

Minutes  
of the  
Oyster Lease Damage Evaluation Board  
January 26, 2004

A meeting of the Oyster Lease Damage Evaluation Board was held on Monday, January 26, 2004, at 10:00 a.m. at the Division of Administrative Law Office, Baton Rouge, Louisiana. The notice and agenda for the meeting are attached.

The meeting was called to order by Judge Vivian Guillory.

Board members present:

Vivian B. Guillory, ALJ, Chairman

Don Briggs, LIOGA representing LIOGA, Mid-Continent Oil and Gas Assn., and Louisiana Landowners Assn.

Ralph V. Pausina, representing the Louisiana Oyster Dealers & Growers Assn.

Philip E. Boyston, Burlington Resources, representing LIOGA, Mid-Continent Oil & Gas Assn., and Louisiana Landowners Assn.

DNR Staff present:

Warren Fleet, Legal Department

Hope Davis, Executive Services Assistant

Others present:

Mr. Ron Kilgren, Kilgren Environmental Services

Mr. Bob Oncelet, Kilgen Environmental Services

Mr. Ed Cake, Gulf Environmental Associates

Mr. John Cirino, Cirino Consulting Services

Mr. Mike Rayle, E & E Group

Mr. Bud Brodtmann, Environmental Professionals Limited

Ms. Clara Cowan, Paralegal, Division of Administrative Law

Mr. Richard Stanick, Private Citizen

A quorum being present, the meeting began the approval of the minutes from the February 20, 2002 meeting. On motion made, seconded and passed unanimously.

The second agenda item concerning comments on methodology for calculating second and third year discounts for living oyster resources. Mr. Pausina explained that the reason for bringing up this issue was because the board was in the process of formulating our methods in order to facilitate the companies and here their case. We never returned to our operating procedures concerning this methodology and he thought that the board needed to bring it back to the table to give guidance to the biologists and board members. There seems to be a lot differences of opinion from different biologists findings in different places. He understands that all oysters are not equally distributed naturally in environment, differences in environment, even in same water bottoms will have different distributions. He is trying to get more sensible numbers as follows:

Proposed changes to:

Oyster Lease Damage Evaluation Board's Manual of Operating Procedures

A. Procedure

1. Overview

Using information from the initial and final.....substrate type. Based on that information, coupled with the current market rate of marketable oysters and the mortality rates of [*non-marketable, immature*] **potentially marketable** oysters.

The Board has classified living oyster resources into three size classes 1)marketable oysters which are those longer than three inches, 2)[*seed oysters, which are*] **potentially marketable oysters** between three inches and two inches, and 3)[*spat, which are those*] **potentially marketable**

**oysters** shorter than two inches.

For the purpose of the Board, a count of 190 oysters is equal to one sack for all size classes. With proper discounting based upon [*standard*] **observed** mortality rates for [*immature*] oysters, the flat rate.....

## 2. Initial Damage Prediction

The future harvest potential of the standing crop of the [*two immature classes (following)*] two years potential market crop [ ] will be determined by discounting the [*immature*] at the appropriate **observed** mortality rate [*(90% mortality for spat and 50% for seed)*]

Delete: bracketed and italic wording

Insert: bold wording

The board moved to make these changes. Mrs. Vaughan verified that these changes were not part of the promulgated regulations but in the operating procedures. Mrs. Vivian verified that this not part of the promulgated rules. Mr. Briggs questioned if potentially marketable is more reasonable. Mr. Pausina explained that oysters that are less than 3" are potentially marketable. Mature oysters was not explanatory enough. Mr. Briggs had a question about why he was replacing standard with the word observed, are they observed when they are tested. Mr. Pausina suggested with the word observed the biologists can determine the mortality rate by measuring life oysters as apposed to freshly fed oysters, dead oysters. Judge Guillory questioned if they are relying on the biologists to make these determinations. Mr. Briggs pointed out that there has been differences of opinion on observations, and questions if there observations would be the same in this situation. Mr. Pausina explained that in the

