

Minutes of the
Oyster Lease Damage Evaluation Board
September 30, 1998

A meeting of the Oyster Lease Damage Evaluation Board was held on Wednesday, September 30, 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.

Don Briggs, representing LIOGA and Louisiana Landowners Assn.

Ralph Pausina, representing the Oyster Dealers and Growers Assn.

Mike Voisin, representing the Louisiana Oyster Task Force

DNR staff present:

James R. Hanchey, Deputy Secretary

Warren Fleet, Chief Counsel

John Waitz, Staff Attorney

Rachel Sweeney, Coastal Restoration Division

Cheryl Baker, Coastal Restoration Division

Yvette Smothers, Public Information

Carolyn Edwards, Executive Assistant

Others present

Fred Dunham, La. Dept. of Wildlife and Fisheries

Noel V. "Bud" Brodtmann, Consultant, EPL

Ronald H. Kilgen, Consultant, Kilgen Environmental

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

Sarah Voisin, Motivatiit Seafood

Mrs. Guillory asked if there were no changes to, or discussion of, the minutes of the last meeting, that a motion be made to approve them. The motion was made by Mr. Pausina and seconded by Mr. Boydston. Motion passed.

Mrs. Guillory asked DNR Staff Attorney John Waitz to discuss Agenda Item No. 3, "Accrual of interest for funds (bonds) deposited in the Board's escrow account." Mr. Waitz said this is still being looked at. The rules, Secs. 4107(c) and 4109(a), now say interest will accrue to either the oil and gas operator or leaseholder, but before the rules are finalized the Board wants to make sure the Treasury says it can do that or whether the interest must accrue to the General Fund. Deputy Secretary Hanchey

said Secretary Caldwell had informed him that he had had a conversation with the Office of the State Treasurer before Secretary Caldwell had written the rules. Secretary Caldwell's understanding was that the money could be treated differently since it is going into an escrow account. Mr. Hanchey said the concern is that the rules are in their final stages of approval. They're at the Legislature now. If any changes are to be made, they need to be made very quickly. The first word back from the Treasury was that the only way they would pay the interest is if it were specifically provided for in the law. The statute for this program doesn't specifically mention the issue of interest. Mr. Hanchey said they could try to get the act amended in the next session, if that were necessary, but in the short term they were considering simply adding some words in the rules, before they are approved, that would say something about paying this interest "if allowed by law," which means the rules wouldn't have to be changed. If this is not possible, the parties to the case now pending before the Board are going to have to be notified quickly so that they'll understand what the situation is going to be. It will also be necessary to make it clear to future parties requesting arbitration that there will be no interest involved. This issue needs to be resolved before the Board begins to deal with the damage setting in the case that is now before the Board. He hoped to have this done in the next week or so.

Mrs. Guillory called on Cheryl Baker of DNR's Coastal Restoration Division, to give a presentation on "the overall arbitration process and associated time line." Mr. Hanchey asked that he first be allowed to make some preliminary remarks. He said that when they had begun putting together some of the forms, procedures, check lists for completeness of applications, etc., requested by the Board, they went back to the statute and saw time requirements that the arbitration process must be completed within 90 days. When they went back to the rules, they realized there were time requirements that made that 90 days impossible, depending on how it was defined, for the work to be done. In the rules there was something called a Preliminary Request for Arbitration that started the front end of the process, which involves the bond-setting, etc., and a Final Request for Arbitration which occurs with the receipt of an application and the final report from the certified biologist after the work has been done. To clarify these applications, Ms. Baker was asked to prepare a check list which would show the steps that would have to be followed from beginning to end. Some of the time periods were in the statute, some were in the rules and some were created by DNR staff because they thought it was necessary for some things to have times associated with them.

Ms. Baker went over the "Outline of the Oyster Lease Damage Evaluation Board's Arbitration Process." She explained that the time requirements in Items I.B., I.C., II.B., and III.C. are arbitrary numbers that she and Rachel Sweeney had come up with thinking that these would be adequate amounts of time necessary to accomplish what is spelled out in those items. The time requirements in Items II.A., II.C. and III.A. are in the rules and can't be changed. The time requirement in Item III.B. is in the statute. She said all of the time lines are maximum amounts of time allotted to complete the components of the process.

