

Minutes
of the
Oyster Lease Damage Evaluation Board
November 5, 1997

A meeting of the Oyster Lease Damage Evaluation Board was held on Wednesday, November 5, 1997, at 1:30 p.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 Chairman Vivian Guillory. The roll was called by Carolyn Edwards.

Board members present:

Vivian B. Guillory, ALJ, Chairman
Don Briggs, representing LIOGA and Louisiana Landowners Assn.
Phillip E. Boydston, Burlington Resources, representing Mid-Continent Oil & Gas Assn. and Louisiana Landowners Assn.
Ralph V. Pausina, representing the Louisiana Oyster Dealers & Growers Assn.
Mike Voisin, representing the Louisiana Oyster Task Force

DNR staff present:

Jack C. Caldwell, Secretary
Steve Mathies, Deputy Secretary
John Waitz, Staff Attorney
Carolyn Edwards, Executive Assistant

Others present:

N. Bud Brodtmann, Environmental Professionals Ltd., Inc.

Chairman Guillory asked if there were any corrections to the minutes of the October 1, 1997 meeting. There being none, Mr. Briggs moved that they be accepted. The motion was seconded by Mr. Voisin and unanimously approved.

Chairman Guillory announced that she would have to leave the meeting early for another engagement and asked if the agenda could be rearranged to place "Discussion of Previous Litigation and Judgements" first and "Discussion of Uniform Evaluation Methods in the Formula" second. Mr. Voisin so moved. The motion was seconded by Mr. Pausina and unanimously approved.

Mr. Waitz asked to take up the issue of a public hearing. He said the regulations have been finalized and sent to the Fiscal Office. The Board has to make a decision whether it wants to have a public hearing. It is not required, but it is required to take public comments before final adoption. It is an and/or situation as to whether to have a public hearing or accept written comments at the Department. Mr. Waitz said that Mr. Caldwell would like for the Board to make the decision. Mr. Voisin asked the

Department to keep the Board apprised of significant comments that might warrant a hearing being held and asked if the Board had to make the decision at this time. Mr. Waitz said that when the Fiscal Impact Statement comes back from the Capitol, he has to submit it to the *State Register*. At that time the Board will have to make a decision. Once it is published, it has to be known whether there is going to be a public hearing because there will have to be a meeting time. Mr. Waitz said that there are some trigger mechanisms that can require a hearing, like if there are a certain number of groups requesting it, but it can be left at just taking public comment for the time being. After some discussion, the Board unanimously decided that no public hearing is necessary at this time.

Chairman Guillory asked if the notice was going to be in the November *Register*. Mr. Waitz said it depended on when he got the Fiscal Impact Statement back. If it goes in the November *Register*, it should be final in February.

Mr. Waitz opened the "Discussion of Previous Litigation and Judgements" by saying that he had met with DNR's staff regarding this. Mr. Andy Wilson, attorney for DNR's oyster litigation, had done a paper on the decisions from start to finish as far as what the courts decided. Most of the cases on appeal are from Plaquemines and St. Bernard parishes and the total damages have been considerable as far as what the Court of Appeal and Supreme Court have upheld. Judgements rendered have been between a half million and a million dollars. Mr. Boydston requested copies of the paper for each Board member. Mr. Waitz agreed to have it sent to them and said he was going to have the subject put on the agenda for the next meeting in order to allow for further discussion. Mr. Waitz continued that the courts have taken economics into account and it seems that in most cases their decisions and rulings have had testimony from biologists/economists on behalf of either the oil company or oyster fisherman. He felt economists had to be considered because each case needs to be looked at not only for damage to the lease, but for its value. He said that in the most recent case he had pulled, 655 So.2d 776, (La.App. 4 Cir. 1995) the court had awarded \$848,000 with \$100,000 for loss of profits and the remainder for the restoration of the lease. It was a 35 year old lease and the courts looked at it from the standpoint that the oysterman had farmed for so long that he had more damage than a lease that had just been issued. The oil company, Chevron, appealed saying the damage was too high, but the court said it was a good judgment. Chairman Guillory asked Mr. Waitz to provide the Board with a copy of this citation. Mr. Waitz agreed to send it to them.

Mr. Boydston said he would like to have some assessment of how the Board is supposed to evaluate information fed to them to approve or disapprove damages. He asked how these cases have been decided.

Mr. Waitz said that each case has been unique. In other case law the courts have established a test or criteria, but they have not done that in oyster cases. Basically, it's how each plaintiff brings his case to the judge.

Mr. Briggs asked why the Board is looking to settlement of court cases for a methodology of

determining value. Mr. Waitz said because the Board is going to be acting as judge and jury and what other courts have done will give the Board guidance. Most of the time those cases are appealed so there are another two tiers of review from the Court of Appeal and Supreme Court. In most cases they have been upheld from the District Court level.

