

# **Coastal Protection and Restoration Authority**

## **Oyster Lease Acquisition and Compensation Program: Draft Recommendations for Improvement**

November 6, 2020

### **EXECUTIVE SUMMARY**

This report presents the Coastal Protection and Restoration Authority (CPRA) draft recommendations for improvements to the Oyster Lease Acquisition and Compensation Program (OLACP) for public review and comment. CPRA will receive and consider these comments, and then issue a Report to the CPRA Board making its formal recommendations.

CPRA has already made the following improvements to OLACP:

- 1.** Memorandum of Understanding with DWF regarding new or renewal leases in buffer zones and planned project areas, and areas incapable of supporting oyster cultivation.
- 2.** Reporting regarding planned and possible coastal projects that may impact oyster leases.
- 3.** Working with DWF to develop the Louisiana Oyster Management Strategic Plan and seek funding for it.

CPRA proposes to recommend the following measures to improve OLACP:

- 1.** Authorize lessees to retain leases upon waiving all OLACP compensation.
- 2.** Authorize fixed “in lieu of” payments for lease acquisitions.
- 3.** Authorize administrative settlements with or without biological assessments or appraisals.
- 4.** Authorize waiver valuations (“informal value estimates”) for small-value acquisitions.
- 5.** Provide zero value for leases incapable of supporting oyster cultivation.
- 6.** Reduce the notice period for the oyster component from one year to six months.
- 7.** Expressly authorize a harvest efficiency determination in the oyster
- 8.** Avoid oyster leases in project planning.

9. Truncate BAs when the biologist concludes leases are incapable of supporting oyster cultivation.
10. Reduce dive samples from 18 to 9.
11. Consider reducing the study area in appropriate situations.

CPRA considered, but does not recommend, the following measures suggested by stakeholders:

1. Decline to apply OLACP because it is an allegedly unconstitutional donation.
2. Convert OLACP to an oyster seed ground improvement program funded by CPRA.
3. Convert OLACP to an oyster lease relocation program.
4. Require payment of OLACP compensation as reimbursement for performing lease improvements, rather than as direct payment.
5. Pay for indirect impacts from diversions as well as direct impacts.
6. Do not pay the oyster component in addition to the lease component.
7. Pay for cultch planted by the lessee, in addition to the lease component.
8. Require proof of productivity in the past.
9. Require lessees to bear the burden of proving value.
10. Fund oyster lease acquisition for private coastal restoration projects.
11. Measures outside CPRA jurisdiction.

**Coastal Protection and Restoration Authority**

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## **BACKGROUND**

The purpose of this report is to present draft recommendations for improvements to the Oyster Lease Acquisition and Compensation Program (OLACP) for public comment. The Coastal Protection and Restoration Authority (CPRA) will receive and consider these comments, and then issue a Report to the CPRA Board making its formal recommendations.

### **1. OLACP Promulgation.**

The Department of Wildlife and Fisheries (DWF) issues oyster leases on State water bottoms, granting lessees the exclusive right to use the leased water bottoms for oyster cultivation. La. R.S. 41:1225; 56:425; 56:423. However, the CPRA Board and CPRA are responsible for integrated coastal protection, which often involves work on State water bottoms. La. R.S. 49:214.5.1; 214.6.1. Projects for integrated coastal protection may include areas where State oyster leases are present, and such projects may impair the leases or destroy oysters there.

The Louisiana Legislature enacted OLACP in 2006 to assist in reconciling conflicts between the State's oyster leasing and integrated coastal protection programs. La. R.S. 56:432.1, Acts 2006, No. 425 (Appendix A). The OLACP statute authorizes compensation to lessees when CPRA acquires state oyster leases for integrated coastal protection projects. This compensation is strictly limited to areas of direct impact caused by the projects: areas where dredging, direct placement of materials, or other activities necessary for construction or maintenance of integrated coastal protection projects are performed. No compensation is authorized for indirect impacts, specifically including but not limited to impacts from freshwater or sediment diversions.

OLACP is not a true "acquisition" – the State already owns the leased water bottoms. Leases "acquired" under OLACP therefore are not literally acquired, but instead are terminated, as to the area acquired. The term "acquisition" is used because the statute uses it.

The Legislature did not define compensation under OLACP. Instead, the Legislature directed the Department of Natural Resources (DNR) to promulgate regulations for determining the compensation due. DNR did so in 2006. LAC 43:VII.301-319 (Appendix B). CPRA is now responsible for administering OLACP, and the statute and regulations have been amended to reflect this change, but otherwise remain as enacted and promulgated in 2006.

### **2. OLACP Procedure.**

Under the OLACP regulations, CPRA:

- Obtains a biological assessment (BA) of leases that may be directly impacted by a coastal project;
- Obtains an appraisal of the market value of any leases or portions thereof within the Direct Impact Area (DIA) of the project (referred to as the "lease," whether the entirety or only a part), based on the BA;

- Terminates the lease (referred to as “acquiring the lease”) by issuing a Notice of Acquisition to the lessee stating the effective date of the termination;
- Pays the oyster lessee the market value of the lease (the “lease component” of compensation), as determined by the appraiser; and
- If less than one year is provided before the effective date, pays the lessee the value of marketable oysters on the lease (the “oyster component” of compensation), as determined by CPRA based on the BA and other information.

The OLACP regulations and procedures were designed to ensure quick acquisition of leases, to ensure fair payment for acquiring the leases, and to provide the strongest possible basis at reasonable cost to defend against any claims by lessees for additional compensation. The regulations therefore require the BA and appraisal to be based on reasonably confirmable data.

