

Minutes of the
Oyster Lease Damage Evaluation Board
January 5, 1999

A meeting of the Oyster Lease Damage Evaluation Board was held on Tuesday, January 5, 1999, 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.

Mike Voisin, representing the Louisiana Oyster Task Force

Board members absent:

Ralph Pausina, representing the Oyster Dealers and Growers Assn.

Don Briggs, representing LIOGA and Louisiana Landowners Assn.

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

Phyllis Darensbourg, Public Information Division

Yvette Smothers, Public Information Division

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

Sarah Voisin, Motivati Seafood

Mrs. Guillory asked for a motion to approve the minutes of the December 2, 1998 meeting. Motion was made by Mr. Voisin and seconded by Mr. Boydston. Minutes approved.

Ms. Cheryl Baker was called on to discuss the "Revised time line." Ms. Baker passed out to Board members copies of the Manual of Operating Procedures, complete with all documents approved by the Board to date. Ms. Baker said she would be discussing revisions to the "Outline of the Oyster Lease Damage Evaluation Board's Arbitration Process," and said the only changes made were those

underlined in Section I. Preliminary Arbitration Request, B: “Within 10 days, DNR will send the list of three oyster biologists’ names to the requesting party (if not previously provided to the mineral owner before a Preliminary Request for Arbitration was made), as well, DNR will notify the Leaseholder that a Preliminary Request for Arbitration was made, and will request the Leaseholder to provide information on lease operations” (specifically requested by Mr. Pausina that lease owners provide as much information as possible on lease operations to help the Board); and C, “Within 10 days of receiving the biologists’ list, DNR shall receive written notice of the chosen biologist (providing a biologist had not been selected previous to the request for arbitration.)” The reason this has been added is that situations have been experienced where a mineral owner will request a list of biologists’ names prior to submitting a Preliminary Request for Arbitration. Nothing in the Statute or the Rules prohibits this as long as the list of biologists provided to the mineral owner before a Preliminary Request for Arbitration is made is tracked to that particular project so that not more than one list is inadvertently sent to the mineral owner. This ensures that they use the same biologist throughout the duration of a particular mineral activity.

Mr. Voisin asked when the leaseholder would be notified of this. Mrs. Sweeney said this would be done when the Preliminary Request for Arbitration is made, not when the list is requested. Mr. Voisin moved to accept the changes. Seconded by Mr. Boydston. Motion passed.

On the next agenda item, “Letter requesting information from leaseholder,” Ms. Baker said that after receiving a preliminary request for arbitration, which initiates the overall arbitration process, DNR will attempt to notify the leaseholder that such a request has been made by issuing a letter to him requesting certain information about the lease that might be pertinent to the Board.

Mr. Hanchey commented that an earlier version of the letter indicated that the information would be confidential and would be provided only to the parties involved in the arbitration hearing. It was concluded, however, that there is no process available to do that. After some discussion, Mrs. Guillory suggested adding a sentence to the letter saying, generally, that these proceedings are governed by the Administrative Procedures Act. Mr. Voisin asked that this item be tabled and taken up last.

Ms. Baker then explained the notice in the Coastal Management Division’s standard public notice mail out. She said it is meant to be a public outreach document intended to make the public more aware of the proceedings, the existence of the arbitration board and, generally, what it’s all about and whom to contact for information. This would go in the bi-weekly Joint Public Notice of the Coastal Management Division and the Corps of Engineers’ mail-out. She said the combined circulation would reach approximately 400 to 500 people and would go out to the majority of people most likely to have an interest in the arbitration board.

Mr. Voisin moved for adoption of the letter. Seconded by Mr. Boydston. Motion passed.

Mr. Boydston asked if this was going to be a one-time circulation. Ms. Baker said it could be on-going

in the bi-weekly mailouts, but she said a letter, with the same general language, would go out in the Coastal Use Permit application packets. Mr. Voisin suggested the notice be sent to oil and gas operators, possibly through their trade associations, and to oyster leaseholders. Mrs. Sweeney said the letter could be modified and sent to LIOGA, Mid-Continent, the chairman of the Oyster Task Force, etc., to try to continue that public outreach. Mr. Hanchey said Wildlife and Fisheries would be contacted to see if they could help to get this information out to that segment of people their publications and web site reach.