In Darryl Clark's absence, Dr. Mathies took up "Uniform Evaluation Methods." He said that in coming up with the methodology, two categories of damage were considered. The first would be direct cost, or physical damage to the lease - what is the actual number of acre impacted and to what degree. The second would be lost production, or the actual damage to live oysters - how long before the reef would recover, how many sacks of oysters we would be liable to pay for.

A suggestion made by Mr. Voisin was to increase the amount of shell cultch needed to restore an acre of substrate to that quantity being used by the oyster relocation program. There was general agreement on this point.

Mr. Voisin noted that on Page 6 of the Uniform Evaluation Methods, the figure of three years is used as the length of time needed to grow mature marketable oysters from spat, but in the formula on Page 8 it is shown as two years. He recommended using the three-year figure. Dr. Mathies said he had based the two years in the formula on the probability that an oyster farmer would not sell 100 percent of his oysters and that 100 percent would not be damaged; therefore, if you use 100 percent, you should use a shorter number of years. The Board, however, decided on the three year figure.

Mr. Pausina asked if the figure of 200 oysters was going to be used to constitute a sack. Mr. Boydston asked him for the rationale for that figure. Mr. Pausina said the Department of Wildlife and Fisheries uses 180 to 200 oysters per sack in all their statistics because they have to convert pounds to sacks for severance tax purposes. Rather than dealing with a range, he would rather have one number so the biologists would be using the same number in their preliminary surveys. Mr. Boydston suggested that the number to use be 190 per sack and the Board agreed.

After considerable discussion of the Uniform Evaluation Methods, Mr. Briggs said he didn't think there should be minuscule details written down. The guidelines have to be flexible. The Board will have to look at all aspects of each situation as they arise. Dr. Mathies said that the Board might want to wait until it has its first case and use the Uniform Evaluation Methods as a working model to see how they work when it actually has a case; that the Board will be constantly modifying them to fill its need in cases that come before the Board. Except for the two changes addressed above, the Uniform Evaluation Methods were accepted.

On the issue of Certification of Biologists, the Board asked Mr. Brodtmann to leave the room while it went into executive session to take a vote. When the Board went back into regular session, Mr. Voisin made the motion to certify Maureen M. Mulino, Steimle & Associates; Earl J. Melancon, Jr., Environmental Consulting; Richard L. Waldron of Robert P. Waldron, Inc.; Robert P. Waldron of

Robert P. Waldron, Inc.; Michael F. Rayle of Steimle & Associates; Noel V. Brodtmann, Jr. of EPL, Inc.; Edward W. Cake, Jr. of Gulf Environmental Associates; Mark Chatry of Fisheries Management Incorporated; H. Dickson Hoese of H. Dickson Hoese Marine Biologist Consulting, and Ronald H. Kilgen of Ronald H. Kilgen Fisheries Scientist & Environmental Consultant, as certified biologists qualified to do initial surveys for the Board.. Mr. Boydston seconded the motion and it was unanimously approved.

Chairman Guillory asked that a letter be sent to all the Board- certified biologist notifying them of their certification. Mr. Voisin requested a certificate indicating this be sent to them also.

Mr. Brodtmann asked if an identification card could be issued to each certified biologist because Wildlife and Fisheries agents often ask them to present such identification when they are sampling in a closed area.

Chairman Guillory asked how the certified biologists would be put in order on the list. Dr. Mathies said it would be by a draw of names. Mr. Voisin moved that the Board authorize the Chairman of the Board to work with staff and report back that a listing of certified biologists has been developed, that the sequence be confidential and that the rotation of names on the list is working according to the rules. The motion was seconded by Mr. Boydston and passed unanimously.

A discussion was begun on the Preliminary Request for Arbitration form, but was cut short because Mr. Briggs had another commitment. It was decided that if a case should come before the Board before the next meeting, the draft forms would be used. They will be finalized at the next meeting.

Chairman Guillory asked that a Point of Contact, the person who will be officially communicating with the Board, be placed on the Preliminary Request for Arbitration form. Also, at the end of the form, there should be a section "For Board Use Only," for notations such as if the fee had been paid when the application was sent in, was it cash, a check, the date, who received it and a place for it to be initialed.

Mr. Boydston asked about the possibility of someone making a presentation on oysters to the Board for informational purposes. Mr. Voisin suggested asking the certified biologists to come in to give their ideas about the arbitration process and how the Board is doing and have someone from the oyster industry and/or Wildlife and Fisheries come in to give a general presentation about oysters. Mr. Pausina suggested having someone from the Health Department come in also.

Chairman Guillory asked that items for the next meeting's agenda be sent to Carolyn Edwards and announced that the next meeting would be held on Wednesday, December 3 at 1:30 p.m. in the 4th floor Mineral Board Docket Room.

Motion to adjourn was offered by Mr. Voisin and seconded by Mr. Boydston. Meeting adjourned.