

**Suffolk County Aquaculture Lease Program Advisory Committee
Public Meeting**

MEETING SUMMARY

April 2, 2008

Meeting Number 14

Location: Cornell Cooperative Extension, Kermit W. Graf Building,
423 Griffing Avenue, Riverhead, New York – Second Floor Conference
Room

Start/End: 4:00 p.m. / 6:00 p.m.

Attending: *Members/Alternates*
Tom Isles, DeWitt Davies, Catherine Stark (representing Jay
Schneiderman), Martin Trent, Robert Whelan, Tamara Sadoo, Debra
Barnes, Arnold Leo, Gregg Rivara, Cornelia Schlenk, John Aldred,
Edward Warner, Jr., David Lessard, James McMahon, David O. Conover

Staff
Lauretta Fischer, Jennifer Kohn, Michael Mulé, Barbara DelGiudice

Others
Gregory Greene, Keith Brewer, Kimberly Somers, Robert Nuzzi, Robert
Wemyss, Michael Craig, Matthew Atkinson, Dean Yaxa, Floyd
Carrington, Howard Pickerell, Michael Moskowitz, Scott Gillis, Wade
Carden, Bell Pell, Chuck Steidle, Michael Kujawa, Jen Skilbred,
Christina Grahm

Materials

Distributed: Final meeting agenda; February 26, 2008 ALPAC Meeting Summary;
Correspondence/Communications (April 1, 2008 letter from Robert M.
Wemyss [Attachment #1]); Notice of Completion of Draft Generic
Environmental Impact Statement and Notice of Public Hearing;
Preliminary Suffolk County Shellfish Aquaculture Lease Program
Administrative Guidance.

Welcome and Introductions

Chairman Tom Isles began the meeting by giving a quick overview of the agenda and a summary of work conducted at previous meetings. T. Isles indicated that a brief public comment following each agenda item, in addition to the public comment period at the end of the meeting, will be permitted.

Review of February 26, 2008 ALPAC Meeting Summary

T. Isles asked the committee for comments regarding the February 26, 2008 ALPAC Meeting Summary.

No comments were raised.

Correspondence, Communications and Updates

DeWitt Davies gave a brief summary of the correspondence and communications the County has received regarding the Lease Program since the last ALPAC meeting on February 26, 2008. Correspondence received and discussed was submitted by Martin Trent, Suffolk County Department of Health Services (SCDHS), regarding comments on the DGEIS; Matthew Atkinson, Peconic Baykeeper Inc., regarding the Shellfish Cultivation Zone; and Bob Wemyss, North Shore Baymen's Association, regarding the Shellfish Lease Program. D. Davies noted that Mr. Wemyss requested that his letter be distributed at this ALPAC meeting, and as such, it will be attached to the summary of same.

D. Davies provided the group with a brief update on the status of the *Underwater Land Title Search Data Report*, stating that it has not yet been finalized due to production issues, but will be on the agenda for the next ALPAC meeting.

Survey of Shellfish Aquaculture Leases in Peconic Bay and Gardiners Bay

T. Isles informed the group that the Suffolk County Department of Planning had met with Cashin Associates, P.C. (CA), the Suffolk County Dept. of Law, the Suffolk County Dept. of Public Works, and the Suffolk County Dept. of Environment and Energy to look into survey methods that could be developed for the Lease Program. More information regarding the survey of shellfish leases is anticipated by the next ALPAC meeting in May.

D. Davies added that the Dept. of Planning has submitted an application for funding under the Suffolk County Water Quality Protection and Restoration Program for conducting lease surveys during the first two years of the program. The funds would be used to secure professional land survey expertise that will be used to locate shellfish leases on the water, install buoys that mark lease boundaries, and prepare lease survey maps. The Suffolk County Water Quality Review Committee will consider this

application at its meeting in April. D. Davies stated that more information regarding this matter would be available at the next ALPAC meeting in May.