Mrs. Guillory summed up by saying that the Special Notice has been adopted and DNR's mailing of it wherever they deem appropriate has been okayed, including the letter which will go in the Coastal Use Permit application packet, and the way to communicate with all the oyster fishermen will be left open for now. Mr. Hanchey said DNR staff would start on that effort and at the next meeting will report on what they have been able to accomplish.

Ms. Baker asked the Board what signature they would like to have on the letter to be included in the Coastal Use Permit application packet. Mr. Voisin thought it should be Chairwoman Guillory. Mrs. Guillory would like to have stationery printed showing the names of all Board members, but said there is no money for this. Mr. Hanchey said DNR staff will look into this.

On the question of how to answer inquiries about the Board and its functions, Dr. Cake suggested including something about that on DNR's Web Page. Mr. Hanchey said he would have someone from DNR's IPS staff look into this.

Mr. Waitz took up Item VI, "'Plain English' summary of the ethics/conflicts issue." He said he had spoken with Gray Sexton of the Ethics Commission, mostly about Mr. Pausina's interpretation, and Mr. Sexton said he didn't want to give blanket, boilerplate language. Mr. Sexton feels the best thing to do if someone thinks there could be a potential problem is to get an opinion from the Ethics Commission. He didn't think Mr. Waitz should be telling the Board whether there is or isn't a conflict.

Mr. Hanchey said the Ethics Commission is still open to giving a presentation on ethics laws to the Board and the biologists. He hoped to have this presentation during the workshop for the biologists. Mrs. Guillory asked for volunteers to work on some ideas for the workshop. Mr. Voisin volunteered his assistance.

Mrs. Guillory asked about the situation with Phil Boydston. Mr. Waitz said he had an Order for Recusal for Mrs. Guillory to sign. A letter from Mid-Continent, LIOGA and the Louisiana Landowners Assn. had been sent to the Governor. Only a letter from the Governor appointing someone needed to be received.

On agenda item, "Technical improvements to the statute," Mrs. Guillory recognized Mr. Hanchey. Mr. Hanchey said the staff reviewed the statute to see if anything needed to be changed as a result of what

has been done so far by the Board, but came up with no recommendations.

Mr. Voisin expressed his concern with the words "nominated" in Section 700.13(B), Establishment of the Board, and suggested replacing them with "appointed" or "selected." Mr. Hanchey said the Board should think about whether or not it wants to change the intent of the law specifically to allow agencies who nominate these Board members to have the power to appoint them, and if they also have the power to appoint replacements. After some discussion, Mr. Hanchey said DNR staff would look into this.

Mr. Voisin pointed out a discrepancy between Section 700.12(3) of the statute and Title 43, Chapter 41, Section 4101(a) of the Rules. The statute states, "If a settlement cannot be reached between the leaseholder and the owner, either party may file a request with the board for arbitration and final determination of the actual damages to the oyster lease due to the mineral activity thereon." The Rules state, "Either an owner or a leaseholder who has been requested by an owner to enter into a settlement for damage to the leasehold ... may file with the Board a preliminary request for arbitration" Mr. Hanchey said he will come back at the next meeting, after discussing this with the lawyers, and will have something for the Board to consider. This could mean modifying the rules. Mr. Voisin said that if, during the review, it is found that his concerns are covered appropriately and there is a ruling that indicates the leaseholder can file according to the rules without being held hostage (where the owner controls the process because he's the only one who can apply to the Board) that will satisfy him.

The next item the Board took up was consideration of the application of Mr. Fred E. Schultz of Steimle & Associates, Inc. to become a certified biologist of the Oyster Lease Damage Evaluation Board. Ms. Baker briefly went over his qualifications (the Board previously had been mailed copies of his application documents to review). Mr. Voisin moved for the Board to take a vote to certify Mr. Schultz. Motion seconded by Mr. Boydston. Motion passed. Mr. Schultz will be added to the Board's list of certified biologists.

Mr. Voisin pointed out that with the certification of Mr. Schultz, there will be three certified biologists from Steimle & Associates, Inc., and if Mr. Cirino is certified, there will be two from Gulf Environmental Associates. He said that some firms are more related to the oyster farming industry while others are more related to the oil and gas industry. He wondered if there should be a limit placed on the number of biologists certified from one firm because there could be the potential that the choice of three biologists would all be from the same firm. He would like to begin discussions at the next meeting about how to handle such a situation should it become a problem.

Dr. Kilgen said if someone is biased in one way or another, the Board has mechanisms to take care of that.