#### **A. Biological Assessment.**

The BA is performed by an experienced biologist, and consists of:

- Determination of the Direct Impact Area (DIA) of the project. This is usually 150’ outside the actual physical footprint of the dredging or construction for the project, but sometimes varies. Only the portion of a lease within the DIA is acquired under OLACP;
- Determination of the water bottom type (reef, shell, or mud) within the study area. This is usually done by poling the entire study area, which is the traditional method to do this for oyster purposes. The study area (also referred to as the Potential Impact Area, or PIA) is usually 1,500’ outside the actual physical footprint of the project dredging or construction, but sometimes varies;
- Sampling for oysters. This is done by diving to retrieve multiple sets of three one-square-meter samples to count the oysters in those samples, in order to determine the number of oysters per square meter. This is done only on areas of reef or shell bottom as determined by the poling, since mud does not support oyster cultivation, but dredge samples are performed for confirmation on firm mud areas. This is the traditional method to do this for oyster purposes; and
- Determination of oyster population on the water bottoms. This is done by multiplying average oyster population on the lease per square meter from the dive samples, by the reef and shell areas determined by the poling within the DIA.

Lessees are notified 15 days in advance by certified mail, and they may provide any data or other relevant information for the biologist, the appraiser, or CPRA to consider. The only requirement is that the data must be reasonably confirmable, as this is required for the BA and appraisal.

In preparing OLACP BAs, CPRA’s biologists generally follow the Oyster Lease Damage Evaluation Board (OLDEB) and DWF seed ground damage evaluation methodologies for poling

and sampling. Neither methodology is required by OLACP, but these are preexisting methodologies for tasks analogous to OLACP, providing a basis for the biologist to use them for OLACP. However, both OLDEB and the DWF seed ground program provide measures of compensation that are vastly different from OLACP in purpose and basis for calculation. Therefore, only their *BA methodologies* can be used for OLACP, not their *measures of compensation*.

## **B. Appraisal – Lease Component of Compensation.**

The appraisal is performed by a Louisiana-licensed appraiser. CPRA has used only appraisers with specific and extensive experience in appraisal of oyster leases.

CPRA has directed its appraiser to follow the Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book) appraisal methodology. This is not required by OLACP, but the Yellow Book states the standard methodology for appraisals under the federal Fifth Amendment measure of compensation. Louisiana law limits compensation for integrated coastal protection projects to the federal Fifth Amendment measure. La. Const. art 1, § 4(F and G) and art. 6, § 42(A); La. R.S. 49:214.5.6 and 214.6.5. Further, many acquisitions involve federal funds, so credit for OLACP acquisitions will be evaluated by federal agencies that routinely apply the Yellow Book. The Yellow Book methodology is clearly appropriate both to ensure payment of the controlling Fifth Amendment measure and to satisfy federal crediting requirements.

CPRA's appraiser has extensive data on prior sales of oyster leases from one oyster fisherman to another, including the size and quality of those leases, the conditions of the prior sales, and the sales prices. The appraisal consists of:

- Determination of prior sales that are most similar to the leases being acquired. This is done using the BA to characterize the leases being acquired, and the appraiser's documentation of the leases under the prior sales to characterize them for comparison;
- Determination of a per-acre value for the leases to be acquired. This is done by determining the per-acre prices in the prior sales of the most similar leases;
- Determination of the market value of the lease. This is done by multiplying the area to be acquired by its per-acre value. An exception occurs with large lease acquisitions with very different values for significant portions, in which case each such area may be valued separately.

This is the typical procedure for appraisals using the market value methodology.

Often only part of a lease is within a project DIA, in which case CPRA will acquire only that part of the lease. Usually the remaining part of the lease is just as usable as it was before the acquisition, due to its size, location adjacent to other leases held by the same lessee, or other reasons. In some instances, however, it is uneconomical (or less economical) to cultivate on just the remainder, or for other reasons the remainder is worth less than before the acquisition. In these situations, the appraiser adds the difference between the pre-acquisition and post-acquisition market value of the remainder, which is referred to as "severance damage," to the compensation

for the acquisition. This is the typical procedure for government property acquisitions, including under the Yellow Book.

Specifically when the remainder is uneconomical to the lessee, CPRA may *also* offer to the lessee to acquire it, at its appraised market value after the acquisition. CPRA acquires an uneconomic remainder only if the lessee wants this, as a concession to the lessee. If both the lessee and CPRA agree, the remainder is added to the acquisition and its post-acquisition market value is added to the compensation for the acquisition.

The market value, including any severance damages, is the lease component of the OLACP compensation. CPRA pays the full appraised amount.

### **C. Marketable Oyster Valuation – Oyster Component of Compensation (where appropriate).**

For leases where the effective date of the acquisition is less than one year after the Notice of Acquisition is issued, CPRA also pays the value of marketable oysters on the lease.

The number of oysters *on the water bottoms* (the “standing crop”) is determined by the biologist in the BA. CPRA applies a “harvest efficiency ratio” to the number of oysters on the bottoms, to reflect the proportion that oyster fishermen could realistically and economically harvest, and thus market. For over a decade, CPRA used a fixed 70% ratio, which was higher than the scientific literature supported, but which was agreed as a compromise in 2007 with the Oyster Task Force (OTF). This was overturned in court in 2018, not because it was incorrect, but because it was applied as a fixed ratio and therefore could be implemented only by regulation. *Bayou Canard, Inc. v. State through CPRA*, 250 So.3d 981, 988 (La. App. 1 Cir. 5/14/18). CPRA is currently developing a lease-specific computer model to determine harvest efficiency.

CPRA determines the marketable oyster component of OLACP compensation, by:

- Obtaining the sales price for oysters from the biologist, DWF postings, or other sources;
- Subtracting the oyster harvest cost from the biologist or other sources; and
- Multiplying the difference by the relevant number of oysters.

CPRA then pays that amount, but again, only if less than one year’s notice is provided before the acquisition is effective.

### **3. OLACP Concerns.**

OLACP has been in effect for nearly 15 years. CPRA has acquired 4,319 acres of leases using OLACP for 25 projects, at a total cost of \$4,986,490 (see Summary of OLACP Acquisitions and Expenditures, Appendix C). A little over half of this amount (\$2,590,608) was for BAs and appraisals, while a little less than half (\$2,395,882) was for compensation payments. Of the compensation payments, about 60% (\$1,378,381) was for the lease component and 40% (\$1,004,903) was for the oyster component.

