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MEMORANDUM

April 10, 2014

TO: Board of Commissioners, CEO, District Treasurer, District Counsel
and District Planner

FROM: Patti Tyson, Director of Administrative Services

RE: **Budget Schedule for FY 2014/15**

The Board's adoption schedule for FY2014/15 Budget is as follows:

4/24	Draft budget prepared – workshop
5/8	Adoption of preliminary budget
5/9	30-day public notice period begins
6/12	Public Hearing and First Reading
6/26	2nd reading and adoption of final budget

Committee meetings with Budget Committee will be scheduled separately.

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(Corrected)

ENERGISTYCS, INC..

EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

This EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT ("Agreement") is entered into this ____ day of ____ 2014, by and between the Humboldt Bay Harbor, Recreation and Conservation District, a California governmental entity, hereinafter referred to as "District" and Energistycs, Inc., hereinafter referred to as "Developer". District and Developer agree as follows:

I. NEGOTIATIONS

A. Length of Negotiation Period

Unless extended by mutual consent of the parties, the Negotiation Period shall be for **one hundred twenty (120)** days, or as otherwise provided in Sections IX.D and IX.E. of this Agreement, commencing on the date of this Agreement; provided, however, that the Negotiation Period may be terminated earlier pursuant to the provisions of Section IX.B of this Agreement.

B. Good Faith Negotiations

The District and the Developer shall negotiate diligently and in good faith during the Negotiation Period towards a Lease Agreement providing for the leasing by the District to the Developer, of all or part of certain real property ("Property") described in the attached Exhibit A to this Agreement that is incorporated into this Agreement by this reference. The Parties contemplate that the Developer will lease a portion of District's Redwood Terminal 2 property known as the Drier Building and Warehouse (Exhibit A) for purposes of a pellet mill operation (Project). Said lease will also include upland areas that may be necessary for activities ancillary to the pellet mill operation including, without limitation, storage and parking. However, nothing in this Agreement shall be construed to require Developer or District to ultimately agree to specific terms for a lease, and both parties have the discretion to decide not to enter a lease if the parties do not reach agreement on details for the lease agreement.

C. Exclusive Negotiations

The District shall not negotiate with any other person or entity regarding long-term

leasing or other long-term use authorization of the Property, as defined in Exhibit A, or any portion of the Property, or solicit or entertain bids or proposals to do so, during the Negotiation Period. Notwithstanding the foregoing, District reserves the right to contract use of the Property to third parties on a temporary basis during the negotiation period, until such time as the parties reach a Lease Agreement, to the extent said use is not inconsistent with Developer's current lease agreement. District shall give notice to Developer of any such temporary use, and the parties will negotiate in good faith to resolve any issues related to accommodation of Developer's site inspection activities contemplated in Section D, below, during any time periods of temporary use.

D. Right of Entry

Developer, its agents, and independent contractors shall have the right to enter on the Property, upon reasonable prior notice to District, to perform, at Developer's expense any and all structural, soil, hydrological, archeological, environmental site assessment, and to conduct any surveys, title work, planning, and any other investigations as Developer deems appropriate in its sole and absolute discretion. Developer shall indemnify and hold District, its elected officials, agents, directors, staff, volunteers and designated representatives, harmless from any lien, loss, claim, liability, damage, or expense, including reasonable attorneys' fees and costs, that District may suffer or incur, arising out of or in connection with Developer's entry upon and inspection of the Property, including, without limitation, any loss, damage, or liability that District may suffer or incur by reason of any injury to any person or property caused by Developer, its agents, employees, independent contractors, consultants or invitees. Developer shall also require that all third parties performing investigation on the site to have and maintain liability insurance with minimum coverage of \$1,000,000 for general commercial liability. Developer shall require written proof of insurance and shall provide copies to District at District's request. Upon the completion by Developer of any and all such investigations of the Property, Developer shall restore the Property to substantially the same condition existing prior to such investigations. Notwithstanding anything to the contrary provided in this

paragraph, Developer shall not be obligated to remediate, restore or indemnify District for incidental or consequential damages with respect to any environmental or physical condition that is merely discovered, as opposed to caused, by Developer. Developer's obligations hereunder shall survive termination of this Agreement or, if applicable, any Lease Agreement.