Dr. Cake commented that if the list were to be either firm-specific or biologist-specific, he would prefer to see it firm specific rather than biologist-specific. Mr. Waldron expressed the same opinion.

Mr. Hanchey said the original list was developed in a random draw. There is nothing, therefore, to prevent three people from the same firm being sequential on the list. It is conceivable that the choice of a biologist could be from the same firm. Mr. Hanchey asked Ms. Sweeney to look into this and, per Mr. Voisin's request, put it on the next meeting's agenda.

Mr. Voisin asked if a check-list could be developed to review the requirements of each certified biologist on an annual basis. Mrs. Sweeney said she would see that this is put together.

Mr. Hanchey said there was some discussion at the last meeting about the final version of the Uniform Evaluation Methods the Board approved, and he had indicated that Secretary Caldwell needed to review them. Mr. Hanchey reported that he had discussed them with the Secretary and Mr. Caldwell approved them with reservations, but wanted to go on record that his concerns deal with his perception that the evaluation guidelines are specifically intended to be used by the Oyster Lease Damage Evaluation Board in their processes and should not be construed as representing the State of Louisiana's view as to values that could be used in other kinds of circumstances. The Secretary expressed his concern that certain values were higher than he thought they should be, but Mr. Hanchey said Secretary Caldwell would send a letter to the Board approving the Uniform Evaluation Methods.

Mr. Voisin moved to adopt the modifications to the Uniform Evaluation Methods. The motion was seconded by Mr. Boydston who added that everyone knows that they are subject to re-evaluation during the process. The Uniform Evaluation Methods were adopted.

Mrs. Sweeney asked everyone to replace the "draft" copy in their manuals with the revised copy and she would provide a clean copy with "draft" removed and the approval date shown on the document.

Dr. Cake asked if the certified biologists could have a copy of the Manual of Operating Procedures to use as their operating manual. Mr. Hanchey said this would be provided.

Mr. Boydston brought up the fact that the Board is not funded. Mr. Boydston and Mr. Voisin asked Mr. Hanchey if DNR needed talk to the Legislature about this. Mr. Hanchey said DNR's budget request had already gone in, but that it would not be impossible to amend it. He said he would look into this.

Mr. Voisin asked that a preliminary budget for the Board be put together for the next meeting. Mr. Hanchey said he would take care of having this done.

Mr. Hanchey began discussion of the procedures for the next hearing. He said that first the hearing needs to be scheduled. There are some requirements to initiate the discovery process and other things. The rules lay out the steps. He said it was time to get things going since the final biological survey report had been received. He told Mrs. Guillory that DNR needs to better understand what her role is and what is the role of the staff supporting her - whether she is going to make the calls to the parties

and discuss time lines and the process with them, and whether she wants DNR's legal staff to do some of that for her. He also said he wouldn't feel comfortable going forward without first talking with DNR's chief counsel, Warren Fleet, to make sure everyone is operating the correct way.

Mrs. Guillory said she needed to get involved at this point by talking to the parties, making sure they have the rules and anything else they need, and setting a date for the hearing.

Mr. Hanchey agreed and offered the assistance of Mr. Waitz and anyone else from DNR's legal staff to work for her. She just had to tell him what she needs. DNR wants to operate as staff support. Mrs. Guillory will get a paralegal involved right away and send out letters and select some tentative hearing dates to make sure that as many Board members as possible will be able to attend. She said the hearing procedure is going to be similar to the bond hearing.

Mrs. Guillory asked about the filing. Mr. Waitz said he has a file set up.

Mr. Voisin made a motion to authorize the chairperson to work with staff to develop procedures for the hearing and to set the first hearing for the Board subject to the modifications to that process. Seconded by Mr. Boydston. Motion passed.

The Board then went back to Item IV, "Letter requesting information from leaseholder." Mr. Waitz suggested adding, after the first sentence in the last paragraph, a sentence: "For your information, all claims for arbitration shall be governed in accordance with the Louisiana Administrative Procedures Act and Louisiana Revised Statute Title 49:950 et. sec." The Board agreed to adding this language.

Mrs. Guillory asked where biologists added to the list would be placed. Mr. Hanchey said the new name would be added at the bottom of the list.

The next meeting previously had been set for Wednesday, February 10, 1999.

Mrs. Guillory called for a motion to adjourn. Mr. Boydston so moved. Motion seconded by Mr. Voisin. Meeting adjourned.