Mr. Pausina requested clarification of Items II.C. and III.C. After some discussion, it was agreed that Item III.C should be reworded to read, "Within 30 days, if the damages exceed the bond amount, the

owner shall submit to the Board those additional funds due the leaseholder, at which point the case is considered closed. If the damages are less than the bond amount, the Board shall refund to the owner, within 30 days, the amount of the bond that was in excess of the actual damages.”

Mr. Pausina noted that Item III.C. did not specify when the leaseholder or owner would get the funds. Mrs. Guillory pointed out that there are certain procedural things to go through to get money from a State fund that make cutting a check take some time. Mr. Hanchey said a statement needed to be added to change Item III.C. to make it consistent with both possibilities and add a statement about final disposition of the funds either to the leaseholder or the leaseholder and the owner, depending on the situation. He said he would check to see how long this would take.

Mr. Voisin said something needed to be added regarding the time period for the Secretary's review. Mr. Hanchey said he thought it was appropriate to reflect in the process the fact that it does have to go to the Secretary for review, but if he vetoes the final determination of damages and it goes back to the Board, there also needs to be a time frame for the Board to deal with that. If the Board doesn't overrule his veto, then it becomes somewhat indeterminate. Based on this, Mr. Hanchey suggested that Item III.C. be corrected to add a statement about the amount and disposition of funds, to reflect a requirement for the Secretary's review and establish a time frame for that, and give the Board some time limits to consider the Secretary's veto, if there is one, of the Board's final determination of damages. He said DNR's staff could modify this, send it out to the Board and get a mail approval of it so it doesn't have to be brought up at the next meeting.

Mrs. Sweeney said that 4109.(a) of the rules is where they begin the discussion of the review by the Secretary and that's all within that final arbitration period of 90 days prescribed by the statute. Mr. Hanchey said that would have to be built into the statement in Item III.B. Mrs. Guillory added that Item III.B. is based on the statute.

Mr. Hanchey said that when the outline is revised the Secretarial review will be built into the 90-day period. How the money gets distributed will be added on to the end of it and a time line put on getting it to the leaseholder or back to the owner.

On the next item, "Minor amendment to General Guidelines for Conducting Oyster Lease Biological Surveys," Mr. Hanchey said that when reviewing the guidelines that had been approved at the last meeting, it was noticed that something had been omitted. Ms. Baker said, according to the guidelines, it didn't appear clear which part of the lease needed to be surveyed - whether it was the entire lease or only the anticipated impact area. What they did was to go through the guidelines and identify the discrepancies and see what they could do to impose minimum guidelines for a lease area to be surveyed, which can be expanded at the Board's discretion based on the professional judgement of the assigned biologist. The wording in the "Bottom Substrate Sampling" area was changed to reflect this and an appendix added. Ms. Baker said she had called Fred Dunham with Wildlife and Fisheries and he said this is the general policy that they've adopted, not so much for surveys, but for notification to

the leaseholders within so much area on either side of whatever mineral activity is going to take place. DNR wanted to be consistent with that.

Mr. Dunham remarked that in "Appendix A," under "The minimum oyster lease survey requirements," in both instances where "jetting a pipeline" appears, this should state, "jetting or trenching."

Mr. Voisin moved to approve both the "Guidelines for Conducting Oyster Lease Biological Surveys" and "Appendix A." This was seconded by Mr. Boydston. Motion passed.

On the next item, "Change 'Request for Arbitration' form to 'Preliminary Request for Arbitration,'" Mr. Waitz said this was done to ensure that we were consistent with the rules and the 90-day window. Mr. Hanchey added that the "Preliminary Request for Arbitration" is the same form that was previously approved as the "Request for Arbitration." Only the name was changed. The "Request for Arbitration" is a new form that will trigger the 90-day period and deals with after-construction information as opposed to pre-construction information requested in the first form. Both kinds of data are needed. After they're approved, they will be given a form number and a date of approval so that the Board will know that they're dealing with the most recently approved form.

Mr. Voisin moved to accept the "Preliminary Request for Arbitration" form. This was seconded by Mr. Boydston. Motion passed.

Mr. Voisin moved to accept the "Request for Arbitration" form. This was seconded by Mr. Pausina. Motion passed.