E. Equipment Storage

Developer or its designees may store equipment necessary for site investigation purposes, for the time period such equipment is reasonably necessary for site investigation purposes, on the Property during the Negotiation Period provided the equipment is in operating condition and currently licensed (if appropriate). Developer or its designees shall store equipment only in areas approved by District. District shall not be responsible for any damage or theft of equipment stored on the Property by Developer or its designees. In the event of termination of this Agreement, Developer shall remove stored equipment from the Property within ten (10) days of the date of termination of this Agreement. If not removed within ten (10) days after the date of termination, stored equipment will be removed, sold or destroyed by District at Developer's sole expense.

F. Cooperation of District

District will cooperate and provide reasonable assistance to Developer and its representatives in carrying out its inspection.

II. CONSIDERATION

A. Consideration for Exclusive Right

Within fifteen (15) days of the execution of this Agreement, the Developer shall pay to the District the sum of \$5,000 as consideration for the exclusive right and initial services of staff administration of the District during the Negotiation Period. If a lease agreement is executed arising out of the negotiations pursuant to this Agreement, this amount shall be credited to the initial lease payment or the purchase amount.

B. Payment Upon Entering Into Lease Agreement

The Developer acknowledges and understands that the District will require as a condition to entering into any Lease Agreement that the Developer must provide the negotiated lease payment to District.

III. SCHEDULE OF PERFORMANCE

The Developer shall perform the following activities during the Negotiation Period:

A. Legal Status of Developer

Within **ten (10)** days of the date of this Agreement Developer shall provide documentation of its legal existence and its authority to conduct business in the State of California.

B. Project Submissions Within 180 Days

Within **sixty (60)** days of the Commencement Date, the Developer shall provide to the District the following information:

1. Name and identification of the type of legal entity with which the District would contract. Identify all joint venture partners, if any.
2. Name and person (or persons) who will represent the Developer in negotiations with the District.
3. A narrative description of the development proposed, including a description of its physical characteristics, potential leasehold improvements and number of proposed employees.
4. A funding Sources and Uses Table for the Project, which shall show the funding sources and uses for the Project including all anticipated development costs, and public improvement cost (if any). Such sources and uses tables shall indicate the proportions of public assistance anticipated (if any), its sources and its uses.
5. Estimated development and pre-development schedule including time required for all design and permit processing including but not limited to compliance with the

- California Environmental Quality Act (CEQA).
6. A Development Plan including a development timeline and development achievement milestones including, but not limited to property survey; appraisal; compliance with the California Subdivision Map Act; lot-line adjustment process; and zoning change process.
 7. Executed copies of any contracts which the Developer has entered into with its consultants for the Project, pertaining to architectural, engineering, environmental analysis and soil analysis.
 8. Copies of any grant funding applications, correspondence with potential grant sources, or other documents relating to potential financing of the project from outside sources.
 9. Proposed site plans for the Project showing the site layout, legal description of the proposed lease area, proposed leasehold improvements, access points and parking layout areas. The plan should show adjacent land uses to illustrate the projects relationship to the surrounding area.
 10. A business plan reflecting Lessor's timetables and business strategy for development of the premises into a viable and sustainable public attraction or benefit, including how and when restoration of the Lessor's rail equipment will be accomplished; the use and maintenance of proposed leasehold developments; projected anticipated public use and potential revenue generation and factual basis or assumptions for same; etc.

IV. DISTRICT APPROVAL OF DEVELOPER'S SUBMISSIONS

Within **ten (10)** days after the District receives any information or documents required to be submitted to it by the Developer pursuant to Section III of this Agreement, the District shall advise the Developer of its acceptance or rejection of the information or documents. If the District rejects any information or documents submitted to it by the Developer, it may in its discretion grant the Developer an opportunity to revise its submission and resubmit it to the District in a time

frame set by the District at the District's sole discretion. The District shall advise the Developer of its acceptance or rejection of any revised submission within **ten (10)** days of its receipt of the revised submission from the Developer.

V. PERMITS REQUIRED

The Developer understands and agrees it is solely responsible for obtaining a Permit from District and all other applicable governmental approvals for the Project, at the Developer's sole expense. The District agrees that it will provide any documentation or authorization necessary for Developer to proceed with the process of obtaining any and all required governmental approvals for the Project, including, without limitation, authorization for Developer to act as the District's agent with respect to those governmental approvals. The required governmental approvals referenced in this Section include any review process required by Public Resources Code Section 21000 et seq. (the California Environmental Quality Act ("CEQA")).

