



VENTURA
PORT DISTRICT
Established 1952

BOARD OF PORT COMMISSIONERS

JANUARY 11, 2017

STANDARD AGENDA ITEM 1

SHELLFISH GRANT -
LEASING ALTERNATIVES AND
OPERATIONAL STRUCTURES

**VENTURA PORT DISTRICT
BOARD COMMUNICATION**

STANDARD AGENDA ITEM 1
Meeting Date: January 11, 2017

TO: Board of Port Commissioners
FROM: Brian Pendleton, Business Operations Manager
SUBJECT: Shellfish Grant - Leasing Alternatives and Operational Structures

RECOMMENDATION:

That the Board of Port Commissioners receives a memorandum by *Plauché & Carr, LLP* analyzing leasing alternatives and operational structures available to the District related to the Shellfish Grant.

SUMMARY:

On September 28, 2016 the Board of Port Commissioners authorized funding in the amount of \$8,500 to retain outside legal services provided by *Plauché & Carr, LLP* to analyze and report on leasing alternatives and operational structures related to the Shellfish Grant.

The Ventura Port District, in collaboration with the Ventura Shellfish Enterprise (VSE), was awarded a two year, approximately \$300,000 Sea Grant (\$265,000 funding directly to the District) to contract with qualified consultant(s) that will enable development of a permitting strategy and all necessary permitting components required for sustainably cultivated shellfish production to be landed at Ventura Harbor.

There has been significant progress made in Task 1 of the Shellfish Grant, which is the research and development of a permitting strategy as outlined above. However, it has become evident that the scope and funding allocated from the Sea Grant for Task 1 legal services is insufficient to more fully evaluate the complex issues of leasing alternatives and operational structures. Given that the State California Department of Fish and Wildlife (“CDFW”) has issued very few leases for offshore aquaculture over the past two decades (primarily renewals), there has been a lack of clarity as to what leasing structures may be available to this District, or other government entities, and cooperatives such as the VSE.

Attached is the memorandum prepared by Robert Smith, *Plauché & Carr, LLP* that summarizes several leasing alternatives and operational structures available to the District to facilitate development of twenty (20) 100-acres plots for growing mussels cultivated in state waters within the Santa Barbara channel near Ventura Harbor.

BACKGROUND:

Plauché & Carr, LLP is a Seattle-based law firm with a practice focused on environmental, land use, and natural resource-based issues. *Plauché & Carr, LLP* has represented a number of non-profit, private, and governmental entities regarding environmental and regulatory matters ranging from regulatory compliance/permitting, to administrative litigation, to litigation in state and federal courts, to conservation land acquisition. On October 14, 2015 the District selected *Plauché & Carr, LLP* and Robert Smith as lead counsel to provide the Task 1 legal services for the Shellfish Grant. This contract was extended by the Commission on September 28, along with other consultants providing services contemplated by the Grant.

For this additional task, Robert Smith has served as lead counsel to the District. Mr. Smith is an attorney with ten years’ experience working in California on land use and environmental issues, on behalf of both private and public clients. During his previous employment at two Los Angeles-based firms, Robert advised and represented numerous clients regarding compliance

with the California Environmental Quality Act (“CEQA”) and National Environmental Policy Act (“NEPA”) and represented several coastal cities and private clients before the California Coastal Commission (“CCC”), California Department of Fish and Wildlife (“CDFW”), Los Angeles County, and U.S. Army Corps of Engineers (“Corps”).

The Shellfish Grant contemplated the Ventura Port District, as a member of VSE would hold all entitlements for a group of offshore aquaculture leases that will in turn be subleased to individual producer-fishermen for shellfish farming. While the CDFW has allowed subleasing, they are reviewing these leasing requirements and evaluating options while seeking input from potential lessees. Mr. Smith’s memorandum provides analysis of likely alternatives that CDFW may permit, and important considerations of each alternative for the District. Mr. Smith will present the findings of his memorandum to the Commission on Wednesday, January 11th.

As a follow up, Mr. Smith can assist the District in preparing draft lease documents and negotiating with CDFW. However, staff believes it is premature to authorize this work which is preliminarily estimated at \$10,000 because it is anticipated that further analysis of the leasing alternatives and organizational structures by Mr. Smith, District staff and general counsel will be necessary.

