

Minutes of the
Oyster Lease Damage Evaluation Board
October 28, 1998

A meeting of the Oyster Lease Damage Evaluation Board was held on Wednesday, October 28, 1998, at 9:00 a.m. in the Conservation Hearing Room, First 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.

Mike Voisin, representing the Louisiana Oyster Task Force

Board member absent:

Don Briggs, representing LIOGA and Louisiana Landowners Assn.

DNR staff present:

James R. Hanchey, Deputy Secretary

Warren Fleet, Chief Counsel

John Waitz, Staff Attorney

Rachel Sweeney, Coastal Restoration Division

Carolyn Edwards, Executive Assistant

Others present

Noel V. "Bud" Brodtmann, Consultant, EPL

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

Brad Robin, Oyster Dealer

John Cirino, Gulf Environmental Associates

Mike Rayle, Steimle and Associates

Mrs. Guillory asked if there were changes to, or discussion of, the minutes of the last meeting. There being none, a motion to accept was made by Mr. Voisin and seconded by Mr. Boydston. The motion passed unanimously and the minutes were approved.

Item No. III on the agenda, Accrual of Interest, was addressed by Deputy Secretary Hanchey. Mr. Hanchey said the information received from the Treasurer was that the Board would be unable to pay interest on the deposit that was made by Burlington Resources unless it was provided for in the statute. Since then Secretary Caldwell has talked with the Office of the Treasury's counsel who will look into this with the understanding that the money is in an escrow account and is not state funds. Mr. Caldwell

is optimistic that they will reverse their previous advice and interest will be able to be paid on the deposit in accordance with the way the Board's rules are written. If the answer is positive, there will be no problem. If they decide the interest cannot be paid, a legislative solution probably will be sought.

Agenda Item IV, "Changes to arbitration process and final approval," was presented by Mrs. Sweeney. She said a few changes in the time line had been requested at the last meeting. One was to add something about Secretarial review and receiving the Secretary's rejection or approval on the Board's decision. Mrs. Sweeney pointed out that this had been added under III. B in the Arbitration Process Outline. Another request for change was that a discreet time period be added for any additional deposits the mineral owner might have to make over the amount of the original bond. Mrs. Sweeney said this had been added as III.B.1.b.: "...the mineral owner shall have thirty days to provide the additional funds, and the Board shall have a maximum of thirty days from receipt of those additional funds to issue payment in full to the leaseholder." The last request for change was for a discreet period of time for payment to the leaseholders. This was added in III.B.1.a.: "Within 30 days the Board will issue payment in full to the leaseholder for all monetary damages to the lease as determined by the Board (provided that additional funds in excess of the original deposit are not required)...."

Mr. Hanchey pointed out that these amounts of time are maximum times and said there should be no reason it should take this long.

Mr. Voisin moved to accept the Outline of the Oyster Lease Damage Evaluation Board's Arbitration Process. Seconded by Mr. Pausina. Motion passed unanimously. Mr. Hanchey said this would be attached to the material that the Board sends both to the applicant and the leaseholder so that everyone would understand the steps that had to be followed and there would be no misunderstandings. He said it probably should go to the certified oyster biologists also so they would understand the time frames they are working with. This would become a public document.

Mr. Voisin asked if the information requested in the Coastal Use Permit would go into the application packet. Mrs. Sweeney responded that the Board's original request was to dovetail the Coastal Use Permitting process and the Oyster Lease Damage Evaluation Board's process. After looking into this, she discovered that it was more complicated than she would like and hoped to work on this further.

Mr. Boydston asked if a letter could be added to the packet sent to Coastal Use Permit applicants to inform them of the Oyster Lease Damage Evaluation Board and the arbitration process that exists.

Mr. Voisin agreed and said the original concept was to save the oil and gas operator the expense of hiring a second biologist. This would be possible if the Board could work somewhere within the Board's time line and the Coastal Use Permit's time line. This might mean modifying or accepting something as an amended rule that the Board would approve to avoid hiring two biologists to do the same thing as long as it's done within a certain period of time and conditions haven't changed. Mrs. Sweeney is going to look into this further and it will be put on the next meeting's agenda.