Draft Generic Environmental Impact Statement (DGEIS)

Copies of the DGEIS were distributed to ALPAC members and Michael Mulé gave a brief overview of the status of the document. M. Mulé stated that the DGEIS was presented to the Suffolk County Council on Environmental Quality (CEQ) on March 19, 2008, during which time the CEQ approved the document and authorized it for distribution for public comment. M. Mulé stated that a public hearing has been scheduled for 7:00 p.m. on April 17, 2008 at the Riverhead Town Hall, chaired by CEQ Chairman, Larry Swanson. The public comment period will extend through May 1, 2008, during which time written comments can be submitted to the Dept. of Planning. M. Mulé informed the group that the DGEIS is available for public review at local libraries, as well as village and town clerks offices throughout the east-end of Suffolk County. Responses to CEQ and public comments will be prepared and submitted as part of the Final GEIS. M. Mulé stated that the SEQR process is anticipated to be completed by the end of summer/early fall 2008.

T. Isles added that the public hearing will provide an opportunity for comments and criticisms, clarifications, or to show support for the program.

Cornelia Schlenk asked if there will be time to share comments and criticisms received from the public with ALPAC prior to submitting responses to CEQ. M. Mulé informed C. Schlenk that there will be time to discuss comments received with ALPAC.

Cashin Associates (CA), P.C., Progress Report

Greg Greene (CA) informed the committee that a preliminary draft of an Administrative Guidance document for the Lease Program was prepared for review by ALPAC. He explained that the guidance document provides information on how the Lease Program will be administered, and answers questions regarding the proposed program components, such as fees, definitions and details discussed at earlier meetings. G. Greene stated that the guidance document is a working draft and asked that the committee provide feedback on details contained within the document.

G. Greene also stated that an electronic version of the Shellfish Cultivation Zone map will be gridded into parcels within which leases can be placed. G. Greene explained that each parcel will be 20 acres, encompassing a 5 or 10 acre lease area, allowing for built-in buffers between leases. G. Greene further explained that the map will provide a mechanism for potential lease holders to pick a lease plot during the application process. The map will be created in GIS format, which will allow the County to identify the GPS coordinates for each plot and information regarding each lease. The map will also enable the County to group lease parcels for surveying. G. Greene informed the group that even though the entire Shellfish Cultivation Zone Map will be divided into 20-acre parcels,

only a small number of plots would be available for a lease under the 1% growth rate for non-grant lands.

Keith Brewer (CA) gave a brief presentation of the draft Administrative Guidance document. K. Brewer stated that the guidance document has been developed mainly for non-grant lease applications thus far. He explained that this is a preliminary draft and that some issues regarding revocation of a lease and lease eligibility are still being developed.

Arnold Leo questioned the amount of clams identified in the guidance document required to determine whether a potential lease area contains a wild clam stock that is of commercial value. A. Leo stated that the standard of 233 clams produced per hour contained in the guidance document was too high; and that the burden of proof should be on the County, not the public.

John Aldred asked if it was possible to use clam density, i.e., the number of clams per square meter, to indicate if a lease contains a commercially valuable wild clam stock. He thought that a threshold density approach would be simpler.

G. Greene replied that use of the clam density approach would be investigated.

Dean Yaxa, private oyster grant holder, stated that the present price of clams is \$0.15-0.16 each; therefore, 233 clams per hour is an unreasonable rate and it is not economical. He believes this catch rate is too low and needs to be increased, otherwise it would not be worthwhile for a clammer to harvest on a commercial level.

Matthew Atkinson, Peconic Baykeeper, Inc., asked if the draft Administrative Guidance document is available to the public. T. Isles replied that it is a working draft document that is only available to the ALPAC members at this time.

A. Leo stated that if a proposed lease site has been identified as a productive shellfish area during the public comment period, he would prefer to see that multiple (2 or 3) individuals submit affidavits declaring that the site has a natural set of clams of commercial value. Such statements would corroborate each other.

Ed Warner stated that criteria for other shellfish species such as bay scallops should also be considered when determining if a lease site is naturally productive.