Generally, the Program has worked well, with only four appeals of OLACP compensation payments over several dozen projects. The first appeal was voluntarily dismissed; two were dismissed due to waivers in the oyster leases but are now on appeal; and the fourth is stayed pending resolution of the latter two. Only one challenge has been raised to OLACP itself, and this was dismissed by the court. *Bayou Canard*, 250 So.3d at 989-90. In short, OLACP has proven to be a robust and highly defensible mechanism for clearing oyster lease conflicts.

Nevertheless, oyster industry, non-governmental organization, and other coastal stakeholders have raised questions regarding potential changes OLACP, and CPRA itself has noted inefficiencies or other issues that could be improved. Among the chief concerns is cost.

The cost for most BAs falls in the range of \$20,000-45,000, with some costing \$75,000-140,000 and a few as much as \$160,000-\$300,000 (see Appendix C). The overall average is approximately \$80,000. The exact cost varies widely by project. Charges are hourly, and include mobilization, so reduction of time spent on any one component of the BA will not reduce the total cost proportionately, because fixed costs such as mobilization or equipment rental will remain essentially the same. For similar reasons, a smaller project does not necessarily result in a proportionately smaller BA cost.

The cost for most appraisals falls in the range of \$10,000-\$25,000, with a few costing as much as \$37,000-\$61,000. The overall average is approximately \$25,000. As with the BAs, the appraisal cost varies widely by project, but a smaller project does not necessarily result in a proportionately smaller appraisal cost. A significant reason for this is that OLACP appraisals require extensive market research and engagement with oyster lessees on an ongoing basis, which must constantly be updated and maintained. This work is a large portion of the overall appraisal cost, and is essentially the same regardless of the size of the projects or the number of acquisitions.

In some instances, OLACP's transactional costs (the BA and appraisal) may appear to be disproportionate or capable of reduction, such as because:

- The transactional costs dwarf the acquisition costs on a project. For example:
  - The Queen Bess (BA-202) project involved \$37,946 in transactional costs, compared to \$592 in acquisition costs;
  - The Caminada Beach & Dune Protection project (BA-143) involved \$41,042 in transactional costs, compared to \$2,085 in acquisition costs;
  - The Bayou Bienvenue project (PO-94) involved \$52,526 in transactional costs, compared to \$6,155 in acquisition costs; and
  - The Chenier Ronquille project (BA-76) involved \$55,961 in transactional costs, compared to \$26,397 in acquisition costs.
- The lease value is clearly nominal. For example, on the Bay Denesse project (BS-31), aerial imagery of the leases in the DIA showed that they were heavily silted in, and therefore unlikely to be able to support oyster cultivation and so likely to have little value and no marketable oysters.

- No leases were directly impacted by the project, so none were acquired. On the Golden Triangle project (PO-163), a BA was conducted because there were leases in the PIA and this triggers a BA under the current OLACP methodology. The cost was \$13,085. However, there were no leases in the DIA, meaning none were directly impacted by the project, so OLACP did not apply and no leases were appraised or acquired.

In short, the existing implementation of OLACP may appear disproportionate in some circumstances, and there may be means to reduce OLACP transaction and acquisition costs.

Other issues that have been raised include requests for more reporting by CPRA regarding upcoming projects and their impacts on oyster cultivation; whether any OLACP payment is appropriate at all due to waivers in the leases for “any claim whatsoever” arising from integrated coastal protection; whether any payment for the oyster component is appropriate beyond the lease component, whether it should be determined based on harvest efficiency, and if so, how harvest efficiency should be measured or applied; and whether lease acquisition can be waived entirely and a lease retained by its lessee instead.

#### **4. Purpose of this Report.**

After nearly 15 years, CPRA Board Chairman Chip Kline concluded that it is time to reevaluate OLACP. On July 13, 2020, he therefore directed CPRA to perform a study to evaluate and recommend potential improvements to OLACP (see OLACP Study Directive, Appendix E). This study must be informed by input from the oyster industry and other coastal stakeholders and “lessons learned” during previous implementation of the Program. The study must feature public meetings where stakeholders can present their views and recommendations, invitation to stakeholders to submit their written comments and recommendations, and consideration of those views as well as CPRA’s own experience and perspective.

Chairman Kline further directed CPRA to submit a written report to the CPRA Board and make it publicly available by January 11, 2021, stating CPRA’s findings pursuant to this study, evaluating the ideas submitted and discussed, and making specific recommendations to the Board for improving OLACP. CPRA must present its findings and recommendations to the CPRA Board at its January 20, 2021 meeting, at which stakeholders may also present their own views to the Board regarding CPRA’s report.

This report presents CPRA’s draft recommendations, based on its Study, regarding improvements to OLACP. These recommendations are only a draft. CPRA requests comment on these recommendations from the oyster industry and other coastal stakeholders, which CPRA will then consider in drafting its formal recommendations.

## STUDY METHODOLOGY

On September 1, 2020, CPRA Executive Director Bren Haase issued an invitation to numerous oyster industry and other coastal stakeholders to provide their views and recommendations regarding OLACP and improvements that might be made (see Invitation Letter and Distribution List, Appendix F). This invitation was emailed directly to the stakeholders, published on CPRA's website, distributed through CPRA's email distribution list, and announced at several CPRA Board, Oyster Task Force, and other public meetings and public fora.

Executive Director Haase's invitation also invited stakeholders to participate in two webinars to provide their views and recommendations. Due to COVID 19, in-person meetings were not feasible. On September 21, 2020 in the evening and September 23, 2020 in the morning, CPRA held two solicitation-of-views webinars at which it gave a presentation regarding OLACP, its operation and procedure, and example issues that had already been identified (see CPRA Webinar Presentation – Phase 1, Solicitation of Views, Appendix G). CPRA provided a chat line at each webinar, through which participants could and did submit questions regarding OLACP and its operation. CPRA answered procedural and technical questions during the webinars. CPRA also provided telephone access for those without internet access, and the Parishes of Lafourche and Plaquemines provided public access sessions.