VI. NEGOTIATION OF LEASE AGREEMENT

If the Developer has performed all of the requirements of Section II and III of this Agreement in a timely manner, the District shall deliver to the Developer a draft of a Lease Agreement within **thirty (30)** days after the Developer's completion of performance. The Developer and District shall negotiate diligently and in good faith until a lease is agreed upon, the one hundred twenty (120) days Negotiation Period pursuant to Section I.A., above has expired, or the Parties terminate this Agreement.

VII. DISTRICT RESPONSIBILITIES

The Developer understands and acknowledges that any Lease Agreement resulting from the negotiations arising from this Agreement shall become effective only if and only after such Agreement has been considered and approved by the District's Board of Commissioners at a regular Board Meeting. The Commission is the only entity for the District with the power and authority to enter into any agreement on behalf of the District. District staff, including but not limited to the Chief Executive Officer and District Counsel, may negotiate on behalf of the District

for proposed terms they believe will be acceptable to the Commission, but approval by the Commission is not guaranteed.

XIII. FAILURE TO PERFORM UNDER THIS AGREEMENT

A. Time is of the Essence

The District and the Developer hereby acknowledge that time is of the essence to this Agreement, such that the Developer's failure to fully perform according to the terms and conditions of this Agreement shall be considered a material breach of this Agreement.

B. Early Termination

On or before the date which is **one hundred twenty (120)** days following the Commencement Date, either party may terminate this Agreement if it determines that development of the Property in the manner contemplated by this Agreement is not feasible.

C. Notice to Developer of Breach

In the event that the Developer fails to perform pursuant to the terms and conditions of this Agreement, the District may declare the Developer in default and terminate this Agreement upon fifteen (15) days written notice to Developer.

D. District Discretion to Extend Time for Performance

Notwithstanding the above, if the District determines that it is in the best interests of the District, the District may extend the time for Developer's performance of any of the terms and conditions of this Agreement. The District shall have sole discretion to grant an extension to the Developer and in no event shall this provision be construed so as to convey any right or entitlement to an extension for performance to the Developer.

E. Extension of Time to Complete Legal Requirements

In the event that the Developer has fully performed under the terms and conditions of this Agreement in a timely manner, and in the event that the Parties have negotiated a preliminary Lease Agreement over which the Parties have reached agreement about its terms, the District shall extend the Negotiating Period by the amount of time necessary to complete the legal

review.

IX. HOLD HARMLESS

The Developer hereby covenants, on behalf of itself, its successors and assigns, to indemnify, save and hold harmless and defend the District, its elected officials, agents, directors, staff, volunteers and designated representatives, from all claims, demands or actions arising from the District's actions with respect to this Agreement, including but not limited to the District's actions or lack of actions with respect to proposals submitted to it by the Developer both prior and subsequent to this Agreement, the District's negotiation and execution of this Agreement, any prior negotiations and agreements by and between the Parties, and negotiation and execution of a Lease Agreement for the Project.

X. LIMITATIONS

By its execution of this Agreement, the District is not committing itself to or agreeing to undertake (a) commitment or reservation of public funds, revenues or reserves to the Project; (b) approval of the Project by the District; (c) any other acts or activities requiring the subsequent independent exercise of discretion by the District.

Execution of this Agreement by the District is merely an agreement to enter into a period of exclusive negotiations according to the terms of this Agreement, and the District's Board of Commissioners reserves final discretion and approval by the District as to any Lease Agreement and all proceedings and decisions in connection with any Lease Agreement.

This Agreement also shall not prevent the District from providing any person or entity with any information regarding the Property that is contained in the public records, as that term is defined by the California Government Code.

XI. NOTICES

Notices for District shall be addressed to:

Jack Crider
Chief Executive Officer
Humboldt Bay Harbor, Recreation and Conservation District
601 Startare Drive
Eureka, CA 95501

Notices for Developer shall be addressed to:

Kevin Leary
Energistycs, Inc.
4801 West End Road
Arcata, CA 95521

IN WITNESS WHEREOF, this Agreement has been executed by the parties on the date first written above.

DISTRICT:

**HUMBOLDT BAY HARBOR,
RECREATION AND CONSERVATION**

DEVELOPER:

ENERGYSTICS, INC.