FISCAL IMPACT:

The additional legal services for *Plauché & Carr, LLP* was in an amount not to exceed \$8,500, however there may be some follow-up travel to Sacramento for meetings with CDFW which may necessitate a contract amendment for additional expense. Staff will advise the Commission of any necessary additional costs.

ATTACHMENT:

Attachment 1 – *Plauché & Carr, LLP* Memorandum

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MEMORANDUM

TO: Ventura Port District Board of Port Commissioners
FROM: Robert M. Smith, Plauché & Carr, LLP
DATE: January 5, 2017
RE: Aquaculture Project Formation Options

This memorandum summarizes several operational structures available to the Ventura Port District (“District”) to facilitate development of twenty 100-acre plots for growing Mediterranean mussels cultivated on submerged longlines in state waters within the Santa Barbara channel near Ventura Harbor.

The District has a number of potential options. Selecting the best option for the District depends on a variety of factors, including (1) the amount of direct control the District wants to have over aquaculture operation and development; (2) whether the District wants to participate financially in the project, either through a joint venture or some other form of public-private partnership; and (3) the amount of investment, either through District administrative resources or financial investment, the District is willing to commit.

The options available to the District, in order of lesser-to-greater District involvement, include: (1) the District acquiring a lease from the California Fish and Game Commission (“CA FGC”) and then subleasing to individual shellfish companies; (2) developing a “pre-permitting” or general permit process, where the District obtains all permits for the project and then designates sublocations for individual farms (this is the option contemplated in the Grant); (3) development of a cooperative where the District leases the land through a master lease and then subleases to a shellfish cooperative group responsible for the day-to-day operation of the project, such as the Ventura Shellfish Enterprise (“VSE”); and/or (4) the District takes a proprietary role in the ownership and operation of the mussel farms. Note that many of these options overlap and several permutations are possible based on the District’s evaluation of the three factors listed above.¹

¹ While all of these options can be legally pursued by the District, there are a number of legal issues that must be considered when developing a specific process for the selected alternative. These considerations include (but may not be limited to) compliance with the Brown Act (Gov. Code § 54950 *et seq.*), prohibitions on the gift of public

A. Permitting Process and Costs

Generally, a company seeking to start a new shellfish farm must obtain five main discretionary permits and approvals.² First, it must obtain a lease from the CA FGC. Second, the growing area waters must be certified by the California Department of Public Health (“CA DPH”).³ Third, it must obtain a coastal development permit (“CDP”) from the California Coastal Commission. Fourth, it must obtain a permit from the U.S. Army Corps of Engineers (“Corps”) pursuant to its jurisdiction under Section 10 of the Rivers and Harbors Act (associated with installation of structures in navigable waters) and Section 404 of the Clean Water Act (“CWA”) (associated with the discharge of dredged or fill material into waters of the United States). Prior to issuance of its permit, the Corps must consult with the National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service (“USFWS”) for consistency with the Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act. Fifth, it must obtain approval from the Los Angeles Regional Water Quality Control Board (“RWQCB”) for CWA Section 401 Water Quality Certification.

The shellfish company must also comply with state and federal environmental review requirements, the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”). Considering the scale of the project, it is likely that the above regulatory agencies would require preparation of an environmental impact report (“EIR”) under CEQA, an environmental assessment under NEPA, and a biological assessment and essential fish habitat analysis to assist NMFS and USFWS in its consultation.⁴ In many circumstances, CEQA and NEPA review may be combined and served by a single environmental review document. Further, it may be possible to utilize environmental review previously conducted by other agencies, including the CA FGC mitigated negative declaration for Santa Barbara Mariculture and the Humboldt Bay Harbor, Recreation, and Conservation District’s (“Humboldt Harbor District”) Humboldt Bay Mariculture Pre-Permitting Project EIR, to maximize efficient environmental review of the proposed project.

The above permitting requirements and environmental review are the most common reasons cited by the aquaculture industry concerning issues preventing expansion of the industry in California. While regulatory costs are not unique to the aquaculture industry, the multifaceted review process and significant upfront costs, in combination with the time required to install a farm and grow a shellfish product, currently limits the expansion of the industry, particularly in terms of diversifying the industry beyond the companies currently operating in California.

funds (Cal. Const. Art. XVI § 6), and conflict of interest issues (Gov. Code § 1090). Once the District selects an option to pursue, we can work with the District’s legal counsel to ensure that these considerations are properly considered in the implementation of the process selected.