David Conover stated that the notion of history and timeframe of bottom productivity should be considered. How recent was an area productive?

Bob Wemyss, North Shore Baymen's Association, noted that the state legislation says that no leases can be issued in naturally productive areas, and that the burden of proof should be on the County, not the accuser. B. Wemyss also stated that no ground-truthing was conducted prior to determining the Shellfish Cultivation Zone, and he questioned the methodology used to create it.

Debra Barnes gave a brief overview of the NYSDEC Temporary Marine Area Use Assignment program at the request of T. Isles. D. Barnes explained that under the temporary assignment program all shellfish cultured must be contained in off-bottom gear. D. Barnes stated that a 30-day public comment period is required, along with a 45-day public comment period for the US Army Corps of Engineers permit review. Public notice is posted in the weekly NYSDEC Environmental Notice Bulletin, and is also sent to the Shellfish Advisory Committee and the Town Supervisor with an attached map and gear description. If substantive comments are received objecting to a site, the DEC requests the applicant to choose a different location. D. Barnes explained that having a temporary assignment is not an exclusive right to the underwater lands. She stated that the public is permitted to harvest wild shellfish and set pots on an assignment plot. D. Barnes also added that the temporary assignments work with fishermen to minimize conflicts.

D. Barnes asked if non-profit leases should have lower fees.

K. Brewer explained that the fees listed in the draft Administrative Guidance document are preliminary and open for discussion among the ALPAC members. They are based on consideration of the fees charged for leases in other states.

C. Schlenk asked if there should be a cap on the issuance of non-commercial leases (number and size) considering that they are not included within the 1% growth rate.

G. Greene replied that the non-commercial leases were left to be as flexible as possible. There were currently no limits on the acreage for non-commercial leases because it is not anticipated that those types of leases would require a large amount of acreage.

D. Conover asked whether non-commercial lease holders would be able to sell their shellfish.

D. Barnes replied that safeguards are in-place with NYSDEC permits. She explained that a scientific researcher permit would be required for a non-commercial lease holder, which prohibits the selling of shellfish.

B. Wemyss stated that the lease rents are too low and that the County should maximize return on lease rents. He suggested a fee of \$100 per acre.

M. Atkinson stated that large non-commercial leases may be of some interest in eelgrass re-seeding projects. K. Brewer replied that most lease areas are located in the deeper waters where eelgrass restoration would most likely not apply. C. Schlenk stated that this program under state law is for shellfish cultivation purposes only.

M. Atkinson stated that if water quality improves and a natural stock of clams sets on the site, he would not want the natural stock to become commercially available. T. Isles stated that if a site becomes productive, it will be taken out of the cultivation zone during the next map revision.

Michael Craig, temporary assignment holder, stated that the County should take steps to promote shellfish aquaculture, and take into consideration the positive benefits of culture, such as improvements to water quality. Lease program fees and requirements should be affordable and doable.

Gregg Rivara stated that he agreed with M. Craig, and that aquaculturists are putting up their own capital to produce shellfish. He felt the annual lease fee proposed by CA of \$200 plus \$5/acre was reasonable.

D. Barnes commented on the Noise and Lighting portion of the guidance document, stating that shellfish harvesting is not permitted after sunset, including sorting or culling operations.

David Lessard replied that buoy maintenance could be conducted during evening hours, during which the crop would not be touched and therefore would not violate the NYSDEC shellfish harvesting regulations.

E. Warner asked what would happen if water quality classifications changed for the worse in a certain area that prohibited the harvest of shellfish from leases in that area.

K. Brewer stated that the lessee would be given the opportunity to relocate to a different site.

A. Leo stated that he would like to see the guidance document mention the concept that a portion of the lease fees be used to repay the County's survey costs.

D. Davies replied that setting up a fund to repay County survey costs could be included as a recommendation in the guidance document.

T. Isles added that the County would first need to talk with the County's budget office. He added that a lot of items within the guidance document need to be looked into and that comments from ALPAC members are welcomed. The County will proceed with the work and further research.