CPRA notified stakeholders both in the invitation and during the webinar that they could submit views and recommendations by email or telephone message by October 7, 2020, or via chat during the webinars. Several comments were submitted via chat during both webinars (see Stakeholder Webinar Comments – Phase 1, Solicitation of Views, Appendix H). Four comments were submitted via email (see Stakeholder Email Comments – Phase 1, Solicitation of Views, Appendix I). No telephone messages were submitted.

Many of the comments were in the nature of statements of concern or general views, rather than actionable recommendations for improvements to OLACP. Nevertheless, all have been considered by CPRA in developing these draft recommendation. All specific recommendations are addressed, and where possible, non-specific views have been converted to particular potential actions based on those views, and likewise addressed.

CPRA also consulted its biologists, appraiser, and CPRA staff regarding their experience and perspective regarding OLACP and previous implementation of the Program.

CPRA's draft recommendations are divided into three sections:

- Improvements Already Made – This section explains measures that have already been or are being implemented by CPRA, as to recommendations suggested by stakeholders;
- Measures Recommended – This section explains suggested measures that CPRA proposes to recommend to the CPRA Board, and why CPRA proposes to do it; and
- Measures Considered But Rejected – This section explains suggested measures that CPRA does not propose to recommend, and why CPRA does not propose to do it.

CPRA is distributing these draft recommendations to all stakeholders originally invited to provide views and recommendations, to anyone else who requests it, and on its website. CPRA will hold two more webinars on November 17, 2020 in the evening and November 18, 2020 in the morning to explain its draft recommendations and request participants' views as to the draft recommendations. Views regarding the draft recommendations may be submitted at any time through December 4, 2020, again by email or telephone message, or via chat during the webinars. Telephone access will again be provided, and it is anticipated that one or more Parishes will again provide public access sessions. Access information for these webinars is included in the Study Invitation Letter, Appendix F.

CPRA will assemble and consider views regarding the draft recommendations that are submitted by December 4, 2020. CPRA will then prepare a written report and submit it to the CPRA Board by January 11, 2021, stating CPRA's findings pursuant to this study, evaluating the views and recommendations submitted, and making formal recommendations to the Board. CPRA will provide the report to all participants via email and make it available to the public on CPRA's website at <https://coastal.la.gov/calendar> on the same day. CPRA will present its findings and recommendations to the CPRA Board at its January 20, 2021 meeting, at which stakeholders may present their views directly to the Board.

## IMPROVEMENTS ALREADY MADE

Several public comments pertain to matters regarding which CPRA has already made improvements, as they relate to OLACP.

### **1. Memorandum of Understanding with DWF regarding new or renewal leases in buffer zones and planned project areas, and areas incapable of supporting oyster cultivation.**

Several comments suggested that the State should terminate or refuse to renew leases in areas where coastal projects will be done, and to deny new leases in such areas.

DWF is responsible for control and supervision of all wildlife of the State of Louisiana, including fish and all other aquatic life, and for the control and supervision of programs relating to its management, protection, conservation, and replenishment. La. R.S. 36:602. DWF, through its Secretary, is also responsible for leasing State-owned water bottoms for the purpose of oyster cultivation. La. R.S. 56:425(A); La. R.S. 41:1225.

State oyster leases are for 15-year terms, and so generally cannot be terminated mid-term. La. R.S. 56:428(A). However, CPRA is responsible for reviewing each application to DWF for new oyster leases or renewals or expansions of leases, in order to determine whether the affected water bottom is located in an area where a buffer zone may be necessary to protect sensitive and eroding coastal lands; and if so, for delineating the necessary buffer zone. La. R.S. 56:425(F). In addition, DWF through its Secretary has discretion regarding whether to grant any new lease or expansion, and may take integrated coastal protection into account in exercising that discretion. La. R.S. 56:425(A, C). Further, DWF through its Secretary must deny lease renewals for water bottoms that DWF determines are not capable of supporting oyster populations, and may exercise his discretion to deny new lease applications for this reason. La. R.S. 56:425(A), 428(A).

By Memorandum of Understanding (MOU) effective November 8, 2019 (see Appendix D), CPRA and DWF agreed on a procedure to work together to fulfill their respective responsibilities efficiently and effectively. Under the MOU, DWF notifies CPRA of oyster lease applications and renewals and the areas covered, and then CPRA notifies DWF of any portions of those areas needed for buffer zones, essential for integrated coastal protection, or that CPRA believes are incapable of supporting oyster populations. MOU, § III(1, 2). Unless DWF disagrees with CPRA's determinations regarding buffer zones or integrated coastal protection areas, DWF will deny the lease application or renewal or allow those areas to be excluded from the lease. DWF also investigates areas that CPRA identifies as incapable of supporting oyster populations, and if DWF concurs, DWF will deny the lease application or renewal or allow those areas to be excluded from the lease. MOU, § III(3). Timeframes, definitions of relevant terms, default conclusions regarding buffer zones and integrated coastal protection areas, and a dispute resolution process are also provided. MOU, § III(4-8).

Through the MOU, CPRA and DWF have implemented and are following a procedure to address conflicts between oyster leasing and integrated coastal protection, as well as non-viable oyster leases, within the requirements of existing law and while respecting both agencies' authorities and responsibilities. The moratorium on new oyster leases that has been in place since

2002 is in the process of being lifted. Acts 2016, Nos. 595, 570. The MOU procedure will preclude new leases in areas where coastal projects are likely to begin in the foreseeable future (generally, 5 years) or in areas that are not conducive to oyster cultivation. Existing leases in such areas and nonproductive leases will be non-renewed as they come up for renewal at the ends of their current 15-year terms. The need to acquire such leases under OLACP will be reduced, as time progresses.

## **2. Reporting regarding planned and possible coastal projects that may impact oyster leases.**

Some comments suggested that CPRA provide more information to lessees regarding upcoming coastal projects and the impacts they may have on existing leases or potential new leases.