² While there are a number of additional ministerial approvals required for shellfish cultivation, including approvals from the U.S. Coast Guard, California State Lands Commission, and California Department of Fish and Wildlife (“CA DFW”), these permits represent the most significant hurdles in terms of project planning.

³ The VSE has already started testing potential growing area waters for certification from CA DPH.

⁴ This conclusion is based on the environmental review processes recently required by state and federal regulatory agencies during the Humboldt Harbor District’s Pre-Permitting process, discussed below.

If an individual applicant sought to develop a mussel farm independently of the District, it is likely that it would take between one to three years to obtain permitting and required environmental review from all the required state and federal regulatory agencies. The estimated cost of conducting the required environmental review, consultant fees, and permitting fees, can be between \$60,000 and \$500,000, depending on the scale and location of the project. Many of the options discussed below would eliminate these delays and costs for potential aquaculture operations and reduce inefficiencies through permitting all proposed mussel farms at one time. Such an arrangement would make the proposed project site an ideal location for shellfish companies seeking to cultivate shellfish in California. Note that the VSE has already started a number of the processes required above, such as collection of water testing for CA DPH certification; therefore, the District or VSE may be able to obtain the required permits in less time than estimated above.

B. Operational Considerations in Establishing a Mussel Farm

Below are several options that the District may consider in the development of its project, with a summary of the potential advantages and disadvantages.

1. Option 1: District Lease from CA FGC and Sublease

The 2015 NOAA Sea Grant Aquaculture Extension and Technology Transfer Grant (the “Grant”) issued to the District contemplates that the District will obtain a lease from the CA FGC for the project. While the CA FGC has not frequently considered aquaculture subleases, there is nothing in the Fish and Game Code that prohibits aquaculture subleases and CA FGC staff appear willing to entertain such an arrangement, provided that the sublease maintains consistency with the master lease and contains appropriate enforcement provisions.⁵ We are in the process of discussing these options with CA FGC staff. In this scenario, the CA FGC would approve the lease to the District and would then approve a sublease or subleases between the District and individual shellfish companies.⁶ While the initial lease must be approved by the CA FGC at a public hearing, the most recent aquaculture sublease was reviewed and approved by the CA FGC Executive Director without a public hearing.

This option would provide the District with some amount of control over the project, with minimal commitment of staff resources and cost. However, revenue from the project would similarly be limited. Under this option, while the shellfish companies would be primarily responsible for compliance with the lease and sublease terms, the District would still be responsible for compliance with the master lease with the CA FGC. The District would also retain joint enforcement authority with the CA FGC in its role as landlord over the project site. However, the District would not have direct management over the day-to-day operations of the project, provided that the sublessee operates in compliance with the lease provisions. In the

⁵ The District would generally be able to lease the project area, even if it is outside the boundaries of the District, pursuant to Harbors & Navigation Code §§ 6203 and 6294.

⁶ While the District could legally acquire the lease and then assign the lease to another entity, like the VSE, it is unclear what benefit would accrue to the District under such an approach. In the event that the District prefers that the lease be held by a different entity (as opposed to a sublease), it should work to revise the Grant award parameters and have the other entity seek the lease and permitting.

event that a sublessee does not comply with lease conditions, the District or CA FGC could evict the sublessee and replace the sublessee with a different tenant.

The District would not incur significant permitting costs associated with this option. The costs of obtaining the lease and drafting the sublease would likely be paid for through the Grant. Further, the CA FGC could issue the lease without going through CEQA review, provided that final approval of the project is conditioned on CEQA review.⁷ The primary costs associated with this option would be enforcement costs associated with patrol of the leased areas, which are estimated by the VSE to cost \$200,000 annually, based on costs associated with two staff and one vessel.⁸

Generally, most state agencies that enter into aquaculture subleases disfavor subleases that increase rental rates above those incurred under the master lease. This is to discourage entities from obtaining state leases and marketing them to other companies or entities at a profit. While this concern is less likely when the lessee is a public agency, the CA FGC may believe that any additional amount paid by the sublessee under this option should go to the state as opposed to the District. Given that the District would be the first public entity in the state to enter into an aquaculture sublease, it is unclear at this time whether the CA FGC would approve a sublease that provides more rental revenue to the District as sublessor.