Mrs. Sweeney addressed Item V, "Cost of shell, cultch material, transportation and placement." She said Mr. Pausina had asked her at the last meeting, while trying to finalize the Uniform Evaluation Methods, to look into what DNR considered to be the cost of suitable cultch materials, including transportation and placement costs. She said three types of material had been identified - limestone, crushed concrete, and shell. Regarding limestone and crushed concrete, they found the materials to be similar in many ways, but sources of crushed concrete may be more local and the material a little less expensive. The dockside prices for purchasing limestone and crushed concrete of an average size range, called a No.57 rating, which is an inch and a half to one-quarter inch in diameter size pieces, for just loading a barge brought to the facility, is \$21.00 to \$23.00 per cubic yard. Transportation and placement costs are the most variable elements. She said she had talked with DNR's construction engineers in the Coastal Restoration Division about the experiences they had had within the past couple of years regarding placement of rock and, in general, the cost had been \$42.00 to \$49.00 per cubic yard. That includes the cost of purchasing the material, transporting and placing it. The engineers believe that because of the differences between piling up rocks in line to build breakwaters and that of laying down cultch by spreading a thin even layer over an area, the cost of cultching will be higher, approximately \$50.00 a cubic yard for a turnkey job. Another thing Mrs. Sweeney did was to contact wetlands construction contractors and ask them in general, throughout the deltaic plain east of the Atchafalaya, what they're seeing as costs of turnkey jobs to purchase, transport and place the material. In ideal situations, which would be excellent access, deep water and close to the supplier, those jobs are averaging \$28.00 to \$32.00 a cubic yard, which is not that far off of what the Coastal Restoration Division is seeing. In worst case scenarios they're seeing \$56.00 to \$63.00 per cubic yard. One thing she decided after looking into this is that to try to come up with a theoretical, coast-wide number is going to be almost impossible. The best one can do is to use a range of \$21.00 to \$60.00 a cubic yard.

In terms of shell, the third category of cultch material, right now it is only available in any form from seafood processing and shucking houses. Large quantities, however, are not available, but, if they are, they are already under contract. Also, as supply goes down, prices increase.

Mr. Hanchey asked Mrs. Sweeney if the Board was in a position, for a specific case such as the one it will be taking up shortly, to produce a reasonable estimate of what it will cost for a typical site as opposed to trying to do it in a general sense for all sites. Mrs. Sweeney said, "Yes. When a particular case comes up, we'll have the details and, at that point, we might want to contact some of the firms that specialize in shell work that we use in coastal restoration and some that might be suggested by the oil and gas industry, and the oyster industry, and get cost estimates."

Mr. Voisin said he thought the certified biologists would provide that information as part of the damage assessment and the Board would use it as part of their criteria.

Mr. Rayle disagreed with this, but Mr. Brodtmann agreed.

Mr. Pausina made a suggestion that Mr. Hanchey look into what the Board has done so far and in what purview the pricing of cultch falls. Is there something that specifies what the biologists are to provide? He would like to have this put on the next meeting's agenda.

Mr. Hanchey said he had assumed the Board had asked the biologists to give it an estimate of what the placement costs would be and make the damage assessment. He would not be comfortable with the Board obtaining the information and making that decision. The bond setting of the first case proved that this is not a completely objective science and that different biologists are going to make different assumptions about what needs to be done, and the potential variability is broad. The ranges were from \$56,000 to \$1,606,000. He said he understood DNR would provide staff support to the Board because it has engineers and construction management experts to review the reports and make independent calls, if necessary, to come up with its view of the reliability of the estimate provided by the oyster biologists. If a case would go to court, having someone who is a registered professional engineer and has construction management experience able to testify as to the basis of their advice to the Board would make the case easier to hear.

Mr. Pausina made a motion that the Board instruct the biologists that if they so choose they shall include in their report in depth cost of material, transportation and placement of cultch material and, in the event they do not include that in their report, that DNR staff seek the same information so that in each case that comes before the Board, it has some information from at least one source and possibly two.

Mr. Voisin said he would remove, "if they so choose" from the motion and made a substitute motion that the biologists include in their report a dollar evaluation of placement of cultch material based upon their biological assessment.

Mr. Pausina asked Mr. Voisin to amend his motion to include that DNR shall also give the Board some estimates of the same thing. Mr. Voisin agreed to include this and Mr. Pausina seconded the substitute motion as amended.

Mr. Hanchey said he had no problem with this, but thought it should be clear what the biologists' assignment should be.

A vote was taken and the motion, as amended, passed unanimously.

Mr. Voisin made a motion to deviate from the agenda to take up Item VII, "Ethics Commission finding." Mr. Warren Fleet explained that the Ethics Commission met on October 15 and had issued an opinion. He said the Department didn't necessarily agree with the opinion and further discussions had been held with them. The Commission agreed to re-hear the issue at their November 12th meeting. He said DNR feels that there is a provision in the Administrative Procedures Act which may provide a specific clause that would render the Commission's opinion a little different and feels that recusal should be an option even if the Commission doesn't agree.

Mr. Boydston said he would not like to resign, but recusal was not an option because that means there would not be a fifth vote to represent his side of the deliberations. The only alternative would be to appoint an alternate, but his company was concerned because this is not provided under the statute. Mr. Fleet said Mr. Boydston was correct that there is no provision in the Oyster Lease Damage Evaluation Board's statute either for recusal or appointment of an alternate. In the case of recusal, there would not be a balanced Board and a balanced Board was clearly the intent of the legislature. If the Administrative Procedures Act (APA) is followed, it is felt that the action of the Board is an adjudication, which means that it is hearing issues and making a decision. Under the adjudicatory functions of the APA, recusal is an option and the Governor's appointment of an alternate to hear that particular matter is also provided. That is the argument DNR will make.

