

Exhibit B

CFS Comments on Supplemental Environmental Impact Statement for Control of
Burrowing Shrimp using Imidacloprid on Commercial Oyster and Clam Beds in
Willapa Bay and Grays Harbor, Washington



Washington State Executive Ethics Board

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INVESTIGATIVE REPORT AND BOARD DETERMINATION OF REASONABLE CAUSE

CASE NUMBER: 2017-012
DATE: July 20, 2017
RESPONDENT: Kim Patten, Director WSU Pacific County Extension
EMPLOYING AGENCY: Washington State University

I. INVESTIGATION

A. Background and Summary of Complaint

On January 12, 2017, the Executive Ethics Board (Board) received a complaint alleging that Kim Patten (Mr. Patten), Director of the Washington State University (WSU) Pacific County Extension Office, may have violated the Ethics in Public Service Act. The complaint alleges that Mr. Patten used state resources to conduct research for his personal benefit and that his personal involvement with the commercial shellfish industry is in conflict with his official duties.

B. Scope of Investigation and Relevant Facts

Board staff reviewed the complaint and all supporting documents, interviewed Mr. Patten, reviewed email records from Mr. Patten's WSU.edu and WSU Gmail accounts, and reviewed Mr. Patten's state owned computer hard drive.

Based upon the investigation, staff determined the following:

1. Mr. Patten has been employed with the WSU Research and Extension Unit located in Long Beach since 1990. In 2004, Mr. Patten became the Extension Professor, and in 2012, he became the Director of the Long Beach Extension Unit.

2. As Director of the Long Beach Extension Unit, Mr. Patten's primary duties are to conduct research and provide education in all aspects of the cranberry, shellfish and other local agriculture in the Pacific County community. Mr. Patten's stakeholders are cranberry and oyster growers, both private and commercial, along with state and federal agriculture and natural resources managers and their related agencies.

3. Mr. Patten uses two different email accounts in his position as the WSU Extension Unit Director. Pattenk@wsu.edu is the official email account used by employees of WSU and is maintained by WSU. Pattenk.wsu@gmail.com is an authorized email account used by WSU employees who work in remote areas where access to the official email account is not readily accessible, but is not maintained by WSU. Mr. Patten uses the pattenk.wsu@gmail.com account to conduct both WSU official and personal business.

4. Mr. Patten indicated in his response to Board staff that he considers the shellfish industry a very important “client” in that they are the major employer and economic engine for the region. Mr. Patten further indicated that he was officially assigned to work on the shellfish pest issue by deans and directors at WSU.

5. Mr. Patten indicated in his response to Board staff that he has the exact same relationship with the shellfish industry as he has with other agriculture industries within the Long Beach area. The cranberry industry provides the WSU Extension Unit office, lab, and utilities with no cost to WSU. The shellfish industry rents office space at the WSU Extension Office from the cranberry industry but the office space is not currently being used.

6. WSU Extension Unit Strategic Goals:

Enhance Natural Resources and Environmental Stewardship:

- Improved economy and quality of life.
- Resolve natural resource conflicts.
- Improve ecosystem management.
- Solve complex issues of water and fisheries management.
- Control spread of non-native invasive species.

Enhance Economic Opportunities for Agricultural Enterprises while Protecting Washington’s Resources:

- Increase profitability and competitiveness of agriculture and food enterprises.
- Reduce market risk to agricultural producers.
- Increase application of alternative agricultural systems.
- Increase application of integrated pest management and conservation strategies.

7. Mr. Patten indicated in his response to Board staff that he would attend some local, state, and regional shellfish grower meetings. At these meetings, he would speak on different topics and obtain feedback on issues affecting the industry. Mr. Patten further indicated that he would do the same thing for the cranberry industry.

8. Brian Sheldon (Mr. Sheldon) is an owner of the Northern Oyster Company and a Board member of the Willapa-Grays Harbor Oyster Growers Association (WGHOGA), a non-profit organization made up of privately owned oyster growers from the Willapa Bay and Grays Harbor area.

