

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

Kim Patten

Respondent.

No. 2017-002

STIPULATED FACTS,
CONCLUSIONS OF LAW AND
AGREED ORDER

THIS STIPULATION is entered into by Respondent, KIM PATTEN, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through Kate Reynolds, Executive Director, pursuant to chapter 42.52 RCW, chapter 34.05 RCW, and WAC 292-100-090(1). The following stipulated facts, conclusions of law, and agreed order will be binding upon the parties if fully executed, and if accepted by the Board without modification(s), and will not be binding if rejected by the Board, or if the Respondent does not accept the Board's proposed modification(s), if any, to the stipulation. This stipulation is based on the following:

A. STIPULATED FACTS

1. 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.

2. 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.

3. 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.

4. 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. In addition to the wsu.edu account, Mr. Patten used Pattenk.wsu@gmail.com to conduct both official and personal email activity.

5. 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.

6. 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.

7. 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.

8. Mr. Patten indicted 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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

16. 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.

17. 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.

18. 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

19. 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.

20. The application identified the following individuals would be applying the herbicide to the site: Kim Patten, Chade Metzger, Nick Halderman and all WSU employees.

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

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. Mr. Patten also indicated in a response to Board staff that he used about ½-acre of his 2-acre 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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 m buffer zone. In his comments, he used his farm as an example of an economic hardship that would be caused by the proposed 10 m 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."

35. 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 m buffer zone in the application process.

36. 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.

37. Mr. Patten further indicated that after the NPDES was issued in May 2014 he treated his entire ½-acre clam farm.

38. 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.

39. 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.

B. CONCLUSIONS OF LAW

1. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from using state resources for their benefit. RCW 42.52.160(1) 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.

2. Based on the stipulated facts above, Mr. Patten used state resources for a private benefit in violation of RCW 42.52.160.

3. The Board is authorized to impose sanctions for violations to the Ethics Act pursuant to RCW 42.52.360. The Board has set forth criteria in WAC 292-120-030 for imposing sanctions and consideration of any mitigating or aggravating factors.

C. AGGRAVATING AND MITIGATING FACTORS

In determining the appropriateness of the civil penalty, the Board reviewed the criteria in WAC 292-120-030. In the matter at hand, it is an aggravating factor these types of violations significantly reduce the public respect and confidence in state government employees and they were continuous in nature.

D. STIPULATION AND AGREED ORDER

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Kim Patten and over the subject matter of this complaint.

2. Under RCW 34.05.060, the Board can establish procedures for attempting and executing informal settlement of matters in lieu of more formal proceedings under the Administrative Procedures Act, including adjudicative hearings. The Board has established such procedures under WAC 292-100-090.

3. Pursuant to WAC 292-100-090(1), the parties have the authority to resolve this matter under the terms contained herein, subject to Board approval.

4. Kim Patten agrees that if any or all of the alleged violations were proven at a hearing, the Board may impose sanctions, including a civil penalty under RCW 42.52.480(1)(b) of up to \$5,000, or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW, for each violation found. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

5. Kim Patten further agrees that the evidence available to the Board is such that the Board may conclude he violated the Ethics in Public Service Act. Therefore, in the interest of seeking an informal and expeditious resolution of this matter, the parties agree to entry of the stipulated findings of fact, conclusions of law and agreed order.

6. Kim Patten waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or his acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2).

7. If the Board accepts this stipulation, the Board agrees to release and discharge Kim Patten from all further ethics proceedings under chapter 42.52 RCW for any allegations arising out of the facts

in this matter, subject to payment of the full amount of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the stipulation. Kim Patten in turn agrees to release and discharge the Board, its officers, agents and employees from all claims, damages, and causes of action arising out of this complaint and this stipulation.

8. If the Board accepts this stipulation, it does not purport to settle any other claims between Kim Patten and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future. No other claims of alleged violations are pending against Kim Patten at this time.

9. If the Board accepts this stipulation, it is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

10. If the Board rejects this stipulation, or if Kim Patten does not accept the Board's proposed modification(s), if any, this matter will be scheduled for an administrative hearing before the Board. If an administrative hearing is scheduled before the Board, Kim Patten waives any objection to participation by any Board member at the hearing to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Kim Patten understands and agrees that this stipulation as well as information obtained during any settlement discussions between the parties shall not be admitted into evidence during the administrative hearing, unless otherwise agreed by the parties.

11. Kim Patten agrees to pay a civil penalty in the amount of four hundred fifty dollars (\$450) associated with the improper use of public resources, RCW 42.52.160.

12. The civil penalty in the amount of four hundred fifty dollars (\$450) is payable in full to the Washington State Executive Ethics Board within forty-five (45) days after this stipulation is signed and accepted by the Board, or as otherwise agreed to by the parties.

II. CERTIFICATION

I, Kim Patten, hereby certify that I have read this stipulation in its entirety, that my counsel of record, if any, has fully explained the legal significance and consequence of it. I further certify that I fully understand and agree to all of it, and that it may be presented to the Board without my appearance. I knowingly and voluntarily waive my right to a hearing in this matter and if the Board accepts the stipulation, I understand that I will receive a signed copy.

Kim Patten 10/24/17
KIM PATTEN Date
Respondent

Presented by:

K. Reynolds 11/7/17
KATE REYNOLDS Date
Executive Director

II. ORDER


Having reviewed the proposed stipulation, WE, THE STATE OF WASHINGTON EXECUTIVE ETHICS BOARD, pursuant to WAC 292-100-090, HEREBY ORDER that the Stipulation is

✓ ACCEPTED in its entirety;

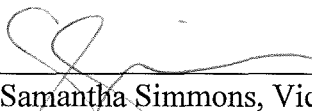
_____ REJECTED in its entirety;

_____ MODIFIED. This stipulation will become the order of the Board if the Respondent approves* the following modification(s):


DATED this 17th day of November, 2017



Anna Dudek Ross, Chair



Samantha Simmons, Vice-Chair



Lisa Marsh, Member



John Ladenburg, Sr., Member



Shirley Battan, Member

* I, Kim Patten, accept/do not accept (circle one) the proposed modification(s).

Kim Patten, Respondent Date