

Minutes of the
Oyster Lease Damage Evaluation Board
December 2, 1998

A meeting of the Oyster Lease Damage Evaluation Board was held on Wednesday, December 2, 1998, at 9:00 a.m. in the Mineral Board Docket Room, Fourth Floor, State Land and Natural Resources Building, Baton Rouge, Louisiana.

The meeting was called to order by the Chair, Vivian Guillory, and roll was taken.

Board members present:

Vivian B. Guillory, ALJ, Chair

Phillip E. Boydston, Burlington Resources, representing Mid-Continent Oil and Gas Assn. and Louisiana Landowners Assn.

Ralph Pausina, representing the Oyster Dealers and Growers Assn.

Don Briggs, representing LIOGA and Louisiana Landowners Assn.

Board member absent:

Mike Voisin, representing the Louisiana Oyster Task Force

DNR staff present:

James R. Hanchey, Deputy Secretary

John Waitz, Staff Attorney

Rachel Sweeney, Coastal Restoration Division

Cheryl Baker, Coastal Restoration Division

Carolyn Edwards, Executive Assistant

Others present

Noel V. "Bud" Brodtmann, Consultant, EPL

Richard Waldron, R.P.W., Inc.

Dr. Ed Cake, Gulf Environmental Associates

Mike Rayle, Steimle and Associates

Dr. Ron Kilgen, Kilgen Environmental Services

Mrs. Guillory asked for a motion to approve the minutes of the October 28, 1998 meeting. Motion was made by Mr. Boydston and seconded by Mr. Pausina. Minutes approved.

On the next agenda item, "Uniform Evaluation Methods," Mr. Hanchey commented that he had asked Mrs. Sweeney to revisit that part of the Evaluation Methods dealing with distinguishing the leases by salinity regime for the purpose of asking the Board if it would want to consider whether or not it is

something that would provide more flexibility when trying to apply the values.

Mrs. Sweeney reported that in a 1996 workshop, two primary factors were identified as contributing to the value of leases - substrate characteristics and salinity regime. In discussing salinity she said the workshop and the Dr. Sammy Ray Report identified salinity as one of the most important factors in determining a lease's value. She said there was some consensus reached in the workshop that salinity regime was well depicted by the Oyster Resources Map developed by Dr. Earl Melancon and others in 1994. The map shows five salinity areas, or zones, with appropriate salinity percentage values. When salinity values are added to the six substrate types, it gives a range of values for reef substrates from 10% of whatever is considered the maximum to 100%, based on the location in the coastal area. The end result is an array of combined values for lease areas based on salinity and substrate. Applying this to the Board's matrix gives a little more detailed guidance in terms of saying that the whole coast is not the same. Leases located throughout the coast are not necessarily created equal and substrate is not the only important factor contributing to lease value. She added that such a map does not exist for leases east of the Mississippi River.

She then went over the requested changes made to the Uniform Evaluation Methods, saying that she had inserted language to strengthen the fact that it is intended to be a guidance document, and that there are factors other than absolute data or criteria that the Board needs to consider. She had also added some clarifying language suggested by Buddy Pausina, and included the salinity and matrix.

Mr. Pausina said that when Dr. Melancon developed the zones appearing in his report, he didn't develop them from reading salinities. He developed them by looking at where oysters live, so looking at the lines on the map are not going to tell you where salinities fall. He suggested not putting percentages by salinity zones in the document and made a motion to put the section dealing with a history of the lease right after the Introduction in the Uniform Evaluation Methods.

Mr. Boydston said the goal was to come up with a mechanism to evaluate a lease with the understanding that there are variables the Board will have to consider.

Mr. Waldron said he understood the idea to be not to devalue a lease because a salinity measurement puts it in the landward zone, but he said he suspected if he found a real oyster reef, the chances are that it wouldn't be in the landward zone anyway.

Mrs. Guillory said that under the rules the biologists are to determine quality, condition and value of oyster beds before the activity, and estimated damage after the activity. She said the biologists need to give the Board as much information as they can in order to substantiate however they arrived at the damages.

Mr. Pausina made another motion to make the wording in the second paragraph of the Uniform Evaluation Methods read, "Prior to the estimation..." instead of "In addition to the estimation...."