9. On October 20, 2010, the Washington State Noxious Weed Control Board (Weed Control Board) received a letter from the Northern Oyster Company regarding a request by Pacific County to list *Zostera japonica* (Zj), a non-native eelgrass, as a Class C noxious weed. The letter indicated that Zj was invading shellfish beds, altering the ground so that it was becoming “un-farmable” and having an impact on the Northern Oyster Company’s ability to

continue farming oysters. The Weed Control Board did not list Zj as a Class C noxious weed in 2010.

10. On April 25, 2011, the Weed Control Board received another letter from the Northern Oyster Company requesting Zj be added to the Class C noxious weed list.

11. In August 2011, the Washington Department of Ecology (Ecology) received a letter from the WGHOGA requesting it begin the process of developing a new National Pollutant Discharge Elimination System (NPDES) permit allowing shellfish growers to control Zj with Imazamox, an aquatic herbicide. In response to the WGHOGA's request, Ecology's Water Quality Program (WQ) made a tentative decision to issue a new NPDES permit for controlling Zj with Imazamox.

12. On September 6, 2011, the Weed Control Board approved adding Zj to the 2012 Class C noxious weed list. On December 15, 2011, the Weed Control Board voted to add Zj as a Class C noxious weed for commercially managed shellfish beds only.

13. As part of the NPDES permit development process, WQ issued a public notice on February 1, 2012. After the initial public comment period, Ecology decided to reduce the scope of the permit and require an Environmental Impact Statement (EIS). The public comment period ended on March 9, 2012 at 5:00 pm

14. On March 7, 2012, Mr. Patten submitted a comment on the proposal as a private tideland owner from his pattenk@wsu.edu email account.

From: Kim Patten
To: Hamel, Kathy (ECY)
Subject: Public comment - NPDES eelgrass.
Date: Wednesday, March 07, 2012 3:43:56 PM

I am submitting a public comment on the NPDES for Japanese Eelgrass Management on Commercial Shellfish Beds General Permit.

I strongly encourage Ecology to issue this permit. As a private tideland owner in Willapa Bay for the past 22 years I've seen Japanese eelgrass change my recreational calm bed from a sandy easy- to -access productive bed to an unproductive muddy mess. I've been at a loss on how to recondition the bed into something useful. I've worn out rakes trying to clean the Japanese eelgrass out of my bed, all to no avail. Since private tideland owners are not covered by this permit, I would consider converting my bed to a commercial bed just to be covered by this permit and be able to remove the japonica.

Thank You

--
Kim and Andrea Patten
Tideland owner
Withheld

15. In 2012, the Washington Department of Fish and Wildlife (WDFW) and the Wildlife and Willapa Oyster Committee funded a grant for the research on estuary use of Imazamox.

16. On March 8, 2012, Mr. Patten submitted an application for an Experimental Use Permit (EUP) to apply the herbicide Imazamox on aquatic sites with the Washington State Department of Agriculture (WSDA) in connection with this grant and research.

17. The WSDA application identified property owners of four sites to be used in the experimental application of Imazamox:

- Brian Sheldon
- Taylor Shellfish
- Eric Hall
- Kim Patten

18. Each test site consisted of approximately $\frac{1}{4}$ of an acre of clam beds for each location for a total area of .98 acres.

19. The application identified the following individuals would be applying the herbicide to the site:

- Kim Patten
- Chade Metzger
- Nick Halderman
- All WSU employees.

20. The EUP application indicated that the ending date for the research was October 31, 2012.

21. In July of 2012, Mr. Patten submitted the final report on the impact of Zj and Imazamox to WDFW and the Wildlife and Willapa Oyster Committee.

22. On March 8, 2013, Mr. Patten again submitted an application to the WSDA for the EUP of Imazamox at the same four sites and the same three individuals as listed in in the 2012 EUP application. The ending date for the research was October 31, 2013.

23. Mr. Patten indicated in a response to Board staff that a EUP is only good for one year. In 2013, the main objective of his research was to conduct additional efficacy studies on Zj seedling control. Mr. Patten further indicated that he was trying to refine all gaps in efficacy he had in order to be sure everything was in order for the 2014 NPDES permit.

24. Mr. Patten indicated in a response to Board staff that when he applies for a EUP he adds all sites available for him to use at the time of the EUP application knowing he might not use some of those sites because if sites are not listed, he cannot use them. He further

indicated that he has dozens of projects going each year and he would rarely accomplish all of them but if he didn't include them on the EUP he would not be able to undertake those projects.