**Richard Marks, President
Board of Commissioners**

Kevin Leary

ATTEST:

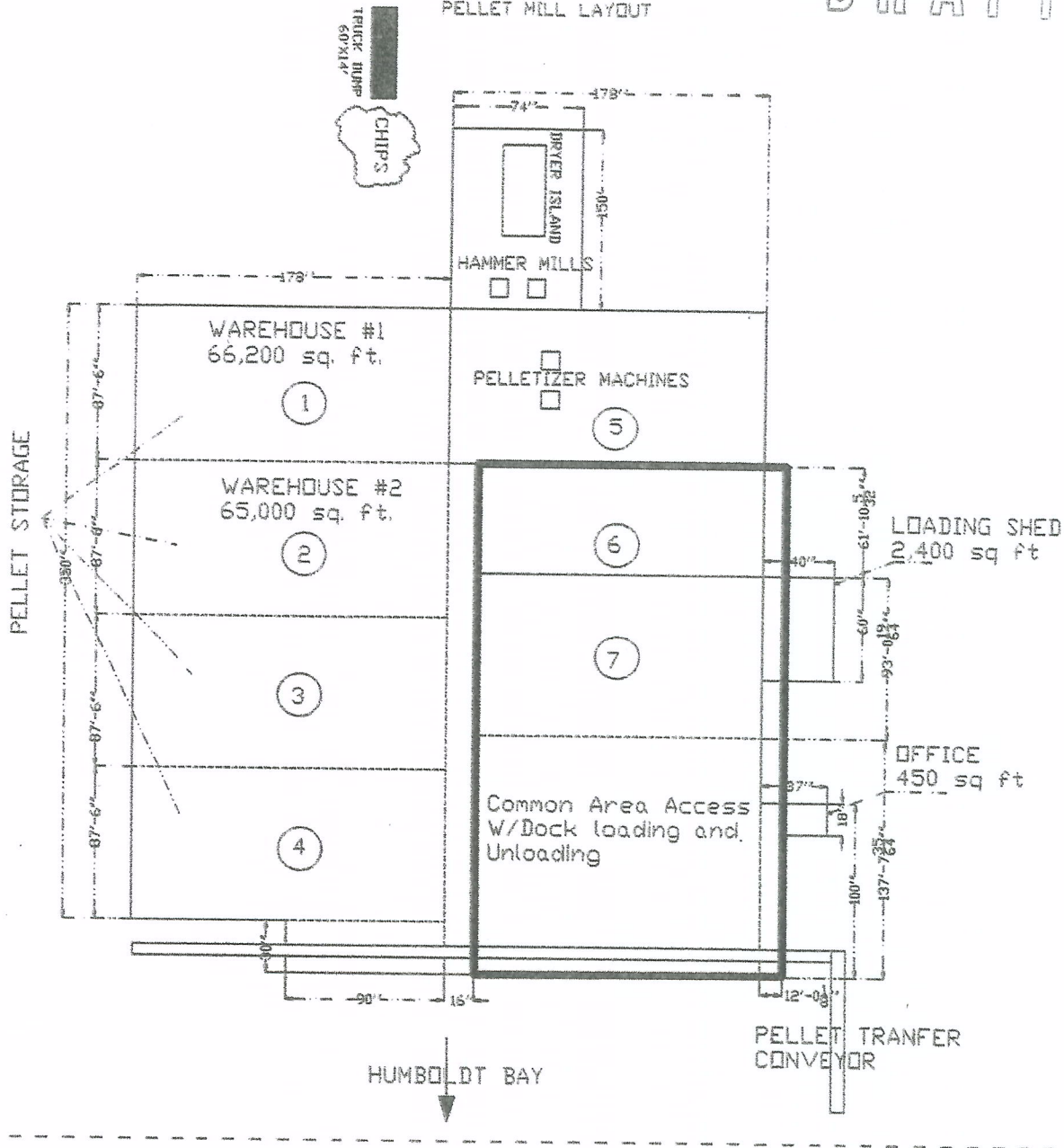
Greg Dale, Secretary

EXHIBIT A

DESCRIPTION OF PROPERTY

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PELLET MILL LAYOUT



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Humboldt Bay Mariculture Pre-Permitting Project
Leasing Considerations Memo
April 4th 2014

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The Humboldt Bay Mariculture Pre-Permitting Project (Project) is an economic development project funded by the County of Humboldt Headwaters Fund and Humboldt Bay Harbor, Recreation and Conservation District (District). The Project can be thought of as having two phases: permitting specific sites in Humboldt Bay, California for oyster and clam culture, and then leasing those newly permitted areas to shellfish growers. The permitting process is ongoing, with the Draft Environmental Impact Report nearing completion. The final permits will define where, how, and under what conditions shellfish culture will be allowed by the various state and federal agencies charged with protecting the environmental resources of the Bay.