G. Greene stated that issues discussed are for leases on non-grants lands, and that more work is needed on a program for grants. He added that criteria for fallow grants are needed and input from ALPAC members is requested.

B. Wemyss stated that fees for grants should be based on the annual income earned on a grant.

Bill Pell, private oyster grant holder, responded that it could take up to five years to make any significant income from a grant.

C. Schlenk suggested a new category for the lease application form, indicating the dispersal of shellfish grown on non-commercial leases; whether they will be left in place, brought to a lab, planted at another location, etc.

A. Leo stated that there is a conflict with the statement in the guidance document that explains that the County will survey leases, as compared to component #10 of the Lease Program Components document, which states that surveys will be conducted by a licensed land surveyor.

K. Brewer replied that the guidance document will be re-worded to clarify that leases would need to be surveyed by a licensed land surveyor to be consistent with the Program Components document.

C. Schlenk stated that it would be a positive thing to do if annual lease fees could be used in some way to promote the entire shellfish industry.

ALPAC Meeting Schedule

T. Isles asked the ALPAC members to submit any comments regarding the guidance document to the County by April 23, 2008. He stated that the next ALPAC meeting has been scheduled for Wednesday, May 14, 2008 in the second floor conference room, Cornell Cooperative Extension Building, Riverhead, at which time a revised guidance document will be reviewed and further information on the survey issue will be presented.

Public Portion/Comments

1. B. Wemyss stated that the County will not generate significant amounts of money on the shellfish lease project, so there will not be enough left over to promote the shellfish industry. B. Wemyss further stated that the County did not perform any ground-truthing in determining the Shellfish Cultivation Zone. He also questioned the legality of issuing blanket leases on grants, especially to those that have not been cultivated for years and have since developed natural clam sets. He stated that the original grants were not issued properly and that all shellfish lease programs have turned into land grabs by big companies. He opposed the harvest of natural clam beds on grant lands by dredge boats. B. Weymss also questioned how the County could have determined the Shellfish Cultivation Zone, particularly Peconic Bay, to be non-productive, when baymen are harvesting shellfish there on a daily basis.
2. Bill Pell replied to B. Wemyss statement by declaring that he has not seen any clammers working in Peconic Bay. B. Pell also stated that we need to learn from our mistakes and make this program work, since the public will be getting greater benefits if the program is implemented, than if it is not.

Meeting adjourned at 6:00.

North Shore Baymen's Assn., Inc.
62 Oldfield Rd.
Huntington, New York

April 1st, 2008

SUFFOLK COUNTY SHELLFISH AQUACULTURE COMMITTEE

Having reviewed the committee's most recent draft proposal, we have come to the conclusion that the committee has departed from its legislative mandate and is acting in the service of individuals and private companies.

When the New York State legislature passed the enabling statute, it did not authorize Suffolk County to lease underwater land that is naturally productive. The legislature did not exempt Oyster Grant Lands (OGL) from the substantive provisions of the statute that protect underwater lands that are capable of supporting significant commercial hand harvesting activity. The legislature did not authorize Suffolk County to lease underwater land currently held as oyster grants.

Always follow the money, keep your eyes on the actions of those who stand to profit.

The oyster grant lands in Gardiners and Peconic Bay are in many cases old growth clam beds that have been open to the public for decades. This is because many of them have not been used for any type of cultivation for decades: unmarked and unused. These lands have been the subject of recent speculative consolidation by members of the committee. The speculation is that the OGL will be eligible for leasing by the owners, and that these owners would eventually be able to hydraulically dredge these old growth clam beds. This has become the primary drive of certain committee members, and it appears that the committee has been co-opted by the individuals who stand to profit the most. The fact is that the committee has allowed OGL owners to drive the committee's agenda.

What value would be conveyed to holder of OGL with the committee's current proposal? OGL holders will be gifted an absolute right to lease the natural old growth clam beds on their grant land, effectively converting to ownership these clam beds creating an exclusive right of fishery for the state owned clams which abound there.