25. Mr. Patten also indicated in a response to Board staff that finding test sites for his research is one of his biggest challenges. The work tends to be destructive and growers need to be comfortable with that. They would crush shellfish accessing the site, they would harvest most of the crop on the test plots for destructive sampling purposes, and growers would have to agree to not harvest until the tests are completed.

26. Mr. Patten indicated in response to Board staff that for this particular research project the studies would be sited near the Nahcotta shellfish growing region on the Long Beach Peninsula, where Zj has formed large "meadows." Those sites were identified using the following criteria:

- They needed to be easily accessible (less than one hour boating or walking);
- needed to have gravel, clams and Zj;
- needed to have property owner's permission to treat and harvest from their site;
- sites could not be harvested until after the research had concluded; and
- the sites must be different enough locations across the bay to reflect the variation of effects that might occur.

27. Mr. Patten indicated that he chose the sites used in the research based on the above criteria. Mr. Patten further indicated that his site was actually a poor site and his last choice but he could not find anything further south down the bay.

28. Mr. Patten also indicated in a response to Board staff that he used about ½-acre of his clam farm. He put out 12 replicated plots within that ½-acre area. Each plot was 8 feet by 10 feet. There were six treated and six untreated control plots. The total area sprayed was about 480 square feet. These plots were destructively harvested to obtain number of clams, size and meat weight.

29. On September 26, 2013, the Weed Control Board announced a public hearing to consider changes to the 2014 noxious weed list. The hearing was scheduled for November 5, 2013 in Wenatchee, Washington. The announcement indicated that the Weed Control Board had several proposed changes for 2014. One of the proposed changes was reinstating the original 2012 listing of Zj as a noxious weed on commercially managed shellfish beds only. In 2013, the Weed Control Board had removed the modification of Zj and listed it as a noxious weed on all shellfish beds, commercial and private.

30. On September 27, 2013, Mr. Patten responded in opposition to the proposed changes from his pattenk@wsu.edu email account. In Mr. Patten's response to the Weed Control Board, he indicates that he is responding as a private landowner and as a scientist.

- **Private Landowner:** "As an owner of 2 acres of noncommercial clam ground in Willapa Bay, I find it unacceptable to learn that I will be unable to control

Japanese eelgrass on my own property.... going back to the 2012 listing I no longer have any options.”

- **Scientist:** “By restricting this listing to the 2012 wording, you are essentially preventing the management of this invasive weed for the purpose of maintaining or restoring critical habitat for an ESA (Endangered Species Act) - listed species. You will no doubt hear testimony that *Z. japonica* provides valuable forage habitat for waterfowl along the Pacific Flyway. This is not a reason to justify going back to the 2012 weed listing...”

Mr. Patten’s response consisted of three pages of text including two graphs and two attachments. The document was created on September 27, 2013 at 10:45 am and was last saved on September 27, 2013 at 12:03 pm. Total edit time was 53 minutes.

31. Mr. Patten told Board staff that he used his personal farm as an example of the effect of going back to the 2012 Weed Control Board modification of Zj as a noxious weed for all of the small private non-commercial shellfish farms in Willapa Bay.

32. After deliberation on the oral and written testimony received from the public comment period, on November 7, 2013, the Weed Control Board decided to leave Zj as classified rather than reverting back to a Class C noxious weed on commercially managed shellfish beds only.

33. On November 28, 2013, Mr. Patten received an email on his WSU Gmail account from Mr. Sheldon regarding Mr. Patten leasing his clam farm to Mr. Sheldon to harvest clams. By entering in to the agreement, Mr. Patten was converting his clam farm to a commercial clam farm.

Brian Sheldon <oysters@willapabay.org>
To: Kim Patten <pattenk.wsu@gmail.com>

Thu, Nov 28, 2013 at 10:35 AM

Hi Kim,

Happy Thanksgiving.

I drafted up a simple lease agreement for your tideland, see attached. Take a look and modify as you want. If it looks ok we can sign and I can get the harvest site application sent in to DOH. I’ll get you a copy of the Harvest site application so you’ll have it for your records.

If you can get me a property description I’ll shoot the north and south lines in from the survey corners so we can get some more permanent lines set.