In the event that the CA FGC did not permit such an arrangement, the revenue available to the District under this option would be limited to landings revenue. The proposed project would represent a significant increase in the acreage available for mussel cultivation within the United States. Currently, there is a significant demand for mussels. NOAA estimates a total annual domestic mussel aquaculture production of 699,000 lbs.⁹ The total volume produced in California is estimated to be approximately 400,000 lbs. (Northern Economics 2013).¹⁰ The VSE has estimated that the proposed project can provide a two-year production cycle of up to 20 million lbs. of mussels, although yield estimates can vary significantly. Based on the landing fee of \$0.03/lb. proposed by the VSE¹¹, this would result in \$600,000 of gross revenue for the District each harvest cycle, or approximately \$300,000 - \$450,000 annually based on shellfish growth and projected growth rates.

This option provides several advantages to the District and potential lessees. First, it would give the District control over the location of the proposed lease areas, thereby permitting the District to fully consider and evaluate any potential conflicts with other uses that operate in

⁷ See 14 CCR § 15004(b)(2)(A) (“agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency’s future use of the site on CEQA compliance”); *Saltonstall v. City of Sacramento*, 234 Cal.App.4th 549, 571-72 (2015). However, it is unclear if the CA FGC and CA DFW would be willing to approve the lease without CEQA review.

⁸ The VSE pro forma anticipates that these costs would be incurred by the VSE or individual shellfish companies.

⁹ NOAA, *Fisheries of the United States 2014*, National Marine Fisheries Service Office of Science and Technology (September 2015).

¹⁰ Northern Economics, *The Economic Impact of Shellfish Aquaculture in Washington, Oregon and California* (April 2013). Note that the survey methodologies employed by NOAA and Northern Economics are different; therefore, the results are not directly comparable and may be affected by underreporting.

¹¹ This is consistent with the production-based rent required by the Washington State Department of Natural Resources (“WA DNR”), although it is more than that required by WA DNR when combined with CA DFW’s required privilege tax required under Fish & Game Code § 15003.

and near Ventura Harbor. Second, it would eliminate an additional point of uncertainty for shellfish companies, in that they would not need to seek and negotiate lease terms with the CA FGC. Third, it would provide a consistent source of additional revenue for the District, either through production-based rent or landings revenue. Fourth, as mentioned above, it provides the District direct control over potential lessees, with direct enforcement mechanisms and/or eviction options available to the District as a landlord if the lessee is in non-compliance or not meeting the expectations of the lease. This option would likely provide a steady revenue stream to the District without significant financial costs or risk.

If the District chose to no longer pursue a lease, the VSE or individual shellfish companies could seek a lease directly from the CA FGC; however, the Grant would need to be amended to propose that the lease be issued to a different entity. While amendment of the Grant is possible, it could delay the project and may eliminate any direct control over the project by the District.

2. Option 2: District Lease, Sublease and General Permit

The second option would be for the District to assume the initial leasing and permitting responsibilities. This is the option that is most similar to the process contemplated by the Grant. The Grant includes funds for “preparation and submittal of all necessary permit applications as well as documentation needed for government agency reviews and clearances,” including preparation of an EIR. Under this option, in addition to entering into a lease with the CA FGC, the District would be the general permit holder for the project and seek approvals from each of the agencies listed in Section A. The District could seek a regional general permit from the Corps. This would be similar to the approach that the Humboldt Harbor District is currently in the process of implementing as part of its Pre-Permitting Project.¹² Upon approval, the shellfish company would only need to execute a sublease with the District to begin cultivation.

This alternative would be particularly attractive to potential shellfish companies. As noted above, the most frequent complaint in the shellfish industry is the time and expense required to obtain permits. By obtaining the required discretionary permits on behalf of potential shellfish companies, the District would have a competitive advantage over other Southern California jurisdictions which could facilitate the rapid growth and expansion of aquaculture operations within the proposed project area. Permitting of a comprehensive plan for aquaculture development by the District would also provide a cost-effective option for permit review as compared to individual permits. Upon obtaining the necessary permits, the District may be able to charge a premium for such leases, given that the lessees will avoid the need to navigate the permitting process. As compared to Option 1, it is more likely under this option that the District could charge a more significant landing fee or production-based rent, given its significant participation in the permitting process. While it is difficult to project how much of a premium the District could charge under this option, given that it would be based both on market demand and approval from the CA FGC, it is possible that the District could increase potential revenue by 20 – 40% (as compared to Option 1), based upon comparable lease premiums charged by the

¹² Note that the Humboldt Harbor District’s project involves certain complexities which are not relevant to the Ventura Port District’s project, including complex questions regarding tideland ownership and interactions between eelgrass and shellfish culture.