It cannot have escaped the committee members that under the present proposal the leases available to the public in ten acre plots will be dwarfed by those gifted to current OLG holders.

One thing court records make clear about Oyster Grant Lands is that any grants issued prior to the 1906 amendment were illegally granted if they are for more than 25 acres. For this reason alone their use should never be expanded. The commissioners who granted them were run out of office for illegally granting productive lands. The court that made landmark decision in the case of Suffolk County v. Edwards, 148 N.Y.S. 305; 86 Misc. Rep. 283 determine in its findings of fact:

“Fourteenth: That contrary to the statute in such case made and provided, the said Commissioners of Shell Fisheries did not bring the said applications to the attention of the Board of Supervisors of Suffolk County, and that said Commissioners and said Board, or a committee thereof, did not hear and pass upon said objections, and did not determine that the said land so applied for by either of the said applicants was of an area of not unreasonable extent and did not direct the Clerk of the County of Suffolk to sell the lands so applied for at public auction to the highest bidder; and that no attempt was made by the said Commissioners of Shell Fisheries to comply with the law applicable to said applications; that Chapter 385 of the Laws of 1884 of the State of New York permitted the conveyance of only four acres of oyster ground under the waters of Gardiner's Bay or the Peconic Bays to one applicant; and that Chapter 916 of the

Laws Of 1896, amending said Chapter 385 of the Laws of 1884, permitted the granting of no more than twenty five acres of such ground to one applicant; and that the only authority for conveying more than twenty five acres of said ground to one applicant, assuming that said ground has not been set apart and can be legally conveyed in an amount, is Chapter 640 of the Laws of 1906, which the defendant attacks as unconstitutional.”

FIFTEENTH: That the defendants Everett J. Edwards, Clarence C. Cartwright and Edwin D. Tuthill, individually and as Commissioners of Shellfisheries, did not act in good faith in making the said attempted conveyance hereinbefore set forth, but acted in ignorance of the law governing their actions as such the commissioners and in defiance and contempt of its provisions”.

When the State of New York took Aqua Culture Technologies to court for illegally dredging natural hard clams, the Attorney General refused to use the Edwards case. The only possible reason for not using that case was that the New York State Department of Conservation (DEC) knew that this would highlight the fact that it had been illegally issuing permits that allowed uses other than oyster culture on OGL to various parties for some time. The only proper course of action for the DEC would be to simply deal with the repercussions of rescinding all permits that allowed non-oyster activity. Instead they continued to permit these activities in clear contravention of the law. ***“There has always been a natural abundance of other shellfish such as clams and scallops...It is also to be observed that the act of 1884, if considered as a grant, is to be construed strictly in favor of the state, and that it was explicitly 'for the purpose of oyster culture' alone...There is clear distinction between grants of private property for private***

purposes and secessions of public properties for governmental purposes. To these lands underwater the right and title of the state was sovereign not proprietary. The state held the title of the people for the common benefit and to promote the public convenience and enjoyment of the natural beds. All the state had to cede and all the county took by the act of 1884 was the title held for government purpose” Suffolk County v. Edwards, 148_N.Y.S. 305; 86 Misc. Rep. 283

It is important to note that once Judge Kelby rendered this decision, any leeway the DEC and the County of Suffolk had with regard to interpreting the statute was suspended. It is role of the courts to interpret the statute and the role of the DEC to act according to the court’s interpretation. In this case that interpretation cannot possibly lead one to conclude that the DEC has any authority to expand use of OGL beyond oyster cultivation, regardless of how they try to craft their policy. This was the sentinel case directly on point to guard the public’s right to the enjoyment of the natural beds.

The effect of the DEC illegally allowing other shellfish to be cultivated on oyster grant lands has been to increase the value of private property that might otherwise have reverted to the public as the statute lays out. When land is no longer used for oyster culture, it reverts to the public. Private holders of OGL that have invested in cultivating species of shellfish other than oysters may in fact be damaged by having their permits rescinded, but the DEC never had any legal right to issue those permits in the first place. The OGL holders never owned anything but a right to cultivate oysters and oysters alone.