Thanks,
Brian



11-28-13 Lease Agreement.docx

18K

34. On Saturday, November 30, 2013, Mr. Patten responded from his pattenk.wsu@gmail.com account

Kim Patten <pattenk.wsu@gmail.com>
To: Brian Sheldon <oysters@willapabay.org>

Sat, Nov 30, 2013 at 9:37 PM

Looks fine.
I need to get the property information from my safe deposit box on Monday. I'll get it to you then.

WSU Extension programs are available to all with out discrimination.

[Quoted text hidden]

35. On December 1, 2013, Mr. Sheldon responded:

Brian Sheldon <oysters@willapabay.org>
To: Kim Patten <pattenk.wsu@gmail.com>

Sun, Dec 1, 2013 at 9:54 AM

I'll be out of town at the Conservation District meetings in Cle Elum until late Wednesday. We can meet when I get back to sign and move ahead. I'd like to get the lines set before I put the crew there so we're harvesting up to the north and south lines. If you get the prop description and can e-mail it to me I'll convert it so we can shoot the lines in and set some more permanent markers on your north and south lines.

Today is Basketball so I'll be in Kelso. Go Ilwaco!!!

Thanks,
Brian

From: Kim Patten

36. On Wednesday December 4, 2013, Mr. Patten responded using the pattenk.wsu@gmail.com account with the property description. On December 5, 2013, Mr. Sheldon responded to Mr. Patten.

Brian Sheldon <oysters@willapabay.org>
To: Kim Patten <pattenk.wsu@gmail.com>

Thu, Dec 5, 2013 at 9:03 AM

Hi Kim,

Just got back into town. I've got meetings today, but will try to get back on this tomorrow. I'll try to get with you and get the lease signed. After that I can submit the harvest site app to DOH.

Also, Nate at DOE has asked for a meet on December 13th down here. He said they want to discuss some changes they want to make to the draft NPDES permit. If you're available I may be asking you to attend. I asked Nate to send me something on what they are looking at changing. I'll let you know what I find out.

Thanks,
Brian

37. On January 2, 2014, Ecology posted a draft EIS to tribes, agencies, organization, and individuals with an interest in the Ecology proposal to issue a NPDES general permit for the use of the Imazamox on commercial clam beds (excluding geoducks) in Willapa Bay. The public comment period ended on February 15, 2014.

38. At 1:16 pm, on January 17, 2014, Mr. Patten commented on the draft permit from his pattenk@wsu.edu email account. Mr. Patten's comments were specific to Section 4(B) of the draft permit, requiring a 10 mm buffer zone. In his comments, he used his farm as an example of an economic hardship that would be caused by the proposed 10 mm buffer.

"My farm: As a commercial clam grower with a small parcel of ground thickly covered by Z japonica, this buffer will prevent most of my ground from being farmed. I have a 160' by 200' parcel that is farmable (32,000 ft²). This buffer removes 16,800 ft². My ground produces ~ 0.5 lbs/ft² every 4-5 years. I get paid \$0.75/ lb. On ground with japonica my yields have been about half. This totals approximately \$5,000 to \$6,000 in crop loss. I think this is an unreasonable economic impact. The ground does not have drainage swales and there is little chance of "chemical trespassing."

"All farms: Not being able to treat up to the buffer zone constitutes a taking of private revenue and right to farm. For every 1 foot of property line on a clam farm, a grower can lose ~ \$10 of net revenue (assumes an average yield of 1 lbs/ft² of clams every 3 years, with the grower netting \$1/ lbs and a 30% reduction in yield with Z. japonica). Using an example of a small 3.5 acre clam farm (1000' by 160') a grower would lose \$23,000 (2320 ft of property line x \$10/ft) every three years having to accommodate this buffer. This buffer would cost a small grower over \$7,000 a year in lost revenue. This constitutes a very significant economic impact."

39. On April 2, 2014, the NPDES general permit was issued by Ecology for the use of the Imazamox on commercial clam beds (excluding geoducks) in Willapa Bay. After consideration of the public comments made by Mr. Patten and others, Ecology did not remove the 10 mm buffer zone in the application process.