Humboldt Harbor District as part of its Pre-Permitting Project. The District would also have more control over the permit conditions of approval, mitigation measures, and monitoring requirements to ensure that other existing uses are protected.

This option would incur some additional costs and resources to the District. District staff would need to be more involved in seeking the required permits and would be required to represent the District at all required public hearings and meetings with the regulatory agencies. As the permittee, the District would need to dedicate resources to renew permits prior to expiration; however, the permit renewal process is generally much less demanding than the initial permitting process provided that the permittee is in compliance with all permit conditions. Further, in the event that the Grant does not fully cover the costs of obtaining the required permits and environmental review, the District would be responsible for any cost overages.

Based on the Humboldt Harbor District's Pre-Permitting Project, there is a significant market and desire for this framework. It provides advantages for shellfish companies, who can immediately start cultivation practices and dedicate capital to production costs as opposed to permitting and regulatory costs, as well as the relevant governmental agencies, who can consider the overall impacts associated with the proposed cultivation at one time and conduct mitigation and monitoring for the entire project as opposed to piecemeal environmental and regulatory review.

3. Option 3: District Lease, Shellfish Cooperative Sublease

This option adds an additional layer to Options 1 and 2, in that the District would play a role in the day-to-day management of the farm and the project would involve a different organizational structure. Under this option, the District would not sublease portions of the project area to individual companies, but would instead sublease the area to a cooperative, which would be primarily responsible for operating the shellfish farm(s). This could be the VSE or another entity. The cooperative, which could be organized as a limited liability company, would be responsible for maintaining all required permits, managing cooperative membership, sharing some operational expenses, and supervising overall management and operation of the shellfish farm. Note that if the VSE sought to manage the cooperative, it would need to be registered with the State of California as a valid legal entity prior to execution of the sublease. The District could be included as a member of the cooperative to oversee day-to-day operations.

While cooperative shellfish farms are common in many places on the East Coast, such as New Jersey, Connecticut, and Rhode Island, there are no existing cooperatives on the West Coast. Similar to Option 2 above, a cooperative approach would reduce the permitting and operation costs associated with each individual mussel farm project and would permit sharing resources that are generally applicable to the project area, such as vessel, monitoring, and enforcement costs. The District would also have a simpler and more predictable lease arrangement as compared to issuing individual subleases. However, there are some disadvantages associated with the cooperative approach. First, given the operational limitations associated with a cooperative, all farm locations would need to be in a single centralized location, which would limit permitting options. Second, given that this is an unfamiliar organizational structure for the West Coast shellfish industry, it is unclear if potential applicants

will be amenable to a cooperative organizational structure, or would prefer operational autonomy and independence from other shellfish companies.

4. Option 4: Joint Venture or Public-Private Partnership

The final option is for the District to take an active proprietary role in the development and operation of the proposed mussel farm. Under this option, the District would enter into a joint venture agreement or another form of public/private partnership with the VSE or a shellfish company or companies to jointly permit, develop, and operate the aquaculture operation.¹³ This option would provide the greatest potential revenue stream to the District, which would not only obtain lease revenue but also revenue from sales of the shellfish produced. Given that mussels have a typical 1.5 to 2-year growth cycle, the VSE pro forma anticipates estimated losses of approximately \$750,000 in year one, gaining profitability by year three, and generating approximately \$800,000 in profit by year five. These amounts are in addition to landings fees that could be collected by the District or waived depending on its level of involvement in the partnership. The disadvantage of this option is that it would entail the most risk and upfront financial and resources investment by the District in an industry that is relatively new in Southern California.

¹³ This memorandum does not address any legal constraints or additional processes that may be required for the District to establish such a joint venture or public/private partnership. While it appears that the District has general authority to enter into such partnerships pursuant to Harbor and Navigation Code § 6297 (authorizing incurrence of indebtedness for valid District purposes), § 6300 (permitting the contribution of money to defray costs of projects within or without the limits of the District when such work will improve commerce within the waters of the District), and § 6301 (authorizing work to aid in the improvement of commerce within the District), additional analysis would be required in the event that the District is interested in pursuing this option.