This memo focuses on the leasing phase of the project, and is intended to engage the Commissioners and the public in a discussion about how the District will allocate the leases to shellfish growers. Major elements of the allocation process that will require decisions include:

- **Lease Classifications.** Leases could potentially have different classifications. For example, leases could be classified for commercial culture, academic research or pilot culture projects.
- **Lease Boundaries.** The permitting process will result in larger areas where culture is allowed, but these areas will likely be divided into smaller individual leases. The size and boundaries of the actual leases will need to be determined.
- **Lessee Qualifications.** The District can set requirements for prospective lessees such as insurance requirements, a business plan, and prior experience in shellfish culture.
- **Lessee Selection.** There are different approaches for selecting the lessees that will conduct culture at each pre-permitted site. For example, the leases could be allocated through a highest bidder approach, a fixed price approach with a lottery, or a request for proposal process.
- **Lease Values.** Lease value will in part be tied to the selection process, for example a lottery system implies a fixed lease value, while a highest bidder approach clearly does not.

On March 21, 2014 a workshop was held with existing and prospective shellfish growers to obtain input regarding some of these elements of the lease allocation process. The following information is largely based on input generated during that workshop. This is a “living document” developed to inform the District Board of Commissioners about current perspectives regarding the future lease allocation process. The Commissioners will have the final decision making authority over the design of this process. The discussion at the April 10th meeting is not intended to be a final decision making process, it is instead an introduction to these issues and an opportunity for staff to hear the Commissioners initial thoughts. A similar discussion with the Headwaters Fund Board will be scheduled for the near future at their request.

In reviewing the following information, it is important to consider the Project’s goal to create local jobs and economic activity. Additionally, it is noteworthy that several attendees at the

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March 21 workshop expressed that a primary goal of the Project should be to provide opportunities for small and new businesses.

Lease Classifications

In some states, different classifications have been applied to leases, which can effect lease costs and also influence the lease allocation process. This is a consideration for the pre-permitting project. For example, in addition to *commercial culture leases*, certain leases might be classified as *academic research leases* where only research will occur or *pilot culture leases* where methods will be tested to determine if commercial production will be feasible. During the workshop with shellfish growers, the following points were identified:

- Classifying sites for research may not be necessary, because research can be a compatible use within any type of lease. However, a research classification may be useful if these leases will have different lease terms, such as lower costs.
- Pilot culture leases may be smaller than commercial culture leases, but cost the same.
- There will certainly be commercial cultures leases. Decisions will need to be made about whether there should also be,
 - Pilot leases that are smaller and potentially have a reduced cost.
 - Research leases that potentially have a reduced cost.
 - Other lease classifications.

At this point staff recommends a single lease type, intended primarily for commercial culture. Research activities and growers experimenting with different culture techniques can all be accommodated within these leases (as allowed by the permits). This will avoid the complexity of having to develop, implement, and oversee different lease types, with different pricing structures, and different qualifications. Staff foresees difficulty in establishing who qualified for a ‘pilot’ vs a ‘commercial’ lease, and when a pilot lease becomes a commercial lease. Allowing for some smaller lease sizes could provide the same benefits in a simpler manner than creating different lease types.

Lease Boundaries

Figures 1 and 2 depict the boundaries of areas that are being permitted through the Project. The following options were discussed during the March 21 workshop.

Intertidal Site 1	<ul style="list-style-type: none"> ▪ Create 2 commercial culture leases, or ▪ Create 4 commercial culture leases.
Intertidal Site 2	<ul style="list-style-type: none"> ▪ Create 6 commercial culture leases, or ▪ Create 6 commercial culture leases and 6 academic research leases.
Intertidal Site 3	<ul style="list-style-type: none"> ▪ There was general consensus that this site should be one commercial culture lease.
Intertidal Site 4	<ul style="list-style-type: none"> ▪ Create 2 commercial culture leases, or ▪ Create 3 commercial culture leases and two smaller pilot culture leases.
Subtidal Site 1	<ul style="list-style-type: none"> ▪ Create 3 commercial culture leases, or

	<ul style="list-style-type: none"> ▪ Create 3 commercial culture leases and three academic research leases.
Subtidal Site 2	<ul style="list-style-type: none"> ▪ Create 2 commercial culture leases, or ▪ Create 4 commercial culture leases, or ▪ Create 4 commercial culture leases and 2 academic research leases. ▪ There was also discussion that a communally used floating dock would be beneficial for the site. ▪
Subtidal Site 3	<ul style="list-style-type: none"> ▪ Create 5 commercial culture leases, or ▪ Create as many as 6 commercial culture leases, 1 research lease and 4 pilot culture leases. ▪ There was also discussion that a communally used floating dock and power source would be beneficial for the site.