40. The effective date of the permit was May 2, 2014, with an expiration date of May 2, 2019.

41. On March 27, 2014, Mr. Patten again applied to the WSDA for a EUP to spray Imazamox in the Willapa Bay. Mr. Patten indicated in a response to Board staff that this application was to conduct some early timing studies to look at when Zj seedlings would emerge in an effort to determine the best time to use Imazamox to affect the germinating Zj seedlings. For this experiment, he needed to conduct several small timing studies.

42. The 2014 EUP only identified one site location owned by Taylor Shellfish Company, removing his site and the two sites owned by Brian Sheldon.

43. Mr. Patten indicated in his response to Board staff that the NPDES was issued in May 2014 and he no longer needed the EUP. The 2014 EUP was only used on .1 acres owned by Taylor Shellfish Company to conduct seedling-timing studies as indicated above.

44. Mr. Patten further indicated that after the NPDES was issued in April 2014 he treated his entire 1/2-acre clam farm.

45. Mr. Sheldon's company, the Northern Oyster Company, commercially harvested clams from Mr. Patten's 1/2 acre clam farm in 2014. According to the lease agreement, Mr. Patten was paid \$0.70 per pound of clams. Pounds of clams were based on washed clams as prepared for shipping.

46. Mr. Patten indicated in a response to Board staff that at that time the average price was about \$0.60 to \$0.70 per pound depending on the size and quality. He recalled that he was paid \$0.60 per pound.



David Killeen, Senior Investigator

II. APPLICABLE LAW

The complaint alleges violations of the following sections of the Ethics in Public Service Act:

RCW 42.52.020 – Activities incompatible with public duties states:

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.

RCW 42.52.160(1) – Use of persons, money, or property for private gain, states:

No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

WAC 292-110-010 Use of state resources, prior to April 2016, states, in part:

.....

(2) The following are permitted uses:

- (a) Use of state resources that is reasonably related to the conduct of official state duties, or which is otherwise allowed by statute.
- (b) An agency head or designee may authorize a use of state resources that is related to an official state purpose, but not directly related to an individual employee's official duty.

(c) An agency may authorize a specific use that promotes organizational effectiveness or enhances the job-related skills of a state officer or state employee.

(d) A state officer or employee may make an occasional but limited personal use of state resources only if each of the following conditions are met:

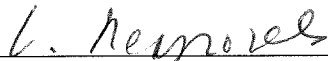
(i) There is little or no cost to the state;

(ii) Any use is brief;

(iii) Any use occurs infrequently;

(iv) The use does not interfere with the performance of any officer's or employee's official duties; and

(v) The use does not compromise the security or integrity of state property, information, or software.



Kate Reynolds, Executive Director
Executive Ethics Board

III. BOARD REASONABLE CAUSE DETERMINATION AND ORDER

Based upon the investigative report, we, the Washington State Executive Ethics Board determine the following:

Dismissal

Pursuant to RCW 42.52.425, IT IS HEREBY ORDERED that the complaint is DISMISSED for the following reason:

_____ Any violation that may have occurred is not within the jurisdiction of the board

_____ The complaint is obviously unfounded or frivolous

_____ Any violation that may have occurred does not constitute a material violation because it was inadvertent and minor, or has been cured, and, after consideration of all of the circumstances, further proceedings would not serve the purposes of this chapter.

Reasonable Cause

Pursuant to RCW 42.52.420, IT IS HEREBY ORDERED

There IS reasonable cause to believe that violation(s) of RCW 42.52 have been or are being committed and the penalty may be:

GREATER THAN \$500

\$500 OR LESS

NONMONETARY

_____ There IS NOT reasonable cause to believe that violation(s) of RCW 42.52 have been or are being committed and the complaint is CLOSED.

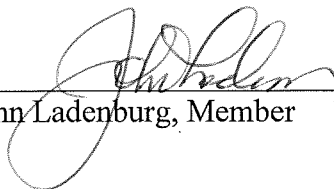
DATED this 8th day of September, 2017



Anna Dudek Ross, Chair



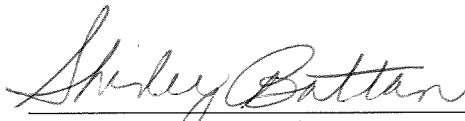
Samantha Simmons, Vice-Chair



John Ladenburg, Member



Lisa Marsh, Member



Shirley Battan, Member