Through the Coastal Master Plan implementation process every 6 years, CPRA produces voluminous reporting to the public regarding all projects it is planning. CPRA issues press releases regarding the Master Plan and the process to develop it, posts the draft Master Plan on its website and widely distributes electronic and hard copies, requests public comment on the draft Master Plan and the projects in it, and holds multiple stakeholder meetings (including separate meetings with the oyster industry) specifically to explain the projects and their impacts. CPRA receives public comments on the draft Master Plan, including concerns of the oyster industry and other stakeholders, answers questions about impacts to the extent possible based on the information available, revises the Master Plan and its project list appropriately, and submits the final Master Plan to the Legislative committees for approval. CPRA then publicizes and again posts and distributes the final Master Plan. In this way, CPRA widely disseminates general information regarding planned and possible projects and their impacts.

CPRA goes through a similar process regarding its Annual Plan every year: CPRA posts and distributes its Annual Plan, holds public meetings to explain the projects, develops its final Annual Plans, obtains legislative approval, and posts and distributes the final Annual Plan. Whereas the Master Plan contains all projects under consideration by CPRA, the Annual Plans focus specifically on the next three years. Again and with greater specificity than the Master Plan process, CPRA widely disseminates information regarding imminent projects and their impacts.

Under the environmental laws, CPRA is usually required to obtain permits from the U.S. Army Corps of Engineers and DNR before it can build a project. The permit applications are publicly available, and draft reports identifying the impacts of the project are published and disseminated for public comment as a major part of the application process. There is an array of public meetings and other opportunities for the public, including the oyster industry and other stakeholders, to learn and inquire about the potential impacts of the project through the permitting process.

The application process also requires CPRA to analyze impacts without the project, and to consider alternative designs for the project and their impacts, all of which is explained in detail in the reports for the permit process. In fact, the design of the project is actually *selected* through the permit process, along with the determination whether the project will be permitted at all. Until the permit is obtained, CPRA has a general project goal and design, but *cannot* decide exactly what or where the project will be; this is determined through the permitting process. There is

extensive discussion of the impacts of the general designs for the project being considered, specific to each alternative, and this is publicly available and open to public comment. Comments and specific requirements of numerous governmental agencies are also obtained, which may greatly affect the final design of the project. The final permitting decision is made only after final reports that address all comments are completed and approved by the Corps and DNR.

Accordingly, the specific impacts of the project are not determined until the permit is issued – meaning CPRA cannot describe the *exact* impacts until then. Before that point, CPRA intends a type of project in an area, but the final project actually permitted (if any) may be different in size, function, location, or design.

The extensive modeling and analysis of the specific impacts necessary to describe them is performed during the permitting process. For example, CPRA has applied for permits for the Mid-Barataria Sediment Diversion Project (BA-153). CPRA has sought a permit for a diversion north of Ironton of *up to* 75,000 cubic feet per second. But the diversion ultimately permitted, if any, may be smaller or in a different location or configuration. CPRA may therefore be able to describe the impacts of its intended design, but until a permit is granted, it is not yet determined whether the project will be built or what impacts it will have or where they will occur. Not only is the general project design undecided at that point, but the work to define specific impact of the alternative designs has not yet been done.

Further, it often costs millions of dollars to define specific impacts of a project, such as for the Mid-Barataria Sediment Diversion Project and other diversion projects that cause much of the concern and comments from the oyster industry stakeholders. This cannot be done until the planning phase of the project receives funding, which can come years or decades after a project is included in the Master Plan. Even then, the work to do this usually takes years, and again, the project ultimately permitted may be different.

For all of these reasons, often it simply is not possible to give the level of detail that the oyster industry may want regarding the specifics of the degree and location of project impacts. Nevertheless, CPRA can and does explain its projects extensively to the public, including their general impacts and the areas of those impacts, to the extent it can.

CPRA is specifically required to provide information to the Oyster Task Force (OTF) once per year “regarding the nature, location, and status of current or planned projects for integrated coastal protection to the extent practical.” La. R.S. 56:432.2. OTF was established by the Legislature to “study and monitor the molluscan industry and to make recommendations for the maximization of benefit from that industry for the state of Louisiana and its citizens.” La. R.S. 56:421. It is therefore an appropriate body to which to present as much detail as possible regarding potential impacts to oyster cultivation of planned and possible coastal projects. The OLACP Study Group recommends that CPRA continue to request to make such a presentation to OTF once per year, and to do so if allowed by OTF.

**3. Working with DWF to develop the Louisiana Oyster Management Strategic Plan and seek funding for it.**

Governor John Bel Edwards has made pursuing initiatives to ensure a sustainable oyster industry one of his second-term coastal priorities. To this end, CPRA has been working with DWF to develop and identify funding sources for a Louisiana Oyster Management and Rehabilitation Strategic Plan. This Strategic Plan is intended to guide the Louisiana public oyster resource and oyster industry to a more productive future, to set forth a path for recovery and maintenance of the State's oyster resources, to promote and maintain the oyster resource and industry, and to assist with industry adaptation and development, while reducing conflicts in the coastal zone.

Pursuant to SCR 56 of the 2020 Regular Session, the Legislature urged and requested DWF and CPRA to continue to work together to develop the Strategic Plan and to identify funding for programs and projects contained in the Plan.

The Strategic Plan is not part of OLACP. Nevertheless, CPRA will continue to work with DWF to complete it. As requested by Governor Edwards and the Legislature, DWF and CPRA expect to finalize the Strategic Plan by December 2020. DWF has presented a draft Strategic Plan to OTF and other stakeholders, and both agencies are continuing their work on it and attempting to identify potential sources of funding. At this time, no measures proposed in the draft Strategic Plan implicate OLACP, except the measure regarding non-renewing unproductive oyster leases. However, this is already addressed for purposes of OLACP by the CPRA/DWF MOU discussed above. If other measures are added to Strategic Plan that affect OLACP, CPRA will supplement its recommendations to address any such matters as appropriate.

## MEASURES RECOMMENDED

After considering the public comments and its own experience and perspective regarding OLACP, CPRA proposes to recommend the following measures to improve OLACP. The recommendations generally fall into categories of regulatory changes, which require or are best implemented in the regulations; and process changes, which may be addressed in the implementation of the existing regulations.