Mr. Boydston asked Mr. Fleet if an attorney could bring this up in litigation and use it as their cause that the Board was acting improperly in any of the decisions they rendered.. In the first case he had recused himself. Mr. Fleet said he didn't think so. He didn't think any action was taken pursuant to him recusing himself and they would have a hard time proving damages.

Mrs. Guillory asked if Mr. Fleet felt the opinion issued by the Ethics Commission on this matter is legally suspended pending the re-hearing. Mr. Fleet said he thought it was.

Mr. Voisin asked Mr. Fleet if his opinion was that Mr. Boydston could continue to serve. Mr. Fleet said, "Yes, until there is a final opinion rendered," but he urged caution and advised not to act upon the issue involving Burlington. As to any other matter, he didn't feel there was a problem within the ethics. He said this issue affects not only Mr. Boydston but all the Board members.

Mr. Hanchey said that in their discussions with the Ethics Commission, the decision was made to send one of the Commission's staff attorneys to the Board to make a presentation on the ethics laws and how they might apply to the Board.

Mrs. Guillory said she would like the biologists to be invited to attend this presentation.

Mr. Voisin suggested, if the ruling is that the Board is under the APA, that Mr. Fleet make a presentation to the Board about the steps to follow.

Mrs. Guillory mentioned that in the pending case, the final request for arbitration hadn't been sent in yet. Mr. Waitz said he had received a call from Charlie Marshall last week and Mr. Marshall said he'd like to have the hearing tentatively set for November's Board meeting. Mrs. Guillory said she didn't see this as a matter to come before the Board's regular meetings. According to the APA and the statute, when someone requests a hearing, the first thing done is to send out a notice and allow time for discovery.

Mr. Boydston said he thought the party requesting arbitration should send in something in writing as a

formal request for arbitration. Mr. Hanchey said DNR has had discussions on how the process is to be handled and will take care of it. He believed the 90 days needed to be broken down into the things that need to happen within that 90 days.

Mrs. Guillory opened the discussion on the Uniform Evaluation Methods. Mr. Pausina had sent in his comments on them and they had been faxed to the Board. After some discussion on the first comment, Mr. Pausina made a motion to change "firm mud" from 5% to 50% and change the cultch section appropriately. Seconded by Mr. Boydston. Motion passed.

Mr. Pausina asked that the "Oyster Bottom Evaluation Methodology Report" by Dr. Sammy Ray be sent to Mr. Boydston, Mr. Briggs and Mrs. Guillory.

Mrs. Guillory suggested the other comments on the Evaluation Methods submitted by Mr. Pausina be continued at the next meeting. A motion to table until the next regular meeting a full discussion of the Uniform Evaluation Methods was made by Mr. Voisin and seconded by Mr. Boydston. Motion passed unanimously.

Because Mr. Pausina had to leave, at this time a date for the next meeting was scheduled. It will be on Wednesday, December 2 and will convene for more than two hours.

Mrs. Guillory asked for suggestions on re-certifying the biologists. Mr. Hanchey said this was brought up because the statute says the Board shall annually review and maintain a list of certified biologists. He suggested a letter be sent, before the next meeting, to all certified biologists asking them if they are interested in continuing to participate in this program, and asking them to update their resumes.

Mr. Voisin suggested having an annual workshop for the certified biologists to discuss issues of concern. Mr. Hanchey agreed that there were many issues that could be discussed in a workshop and said one could be held in the next three or four months. He told Mr. Voisin he would come back at the next meeting with a list of issues that could be discussed.

Mrs. Sweeney asked to comment on a newsletter, "The Enforcement Corner," she had received from the Louisiana Oyster Task Force. It indicated there were some recent citations to oyster consultants for dredging on oyster leases, issued as a reminder that they must operate under what they call a Scientific Collecting Permit, and, in addition, they must notify the regional enforcement captain for Wildlife and Fisheries and have a letter of permission from the lessee.

On the item, "Ethics and the biologists," Mrs. Guillory said she just wanted to bring it up because it was mentioned to her by one of the other state agencies. Mr. Hanchey said the biologists are not members of the Board or employees of the state. They're relationship is with the person who hires them. The Board expects them to be objective scientists. Since the Board gets to review their results, this, hopefully, assures objectivity. Since they don't have a financial relationship with the state, he didn't

believe there would be a conflict, but he said he would look into this.

Mr. Voisin made a motion to adjourn. This was seconded and the meeting was adjourned.