- ❖ District staff, in cooperation with shellfish growers, continues to design and discuss options for the configuration of lease boundaries. A better understanding of whether the Board of Commissioners is interested in different lease classifications would help focus these discussions, as would any other input the Commissioners have.

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Figure 1. Proposed intertidal shellfish culture sites. Site 1 is 98.5 acres, Site 2 is 364.0 acres, Site 3 is 13.6 acres and Site 4 is 49.9 acres.

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Figure 2. Proposed subtidal shellfish culture sites. Site 1 is 3.9 acres, Site 2 is 8.6 acres and Site 3 is 8.7 acres.

Lease Allocation Process

There are different options for how leases will be allocated to private shellfish growers. Individual leases could be basically auctioned to the highest bidder, in either a sealed bid or an open bid process. The other extreme would be the District establishing a fixed price for the leases, and selecting interested and qualified lessees for each lease through a lottery. In either case a minimum value will need to be established that incorporates the underlying value of the lease, the added value of having it already permitted, and the District resources necessary to comply with and maintain those permits over time.

Some of the issues raised in the initial discussions with growers include:

- The final approach should provide opportunities for local and/or smaller operators, who could lose out to larger players in a high bidder scenario.
- Ensuring prices are in the ‘right’ range so that the District is covering costs and operators are reimbursing the public for their use of the public tidelands, but prices are not so high as to discourage the economic development goals of the project.

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- Limiting the percentage of total area or leases obtained by any single party is an approach that a number of growers agreed could help ensure opportunities for smaller parties
- Allocating leases over multiple rounds rather than making them all available at once could help the District and the growers narrow in on the ‘right’ price ranges.
- Should sub-leases be allowed? Sub-leasing can provide a mechanism for new or small growers to get started. However it could also be used to get around limits on acreage, and could lead to lessees only interested in rent-seeking rather than producing product.

Lease Valuation

Lease valuation will clearly be tied to the decision about high-bidder vs. fixed price lottery. Other factors include:

Inclusion of production in the rates

Lease rates can be purely based on acreage, or could have a production component, where lessees pay a rate per dozen (or per thousand seed, or some other measure of production) in addition to a per acre rate. For reference, only one of the District’s current lessees has a production component to their lease (Coast Seafoods). The rest are fixed prices by acreage.

Including production in the lease rates would complicate the bookkeeping work by the District, make the incoming lease amounts less certain, and would rely primarily on self-reporting of actual production by the lessee.

On the positive side, a production-based lease component could help some growers get started by allowing for cheaper per acre rates during startup, with higher rates coming as growers are more successful at producing product. In the long run a production component may do a better job at ensuring a highly successful lessee is adequately compensating the public (District) for their use of the tidelands. Estimating the overall effect on revenue depends on the various rates, and on estimating future production.

Lessee Qualifications and Lease Conditions

Some necessary conditions are clear: lessees will need to provide adequate insurance, commit to complying with all applicable permit conditions, and otherwise agree to the standard lease conditions to be developed by the District.

Other potential qualifications are at the discretion of the District, and should be aimed at ensuring the success of the overall Project. Staff sees this as a balancing act between setting reasonable requirements to avoid awarding leases to parties unlikely to succeed, while not

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making requirements more exclusionary than necessary. Potential pre-qualification requirements that have been discussed are listed below.

1. Financial assurances –
 - a. Submission of a 3-5 yr business plan
 - b. Demonstration of financial resources to implement the business plan
 - c. Minimum credit rating
 - d. Posting a 'cleanup bond' to cover removal of equipment and lost lease time in the event of lessee walking away from the lease

2. Mariculture Experience:
 - a. Some level of experience and/or professional qualifications in same or similar operations (fisheries, aquaculture)

3. Production Requirements:
 - a. Lessees must be actively working their lease, with minimum planting and production required over appropriate time frames.

4. Other possible considerations:
 - a. No outstanding child support (New Jersey)
 - b. No wildlife violations, no felons (some states)
 - c. Sign a list of "assurances"(WA DNR wording) that they will comply with Vibrio, harvest closures, Shellfish High Health Plan.

Staff is providing this list for discussion, and is not making specific recommendations at this time.

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