### 1. Regulatory Changes.

#### A. Authorize lessees to retain leases upon waiving all OLACP compensation.

In the past, some lessees have indicated that they would prefer to retain their leases and take the risk that their ability to cultivate oysters on it would not be permanently impaired by coastal projects, rather than receive the compensation authorized under OLACP. CPRA is agreeable to this, provided that: (1) the lessee expressly and in writing waives any right to compensation under OLACP in relation to the project or any future coastal work on the lease; and (2) the lessee does so before CPRA incurs costs for a BA (beyond determination of the DIA, which is necessary to determine which leases are to be acquired), or for an appraisal.

Through this recommendation, the lessee can choose to continue to attempt to cultivate oysters, which, if successful, benefits both the lessee and the public through enhancement of the oyster resource; and CPRA can avoid substantial OLACP BA and appraisal costs. This will also likely expedite project construction, as the OLACP process takes time and is generally performed at the end of project design and close to construction contract letting. This tight timeframe is often necessary because acquisition requires that the design be finalized, so that the impacted leases can be determined, and also requires that funding for construction be in place.

As compromise of a contested claim at no cost to CPRA, regulatory amendment may be unnecessary to implement this recommendation. Nevertheless, CPRA recommends amending the OLACP regulations to state the process and conditions with clarity and binding force.

#### B. Authorize fixed “in lieu of” payments for lease acquisitions.

The existing regulations authorize but do not require BAs for OLACP acquisitions. LAC 43:VII.307(B). Nevertheless, decisions regarding compensation depend on the DIA, the nature of the water bottoms, and the number of oysters on the water bottoms, which in most circumstances are matters best determined by the biologist. Additionally, the regulations require appraisals for all leases within the DIA of a coastal project. LAC 43:VII.309(B).

In some instances, it is clear that leases are nonproductive, which in the past CPRA’s appraiser has valued at \$50-\$100 per acre. For comparison, the appraiser has valued productive leases at \$500-\$1,000 per acre, and has found that no market evidence supports any value higher than \$1,000 per acre – and in the one appeal where this was challenged, the lessee’s own appraiser ultimately concurred. The appraiser has valued marginally productive leases at \$200-\$450 per acre. The variances depend on exactly *how* productive the leases are, within those general categories.

BAs and appraisals have significant cost, and take time to complete. Where it is obvious that a lease is nonproductive and has no oysters on it, instead of undertaking the BA and appraisal costs only to determine a small acquisition price, it may be more cost-effective to authorize CPRA to offer a fixed price that the lessee could accept or reject. Such a price would have to be higher than the value a BA and appraisal would likely show, in order to incentivize the lessee to forego the appraisal and the possibility it may conclude a higher value. The price would also have to be lower than the combined BA, appraisal, and acquisition costs in order to incentivize and authorize CPRA to make the payment.

As addressed below, CPRA recommends regulatory amendments to deny compensation for nonproductive leases and lease areas. Nevertheless, while OLACP denies compensation to lessees based on payments from oil and gas exploration and production operations (which are not oyster cultivation and are not based on market value), it must be borne in mind that lessees do in fact receive such payments and will consider this income in deciding whether to accept in-lieu payments for the leases, regardless of the productivity of the lease.

CPRA recommends authorizing a fixed acquisition price of \$100 per acre, subject to a \$1,000 minimum payment regardless of the size of the acquisition, provided that: (1) the lessee expressly and in writing waives any right to additional compensation under OLACP or otherwise; (2) the lessee does so before CPRA incurs costs for a BA (beyond the DIA determination) or for an appraisal; and (3) the lessee and CPRA concur that such compensation is appropriate. This fixed price “in lieu of” appraisal would function as a default; if CPRA offers and the lessee accepts this amount, no further BA or any appraisal would be done. If either CPRA or the lessee rejects this default, the acquisition would proceed through OLACP as otherwise provided.

This recommendation would generally be viable only for nonproductive leases, and possibly low-end marginally productive leases. Productive leases would likely require a BA and appraisal to determine their value, unless an administrative settlement can be reached, which is addressed below.

Regulatory amendment would be necessary to implement this recommendation, due to the appraisal requirement. It is also desirable to state the process and conditions with clarity and binding force.

**C. Authorize administrative settlements with or without biological assessments or appraisals.**

For the same reasons that a fixed default price may be cost-effective for nonproductive lease, administrative settlements may be appropriate to eliminate or reduce BA or appraisal costs in more complex situations where the lessee and CPRA agree on valuation. Again, the price would have to be higher than the price that a BA and appraisal would likely show in order to incentivize the lessee to settle, but lower than the BA and appraisal costs in order to incentivize and authorize CPRA to settle.

CPRA therefore recommends authorizing administrative settlements for OLACP acquisitions, where CPRA determines that the settlement amount is less than the combination of the anticipated BA, appraisal, and acquisition costs. There must be sufficient basis for CPRA’s

determination to settle and the settlement amount, and supporting information may have to be presented to the lessee to persuade him to settle. Some work by the biologist and appraiser may therefore be necessary to develop this information. For example, the DIA determination will always be necessary, and a water bottom assessment may be required to characterize the quality of the lease. Thus, CPRA's transactional cost probably cannot be eliminated entirely. Nevertheless, substantial cost savings may still be realized in appropriate cases.

As compromise of a contested claim, given sufficient basis for CPRA's decision, settlement is appropriate. However, federal partner approval may be necessary on projects where crediting is sought. Where CPRA is acquiring the leases for other agencies or private parties, that agency's or party's consent must be obtained.

Regulatory amendment would be necessary to implement this recommendation, due to the appraisal requirement. It is also desirable to state the process and conditions with clarity and binding force.

**D. Authorize waiver valuations (“informal value estimates”) for small-value acquisitions.**

The existing regulations require appraisals for all leases within the DIA of a coastal project. LAC 43:VII.309(B). However, for typical acquisitions under the federal compensation standard, the federal Uniform Act authorizes “waiver valuations” (also referred to as “informal value estimates”) by the acquiring agency, in lieu of appraisal, when the anticipated value is less than \$10,000 and the person performing the waiver valuation has sufficient understanding of the relevant real estate market. 49 CFR 24.102(c)(2). Such waiver valuations are also permitted if the anticipated value is between \$10,000 and \$25,000, though the owner may still require an appraisal. 49 CFR 24.102(c)(2)(ii)(C). The purpose is to provide Agencies a technique to avoid the costs and time delay associated with appraisals for low-value, non-complex acquisitions, where the agency has a reasonable basis for the waiver valuation. 49 CFR Part 24, Appendix A, Section 24.102(c)(2).