definitions in the beginning that oysters larger than 3" were sack oysters, between 1"-2" are considered seed, and oysters less than 1" are considered spat. In the rules we are classifying seed oyster between 2-3" where in definition it's between 1-2" which is the standard that the biologists use. Spat for our purposes is smaller than 2" which would serve the purpose of this board in determining damages. Which would help in measuring the potential cost factor or price factor that will be marketable one or two years from now. Mr. Boydston questioned that the discounting would not be determined by the standard but by the observation. That the biologists would go out and develop a formula by looking at the crop and determining the marketable oysters from that particular reef. Mr. Pausina agreed. Mrs. Vaughan clarified if they want to make it clear the board clarifies that they mean that the board will rely on the biologists to determine the mortality rate of the oyster beds and wanted to know if they wanted to set some guidelines. Mr. Pausina explained that the guidelines did explain what the biologists have to follow. Dr. Cake asked if the potentially marketable is not defined as the seed oysters that can be sold by one less seed to another less seed. Are seed oysters sellable. Mr. Pausina verified that they are sellable. Mr. Boydston questioned if there are seed oysters that are not marketable. Mr. Pausina verified that all seed oysters or potentially marketable. Depending on which market you are talking about. Mr. Boydston questioned if a biologist came to the board and asked if there are percentage of oysters that are not marketable could that be. Mr. Pausina explained that any live oysters would be marketable. Mr. Rayle explained that the board can take care of that in adjusting their deliberations on the cost of harvest, the extra step in hiring guards to stay on the boats for the entire time they are harvested and the two week period they have to clean themselves and make sure no one picks them back up. This is typically marketable at a much higher cost than the normal harvesting. Mr. Boydston

wants to see data by the biologists based on methodology that's in this policy. He didn't want to see new terminology that will conflict with the rules that are being set. Mr. Rayle explained that this area is closed to direct harvest and any harvest from here would require a permit from the Department of Health and would have to follow the Department of Health guidelines which would increase the cost of the harvest. The Board would decide what that harvest cost will be. Mr. Cirino explained that the language was fine and that marketable is following the definition is the traditional sense of marketable 3" is traditionally sold, and his simple use of potential marketable follows the definition of marketable oysters which are those longer than 3" and anything less is potentially marketable and until it gets 3" it does not meet the definition here in use. It's not addressing where it is sold as seed. Mr. Cake asked that a sack of oysters is value X and that a sack of seed oysters sold to another fisherman is sold at a different value. Are the biologists in there reports to you supposed to evaluate them differently based on the purpose, if the sale was for seed or consumption? Mr. Pausina answered by saying that the sack count and current sales price for oysters that are sold by the sack, should be at the discount rate that the oysters, cost plus what the harvest cost would be subtracted from that is. Mr. Brodtmann commented that he can not find 90% and 50% numbers are in any of the literature and any biological species that loose 90% of it's offspring will come to distinction. This is clearly not the case. **Buddy is suggesting that the biologists will give 50% mortality for market size oysters, marketable oysters and two ranges of the potentially marketable which will grow up in a year and which will grow up in the third year.** Why come up with a 90-50 number when the biologists can provide the board with the actual observed mortality. Mr. Kilgen explained that the purpose there was to convert everything to sake oysters not to bring anything to about selling them etc. that's why it's a predictor of what the spat

oysters would be some time down the road as large oyster equivalents sacks so that everything would be in the same dollar figure. And he is sure that if there are other situations that would arise where a particular lease holder would just sell seed oysters that have to come to play and the biologists would have to make adjustments to the sack equivalent. It's a size thing rather than being mature. But to come up with that standard figure they would all scaled over to a size equivalent. Mrs. Vaughan asked the question that 50 and 90% is a discount value factor to achieve a market value number. Mr. Pausina agreed. Mrs. Vaughan asked that the board members look back at the evaluation section to make sure there are no corresponding changes that need to be made in the section. Mr. Pausina suggested that they act on this motion and at the some time make another motion to make sure that the whole binder and the other section be consistent. Mrs. Vaughan stated that she understands the concept is that the biologists make value adjustments to give the board guidance on the second and third year crops and we need to make sure that these changes are consistent. Mr. Boydston wanted to make sure that no biologists was in conflict with this motion before they passed it. Mr. Rayle suggested that they check the sheet for consistency with the changes the board was making. Mrs. Guillory asked who would be the best person to check these forms. Mrs. Vaughan volunteered to check these forms and to post on the website the conforming changes. Mrs. Guillory stated that Mrs. Vaughan would check the forms and asked if the guidelines might need to also be reviewed for consistency, Mrs. Vaughan let the board know that she had invited Wildlife and Fisheries to the meeting and asked them if they had any comments. As of 8:30 this morning they had no other changes that they wanted to present today. Mr. Pausina suggested that they check the glossary, that explains the different size classes of the seed sizes should also be checked and that it all agrees. Mrs. Vaughan suggested that the board might wish to

