**

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

15 **F. EXECUTION**

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

19
20 STATE OF WASHINGTON
21 DEPARTMENT OF ECOLOGY

22
23 _____
24 RICH DOENGES
25 Department of Ecology
26 Southwest Regional Director

Dated: _____

WILLAPA-GRAYS HARBOR OYSTER
GROWERS ASSOCIATION

22
23 _____
24 KEN WIEGARDT
25 President
26 Willapa Grays Harbor Oyster Growers
Association

Dated: 10/15/19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ROBERT W. FERGUSON
Attorney General

NORTHWEST RESOURCE LAW PLLC



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

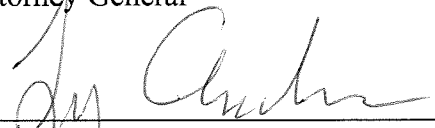
DOUGLAS J. STEDING, WSBA #37020
Attorney for Appellant
Willapa-Grays Harbor Oyster Growers
Association
206-971-1567

Dated: _____

Dated: 10/15/19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

NORTHWEST RESOURCE LAW PLLC

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

Dated: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

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.

PCHB NO. 18-073

CERTIFICATE OF SERVICE

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
 Email
dsteding@nwresourceclaw.com
mengel@nwresourceclaw.com
ehinkes@nwresourceclaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

LARRY WARNBERG
AD HOC COALITION FOR WILLAPA BAY
31 HURT ROAD
RAYMOND, WA 98577

U.S. Mail
 Hand Delivered
 Overnight Express
 Email
warnberg@pacifier.com

ANDREW HAWLEY
WESTERN ENVIRONMENTAL LAW CENTER
1402 3RD AVE, SUITE 1022
SEATTLE, WA 98101

U.S. Mail
 Hand Delivered
 Overnight Express
 Email
hawley@westernlaw.org

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