The U.S. Army Corps of Engineers allows this as well. Dept. of the Army, Regulation ER 405-1-04, § 4-33 (1/29/2016). This has been done on many levee projects, such as the Corps' recent LPV ARM-09 levee armoring project.

OLACP and the measure and methodology of compensation under this statute are not constrained by federal law, or by any other law except Subpart D of Part VII of Chapter 1 of Title 56 of the Revised Statutes, which fully defines the nature and extent of the property rights afforded by a State oyster lease. *Avenal v. State*, 03-3521 (La. 10/19/04), 886 So.2d 1085, 1095 (“All oyster leases issued on State water bottoms are governed exclusively by this statutory scheme”). OLACP is within Subpart D, and so defines lessees' rights, and therefore the compensation that they may receive. Compensation under OLACP is determined by the CPRA regulations that implement the OLACP statute. La. R.S. 56:431.2(B)(2). Accordingly, CPRA is not bound by the limitations under the federal Uniform Act, in authorizing waiver valuations or the dollar amounts thereof.

Waiver valuations for low-value acquisitions are reasonable under OLACP for the same reasons as under the federal Uniform Act. Further, \$25,000 is similarly a reasonable dollar amount

for defining “low-value.” CPRA has extensive documentation of the value of oyster leases of varying productivity from dozens of prior appraisals. CPRA can therefore reasonably determine lease value in some situations, when the productivity of the leases is determinable, such as from aerial photography clearly demonstrating nonproductivity due to siltation or known areas of very high or very low salinity; or conversely, where the leases are clearly marginally productive or highly productive based on knowledge of productivity in the area, salinity, and similar factors.

Such waiver valuations would potentially have covered more than half of the past OLACP acquisitions, which involved total acquisition payments under \$25,000 *in total* for all leases acquired on the project. The cost savings may therefore be substantial.

CPRA therefore recommends authorizing waiver valuations to be performed by CPRA or a person designated by CPRA, where CPRA determines that the anticipated value is less than \$25,000 and the person performing the waiver valuation has sufficient understanding of the market for leases of similar productivity to the lease to be acquired. CPRA further recommends authorizing settlements for an amount or percentage above the appraisal, as determined appropriate by CPRA such as by reference to the anticipated BA and appraisal cost saved, to increase the likelihood of cost- and time-saving settlements. This waiver valuation would be in lieu of an appraisal.

Regulatory amendment would be necessary to implement this recommendation, due to the appraisal requirement. It is also desirable to state the process and conditions with clarity and binding force.

**E. Provide zero value for leases incapable of supporting oyster cultivation.**

Several comments recommended that CPRA refuse OLACP compensation for leases or lease areas that are incapable of supporting oyster cultivation, such as because they are silted in, have unsurvivable salinity, or are permanently closed to oyster harvest due to pollution.

The purpose of the State in granting oyster leases is “for oyster cultivation, bedding, and harvesting.” La. R.S. 41:1225. This purpose is not served by oyster leases that are incapable of doing so, and in fact, such leases are required to be nonrenewed. La. R.S. 56:428(A). Further, leases that are incapable of supporting oyster cultivation do not further the public interest in the oyster resource. By definition, there is no oyster resource there.

The oyster industry contends that salinity changes over time, such that areas incapable of supporting oyster cultivation at one time may become capable of supporting oysters years later. However, compensation for government acquisitions is appropriate only on the basis of uses to which property may be put within the foreseeable future.

Under the federal Fifth Amendment, the market value of acquired property is based on the highest and most profitable use for which property is adaptable and needed or likely to be needed *in the reasonably near future*. *Olson v. United States*, 54 S.Ct. 704, 708–09 (1934) (“The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered”); *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2017-0434, p. 14 (La. 1/30/18); 239 So.3d 243, 253 (compensation must be paid based on the use to which the property can be put “in the not too distant future”).

Accordingly, the mere possibility of future salinity changes cannot justify compensation in an acquisition.

Finally, all oyster leases contain waivers of all claims “whatsoever” against the State for claims arising from coastal projects. *Bayou Canard*, 250 So.3d at 989-90. Similarly, the Louisiana Supreme Court ruled in *Avenal v. State*, 886 So.2d 1085, 1100 (La. 10/19/04), that the lessee waives any claim “whatsoever” if the State needs the water bottoms for coastal restoration. Payments under OLACP are still appropriate because there is a public interest in paying lessees when their oyster leases are required for coastal protection – but as discussed further below, this is for the benefit of the oyster resource, which lessees further through their oyster cultivation efforts. There is no such benefit, however, in paying for leases that are incapable of supporting oyster cultivation.

Accordingly, leases that are currently nonproductive, and are likely to be so for the foreseeable future, serve no public purpose. Payment for them under OLACP likewise serves no public purpose.

Lessees do purchase and sell nonproductive leases, and therefore CPRA’s appraiser has assigned value to them in OLACP acquisitions in the past (generally \$50-\$100 per acre). Lessees claim that they purchase nonproductive leases because they expect the lease to become productive due to salinity changes in the future. However, this is an improper basis for compensation in an acquisition, as explained above. Oil and gas operators claim that the leases are purchased to obtain payments from them for exploration and production activities, but this has no bearing on the purpose for which the State grants oyster leases. Regardless, no OLACP compensation is appropriate for nonproductive leases.

The OLACP statute authorizes and requires CPRA to determine the measure of compensation for lease acquisitions under that statute. La. R.S. 56:432.1(B)(2). For the reasons given above, CPRA recommends precluding compensation for leases, or significant subareas of leases, that are incapable of supporting oyster cultivation in the foreseeable future.