Agenda Item No., VIII, "Adoption of the revised Uniform Evaluation Methods," was discussed by Mrs. Sweeney. She said damages to oyster leases from mineral activities were classified into two types: damages to substrate, and damages to living oyster resources, or standing crop. She went over the guidelines page-by-page.

Mrs. Guillory called for discussion on the "Uniform Evaluation Methods."

Mr. Pausina suggested the staff work on the cost of shell, cultch material, transportation and placement. Mrs. Sweeney said she would have a report ready for the next meeting.

After much discussion, it was decided that within the next two weeks Board members would send their comments on the draft Uniform Evaluation Methods to Ms. Edwards and she would distribute these to the Board. Also, the three biologists present would, if they chose to do so, send their comments as well. The issue was then tabled until the next meeting.

The next agenda item, "Conflict of Interest," was addressed by DNR's Chief Counsel, Mr. Warren Fleet. Mr. Fleet informed the board that the Department had requested an advisory opinion of the

Ethics Commission on the propriety of whether it would be a violation of the Code of Governmental Ethics for a Board member to participate in a transaction involving either an applicant, oysterman or oil company, in which a Board member has some type of relationship or conflict of interest with that particular applicant or oil company. He said the problem is inherent and will be recurring due to the nature of the makeup of the Board, and he is seeking to come up with a solution which will allow the Board to conduct its business. He said there are two competing areas of the law that would apply. One is the Code of Ethics for Governmental Employees and the other is the Administrative Procedures Act. Each provides for situations in recusals or disqualifications of Board members when their participation in a transaction involving someone in which there is a relationship would be prohibited. He said that in discussions with attorneys of the Ethics Commission and in past practices, it would appear that the affected Board member would be required to resign from the Board or terminate the relationship with the Department.

Mr. Boydston said he needed to know as soon as possible the response from the Ethics Commission because recusal was not an option for him. He would not expect Mike Voisin or Buddy Pausina to recuse themselves on any decision. He asked if it would be possible to have an alternate for each side if the issue is not resolved in time for the hearing of final damages. Mr. Fleet said he had looked into this and that it is possible. Mr. Boydston asked Mrs. Guillory if she would write a letter as soon as possible to organizations named in the legislation, who have appointed Board members, to appoint alternates to serve on the Board. Mrs. Guillory said she would do this.

Mrs. Guillory asked Mr. Fleet if he knew if the Ethics Commission was going to be considering this issue at their next meeting. Mr. Fleet said he would call Maris McCrory about this and find out what their scheduling is and where we are on it.

Regarding Agenda Item No. X, "Annual re-certification of Certified Oyster Biologists, Mr. Hanchey said he had put this on the agenda because the rules require for an annual review in maintaining the list. This review would give the Board an opportunity to see if the biologists currently on the list wish to remain on it and give biologists not currently on the list who wish to be on it, an opportunity to be evaluated and added to it. If there is any guidance for the Board on how to prepare for this, we would want to start the process. Mr. Voisin said he also felt there were some requirements to continue their certification, such as continuing education like that required in the legal and medical professions, and asked DNR to provide the Board with some recommendations. Mr. Hanchey said he would put together some thoughts on it and would consult with those biologists now certified to ensure that they will at least have had the opportunity to provide their views on whatever will be done. Mr. Voisin asked that this be brought up at the next meeting.

Mrs. Guillory said at the next meeting she also would like to discuss the matter of ethics and the biologists.

Mrs. Guillory asked if it was necessary for the biologists to be re-certified before November 5, 1998.

Mr. Hanchey said, "Probably not. It would only be a problem if the case came up."

Mrs. Guillory asked if a Request for Arbitration had been filed in the case that's presently pending. Mr. Hanchey said he had talked with Warren Fleet and he said the work had been done. Mr. Kilgen had done his field work and is in the process of preparing a report. Mr. Hanchey said he figured that within a month the Board would get the "Request for Arbitration." He said a meeting to address the damages would probably be within the next two months.

It was agreed that the next meeting will be held at 9:00 a.m., Wednesday, October 28, 1998.

Mrs. Guillory called for a motion to adjourn. The motion was made by Mr. Pausina and seconded by Mr. Voisin. Meeting adjourned.