The DEC has sought to limit the states liability for issuing permits that were beyond its authority. That is understandable given the long history of collusion between DEC Suffolk County and oyster companies. Suffolk County issuing old growth clam bed leases to OGL holders would conveniently bail out the DEC at the expense of the law and the public right to the natural beds.

The proposed draft program recommends putting the obligation of determining the productivity of land on the public:

“14. Documentation of Natural Non-Productivity of Proposed Lease --If, during the application public comment period, comment is received indicating the presence of significant natural productivity on the proposed lease site, ~~Prior to issuance of a lease on lands not currently used for aquaculture,~~ the applicant must provide documentation that the subject land does not presently support a

productive natural shellfish stock. The County will identify what will be considered adequate documentation of the status of natural shellfish stock; such documentation may include, but not be limited to, a field benthic survey of the underwater land. The County will identify what is considered a significant shellfish stock.

What is “not be limited to a field benthic survey” supposed to mean? Where is the committee’s obligation to the public?

The law requires the determination that land offered for lease is not productive. The law does not authorize leasing of productive land as long as no one objects. At the very minimum a complete benthic survey needs to be performed with a full report conducted on behalf of the County at the expense of the applicant. It is the County of Suffolk that is responsible under the law to certify to the public that the land it proposes to lease is not capable of supporting significant hand harvesting activity. There must then be a minimum 60 day public inspection period to allow the public to rebut the claim of non-productivity. That “claim of non-productivity” is no mere formality; it is the event in the process where the greatest conflict of interest exists. Objective criteria must be developed and applied. That 60 day period must be extended if extreme weather conditions or other extenuating circumstances prevent public inspection.

If the committee was really about the business of promoting aquaculture, it would designate modest cultivation zones in areas known to be non-productive. Has the committee scrapped the blue zone? Is the idea to make the entire Gardiner Peconic Bay system a cultivation zone? There is an obligation to determine where there is significant hard clam habitat; that habitat is meant by law to be protected from leasing. We have seen nowhere in the committee paper work a discussion of specific hard clam habitat. The idea is not to create the appearance of transparent government but actually to engage in transparent government.

The temporary assignment program is mischaracterized in the scoping document. The temporary assignment program was designed with particular safeguards for public access to the natural shellfish beds. This was repeated to me by DEC personnel on many occasions. I particularly remember telling Josh Thiele how I felt applicants were being granted temporary assignments on edges that were primary hard clam habitat; he dismissed my concerns. My point then was that it was poor policy to grant temporary assignments in areas

where the underwater topography make hard clam abundance likely. My point now is that the assignments on the edges in Gardiners and Peconic Bays should not be considered for conversion to leases. The DEC had no obligation at the time to certify that these areas were nonproductive, and they ignored and dismissed the suggestion that the assignments not be granted on edges.

The committee is designing an aquaculture program that will be a land grab for the naturally productive hard clam habitat that it is bound by law to protect. Blanket designation of aquaculture zones without ground truthing is an abuse of the authorizing legislation. The whole point of designating aquaculture zones was to put the question of natural productivity to rest to protect public access to the natural beds. Instead the committee spends its time crafting ways to avoid its duty to do the actual physical work. This is disappointing but not surprising. Every act for granting, leasing or otherwise alienating public land for shellfish cultivation in Suffolk County has always been a land grab for naturally productive underwater land. Huntington and Islip leases and the nefarious Blue Point Smith Patent were all naturally productive underwater lands, sold out from under the public by corrupt politicians and forwarded by judges and courts by deals made in Country Clubs. These oyster lands are part of one of the most corrupt land grabs in Long Island history - remnants of Blue Points and Long Island Oyster Farms clam cartel, and it is an insult that these illegally granted lands would even be considered for inclusion in any leasing program.

Robert M. Wemyss
Secretary, NSBA