Regarding who should provide a history of the lease to the Board, Mr. Hanchey said it seemed to him that if there is a dispute and the Board is going to establish a bond, then it's incumbent on both sides to present their case as best they can in both the bond setting and the actual damage phases. If the Board requests of, or even suggests to, each party that they bring certain materials to the Board, the Board could very easily request that the leaseholder provide a history of his lease since it has already placed a request on the oil company by requiring a biological survey to be conducted at the oil company's expense. If the leaseholder refuses to provide it, then the Board can take that into consideration in its deliberations. The same thing would apply to the actual damages part. There is a "discovery process" where each party to the arbitration has to be advised of his rights of discovery. This is a fairly formal process and it would seem incumbent upon each party to make their case as best they can, as long as the Board makes it clear that the history of the lease is important in their consideration and determination. If a person refuses to provide it, then there's some risk to his case.

Mrs. Guillory and Mr. Boydston agreed, but Mr. Boydston said he wanted to know who is obligated to notify the leaseholder to provide these data - the state, the biologist, the oil company?

Mr. Hanchey said he thought that when a Preliminary Request for Arbitration is received from the oil company, it would be incumbent upon the Board to communicate something to both parties. Staff of DNR, who supports the Board, can prepare a standard letter that goes to both parties and which sets the whole process in motion. He said the request could be included in this letter.

Mr. Pausina said he thought this would work and that the document would not have to be amended.

Mrs. Sweeney recapped by saying, "Early on in the process, like when the three biologists names are being drawn, under the Board's signature a letter would be sent to the leaseholder requesting him to provide background information on the lease so the Board will have as much information as possible. The biologists would also collect any information they could find and incorporate it into their report and the report would, basically, put the burden on the leaseholder to come forth with this background information."

Mr. Pausina said the biologists could also include their general knowledge of the area.

Mr. Rayle suggested to include in the biologist's original "Permission to Sample the Lease" letter, whatever verbiage the Board comes up with for its letter.

Mr. Pausina made two motions. The first was that the Board use a cultch rate per acre that would establish a thickness of three inches as reef. The second was that the impending workshop for certified biologists, as a first priority item, take up refining the matrix.

Discussion on the second motion was heard first. Mr. Pausina said he had three different versions of the matrix, but he thought the biologists should develop the matrix for the Board.

Mrs. Guillory said she thought the Board should deal with the information it has now, make a decision, go on with it and work out the bugs as it goes along. Mr. Boydston agreed because the document is a live document and its application can be looked at by the Board as cases come before it.

There was no second to the motion.

The Board then took up the first motion to increase the cultch rate from 187 yards per acre, which roughly translates to one inch, to a rate per acre which will yield three inches, or 403 yards per acre.

Mr. Boydston said he was disinclined to second the motion. He wanted to go along with what staff is recommending.

Mr. Rayle asked if the Board realized that all the cubic yards are based on a percentage of a maximum value so, if that goes up to three inches, that means all the other categories go up also.

At this point Mr. Hanchey brought up something he thought would be important in the Board's deliberations. He said he had talked with Mr. Caldwell about what the Secretary's role is in this process. They looked at the law and Mr. Caldwell was of the opinion that the law says the Secretary, in conjunction with the Board, shall promulgate the rules and regulations. Secretary Caldwell said he felt he should have a say in the evaluation guidelines that the Board develops; that he should review them before they are finalized. This means that anything the Board does is going to have to be approved by Secretary Caldwell.

Mr. Pausina said the Board was aware of this.

Mr. Hanchey said this was clear for the damages, but Secretary Caldwell wants to review and have the opportunity to approve or disapprove the actual evaluation guidelines.

Mr. Boydston suggested not taking any action on the motion and asked if the three inches is a valid industry tested number. Is that the standard? Mrs. Sweeney explained that there is some information to support three inches as a cultch application rate. She summarized Dr. Cake's 1983 Habitat Suitability Model findings that the optimal density of substrate is a load bearing capacity (LBC) of 1 kg/cm², and that there was some hypothesis that this optimal LBC could be provided by a six inch shell mat. She then described some related studies performed by Mr. Brodtmann which produced some data demonstrating that six inches provided LBC well in excess of the optimal 1 kg/cm². Some of Mr. Brodtmann's data suggested that three inches would be a more appropriate cultch application rate to produce the preferred LBC. Mrs. Sweeney also pointed out that there is some evidence that the cultch application rate used by the Department of Wildlife and Fisheries on its shell plants does provide adequate substrate firmness over the long term. Mrs. Sweeney summarized that 1) there is evidence demonstrating that six inches is too thick; 2) a hypothesis, supported by some data, that three inches would provide optimal firmness; and 3) there is some information indicating one to 1.4 inches may not

be thick enough.

After further discussion, the motion did not receive a second. Mr. Pausina then made another motion to use Sheet 2 on an interim basis until the Board can come up with something better. Since no one was comfortable enough to put this in the document, it did not receive a second.