redefine the status seed, come up with a potentially marketable oyster definition today since they are eliminating the spat seed. Mr. Pausina explained that his original thought was to get precise and say second year and third year crop, but instead he would say potentially marketable and let the guidelines tell the biologists the different size groups to work with. He has no problem with giving them each year group or crop. Mr. Boydston asked if there is a definition of potentially marketable oysters? Mrs. Guillory stated that in the guidelines on page 2 under section lease potential methodology it says that the sack counts be discounted with exception of oysters 3" and greater in size shall have un-discounted sack count of 190 oyster-sack and be called marketable oysters, oysters 2-3 and less than 2" in size shall have a sack count of 190-sack and be called potential marketable oysters. **The board motioned to change the wording from potentially marketable oysters to potential marketable oysters.** The board agreed. Mr. Kilgen let the board know that Wildlife and Fisheries also has a guidelines that has 3 different size categories from the OLDEB. The Board did not think that it mattered in this case. Mr. Cirino suggested that in the last paragraph where the language states that it will be determined, he would like the language to be changed to say that it may be determined. So that the biologists will not be forced to use this language. Mr. Pausina thought if the board says **(may)** that it would distract from what they are trying to accomplish and suggested that they not change the language to **(may)**, but keep it as will. **The Board voted and the motion was passed to change the language from potentially to potential.** Mrs. Guillory went to the next agenda item, which was to accept Mr. Read Hendon as one of the certified biologists. Mr. Boydston questioned if they have any background checking of the certified biologists. He suggested that some staff member call and verify his credentials. Mrs. Vaughan let Mr. Boydston know that the board doesn't have the staff to check on each one of these biologists

and she suggested that the board should have some certification guidelines. Mrs. Guillory stated that the rules state in 39:05 that the biologists must have a minimum education or degree in a biological science or have been inspected in a federal or state court in Louisiana as a witness in the field of oyster biology or oyster ecology they can apply to the board for certification. The Board voted to accept Mr. Read Hendon be accepted as a certified biologists under the condition that he provide the information required. Mrs. Vaughan suggested they review the biologists information before they send the biologist their re-certification letters. The Board motioned to accept Mr. Read Hendon as a certified biologists, the board voted and passed. Mr. Cirino stated that a lot of oil companies have been asking for a letter or certificate stating that they are a certified biologists. Mrs. Vaughan did not want to send out letters because of the confusion that has been in the past where companies have went out and picked a biologist without going through the rotation list procedure. Mrs. Vaughan stated that the list of biologist is listed on the website and that each time a oil company request a biologist, DNR request a biologist and the oil company is sent a letter. There is a process in the reqs that is required and she is concerned that they will not follow this rule. Mr. Cirino suggested that if a oil company does not like the three biologists that they can pick three additional biologists. Mrs. Vaughan explained that this is not the rule and that the Oil company has to chose from the three biologists given and that they cannot pick and chose. Mrs. Vaughan suggested that they send out a letter for re-certification letters. Mrs. Guillory suggested a certificate. Mrs. Vaughan asked that with the small staff that the board has, that the board just use the letters instead of certificates. Mrs. Vaughan asked the board if they wanted to ask the biologists to resubmit there credentials when it's time for re-certification. The Board suggested that DNR check the files. Ms. Vaughan will send out a letter asking the biologists for any information



that will be needed to complete the certification of the biologists. Mrs. Vaughan suggested that the Board motion to authorize re-certification of the biologists currently on the list with the exception of the review and updating of any credentials that is not submitted currently. The Board motioned to add this to the agenda of this meeting. The board voted and passed. Mrs. Vivian went to the last agenda item on the board which was the LDNR web page concerning the OLDEB. Katherine informed the board that OLDEB now has a section on the web with the notices, agenda, directions, information on the Biologists, Board members, we have scanned in the statues and the reqs. The minutes are not on the web as of yet. Mrs. Guillory moved that they adjourn. The Board voted and passed.