Mr. Boydston asked that staff re-work the table. He asked if the percentages are right in light of 403 yards per acre which seems to be an acceptable figure for three inches. He did not feel the present time was right to render a decision. Mrs. Guillory agreed saying she would be uncomfortable with any matrix that puts in concrete exactly what the Board was going to do. She suggested, instead, to put in language that everyone could live with and work things out as DNR takes time to re-work the table.

Mr. Pausina recommended letting the biologists make their own recommendations and not use the matrix at all. He amended his motion that the firm mud be in a range of from 10 to 50 percent, to be determined by the biologists. After some discussion, this was seconded by Mr. Boydston. The motion passed unanimously.

Mrs. Sweeney said she would integrate the motion into the proposal where it was changed from 10 to 50 percent and add some language that the biologists in their field investigations will try to make a recommendation, based on whatever information they gather, as to the actual value of the firm mud present on the lease. She said she would get this out to the Board as soon as it is completed.

Mr. Hanchey said he would have Secretary Caldwell review the finalized document.

Mrs. Guillory asked Mr. Hanchey to report on Agenda Item IV, "Update on accrual of interest." Mr. Hanchey said the issue has been resolved. Essentially, the State Treasury has agreed that this money should be put into an escrow account and the interest accruing on it remain with the fund. The way the rules are written, the leaseholder and/or oil company would get the interest on the amount of the award.

Mr. Boydston asked if the rules were final. Mr. Waitz said he plans to have them published in The Register in January. They're at the House Natural Resources Committee now. That committee has the right, not the obligation, to hold hearings on these rules. If they don't do this within 30 days, they become final.

Regarding Item V, "Ethics Commission finding," Mr. Waitz said the Commission revisited the Board's request and had come to a different conclusion. The Commission said recusal is an option for a member who has a conflict and the Governor can appoint an alternate for that Board member who must recuse himself. Mrs. Guillory said that in the case that is presently pending, the Governor is going to appoint a substitute for the arbitration hearing, but Mr. Boydston is still a member of the Board.

Mr. Waitz said LIOGA, Mid-Continent and the Louisiana Landowners Assn. will need to send a letter to the Governor nominating a candidate to serve in Mr. Boydston's place for the arbitration hearing. This will have to be done in each case where there is a conflict.

Mr. Pausina asked if a document could be written to the Board in "plain English, not legal language," outlining the guidelines they have to follow in case one of them has to recuse himself. Mrs. Guillory said, "We'll work on that."

Mrs. Guillory asked Mrs. Sweeney to report on the next agenda item, "Letter to Coastal Use Permit applicants." Mrs. Sweeney said the overall goal was to dovetail the arbitration process of the Board with the Coastal Use Permit process. She said the prospect of this didn't look good because the two processes don't link very well. She didn't have a recommendation at this time, but would work on this further and hoped to have a better report at the next meeting.

Mr. Waitz mentioned that Mr. Rocky Hinds, of DNR's Permits Section, said they are willing to include in the Coastal Use Permit application package whatever information the Board has.

Regarding "Pricing of cultch," Mr. Hanchey said this had already been covered.

On the "Workshop for certified biologists," Mr. Hanchey said a letter had been sent to the certified biologists concerning their recertification and, in that letter, they were asked about topics they would like to see included in that workshop. He said preparations for the workshop, however, would not begin until some time next year.

Mrs. Guillory said that "Ethics and the biologists" (Item IX on the agenda) could be included in the workshop. Mr. Hanchey said the Ethics Commission had volunteered to speak to the Board about ethics issues and he thought they could include the biologists in this topic also.

Mrs. Guillory asked if there was a Request for Hearing yet from the case that's pending. Mr. Waitz said he had received the report from Burlington's and LL&E's attorney who would like to put off the actual hearing until shortly after the first of the year. Mr. Hanchey added that the Final Request for Arbitration, which starts the 90-day clock, had not yet been received.

Tuesday, January 5, 1999, was agreed upon as the date of the next meeting, and Wednesday, February 10, 1999, was set for the February meeting.

Taking up the item of "New business," Mr. Boydston reminded the Board that the Legislature will be meeting in March and recommended that the Board and others present look at the law and come to the January Board meeting to recommend any changes to the statute. He suggested that Mr. Waitz make a list of things the Board should look at and what needs to be changed in the law, and then begin drafting those bills and get an author. This must be done by the January meeting or the bills won't get on the

calendar. Mr. Guillory said this will be put on the Board's January meeting agenda.

Mr. Pausina made a motion to close. This was seconded by Mr. Boydston. Meeting adjourned.