Regulatory amendment would be necessary to implement this recommendation, including by providing a jurisdictional exception to the appraiser directing that zero compensation be paid for leases or significant lease subareas incapable of supporting oyster cultivation in the foreseeable future.

**F. Reduce the notice period for the oyster component from one year to six months.**

The existing regulations authorize compensation for marketable oysters on an acquired lease when less than one year’s notice is provided before the effective date of the acquisition. LAC 43:VII.311(A)(2). This allows the lessee to harvest the oysters until the effective date, since the lease does not terminate until that date, even though the lessee has been paid for them.

By contrast, when a lease is nonrenewed, including because it is within a buffer zone or needed for a coastal project, DWF allows lessees only six months to remove cultch or other improvements to the water bottom made by the lessee. LAC 76:VII.501(C)(4). DWF through its Secretary may authorize an additional three months, in his discretion. *Id.*

There is no reason to allow more time for removal of oysters upon acquisition of a lease by CPRA, than for removal upon nonrenewal of the lease by DWF. Observing the same six-month period as DWF would standardize the time period for removing the oysters or improvements. It would also decrease the likelihood that CPRA would have to pay the oyster component, since project work on the lease is much more likely to be capable of being delayed for six months than for one year. Correspondingly, six months is still a long time for lessees to remove their oysters.

CPRA therefore recommends reducing the notice period triggering payment for market oysters from one year to six months. CPRA further recommends authorizing CPRA to allow an additional three months to remove the oysters, in its discretion, provided that CPRA determines that this would not impact project construction or other aspects of integrated coastal protection.

Regulatory amendment would be necessary to implement this recommendation.

**G. Expressly authorize a harvest efficiency determination in the oyster component of compensation.**

The OLACP statute does not expressly authorize, or even mention, the oyster component of compensation. The OLACP regulations, however, authorize compensation for “non-removable marketable oysters on the affected acreage” when less than one year’s notice of the acquisition is provided. LAC 43:VII.311(A)(2).

The regulations do not define “marketable oysters,” except to state that the term “Marketable Oysters – includes both market-size and seed oysters as defined by DWF.” LAC 43:VII.305. Thus, there is a size component to this term: small (25-74 mm, “seed”) and large ( $\geq 75$  mm, “market-size”) oysters are included, but tiny oysters (0-24 mm, “spat”) are not. *Id.*

It is clear from the regulatory language, which uses the word “includes” in referring to the size limit, that this is not the *full* definition of the term. Common sense dictates that a thing must be “capable of being marketed” to be “marketable.” The word “marketable” means “fit to be offered for sale in a market : being such as may be justly and lawfully bought or sold.” WEBSTER’S THIRD NEW INT’L DICTIONARY, p. 1383. “Market” (as a verb) means “to expose for sale in a market : traffic in : sell in a market,” or simply “to sell.” WEBSTER’S THIRD NEW INT’L DICTIONARY, p. 1383.

Further, the OLACP regulations specifically refer to payment for “**non-removable marketable oysters.**” LAC 43:VII.311(A)(2) (emphasis added). Whether oysters can in fact be harvested (“removed”) must therefore be considered for the oyster component payment.

Thus, the term “marketable oysters” as used in OLACP is defined by reference not only to size, but also by reference to whether the oysters could or likely would be “*marketed*,” i.e., offered for sale, and sold. In turn, whether oysters could or would be marketed depends on whether they could or likely would be harvested, since oysters cannot be marketed without being harvested. An oyster cannot be “marketable” unless the lessee can market it, which is impossible if it is not raised from the water bottom.

When DNR (CPRA’s predecessor) sought to implement OLACP in 2006, it learned that the experts and commentators in the scientific literature had concluded that oyster fishermen can

physically and economically harvest only 5-65% of the oysters on their leases. This means that the actual “harvest efficiency ratio” for oysters is 5-65%. Thus, an oyster lessee would not be able to retrieve in an economically viable manner, and thus could not market, the other 35-95% of the oysters present on the water bottoms.

DNR therefore proposed to determine the number of marketable oysters by multiplying the biologist’s report of the standing crop (the number of oysters present on the water bottom) by the maximum harvest efficiency ratio shown in the scientific literature – 65%. DNR then consulted with the Oyster Task Force (OTF) about this, since the OLACP statute requires consideration of OTF recommendations in adopting regulations for the Program. La. R.S. 56:432.1(B)(2). The OTF disagreed with DNR’s proposed 65% ratio. Instead, the OTF recommended a higher 70% harvest efficiency ratio.

DNR adopted the 70% ratio recommended by the OTF in 2007 (even though this was higher than shown in the scientific literature). DNR did not promulgate regulations to this effect, but applied the 70% ratio as a matter of policy in implementing the regulations. For over a decade DNR, and then CPRA, applied the 70% ratio in this manner. The agencies paid lessees for the oyster component of OLACP compensation, when applicable, for 70% of the standing crop of oysters on the water bottoms.

In 2018, the First Circuit held that the 70% ratio is unenforceable, but only because it was a fixed percentage, and for this reason had to be promulgated as a regulation. *Bayou Canard*, 250 So.3d at 988. The First Circuit *did not* rule (or even suggest) that the 70% figure was incorrect. Nevertheless, CPRA cannot use the 70% fixed ratio without amending the regulations to state it as a rule, even though it is higher than the scientific literature shows they could realistically harvest. Since that decision, CPRA has retained oyster expert Dr. Eric Powell to develop a computer model to determine lease-specific harvest efficiency ratios.

The OTF now asserts that lessees can economically harvest 95% of the oysters on the bottom, but this is contrary to the scientific evidence. In addition to the prior scientific literature, Dr. Powell confirmed during his work for CPRA that 70% is higher than the ratio that lessees can realistically and economically harvest in almost any situation.

CPRA therefore recommends expressly requiring the oyster component of OLACP compensation to include harvest efficiency in the enumeration of marketable oysters, and to provide the 70% ratio as a rebuttable presumption. The computer harvest efficiency model Dr. Powell is developing for CPRA depends on water bottom and oyster population data from the BA, but also information regarding the lessee’s oyster harvesting equipment, practices, and costs. Accordingly, CPRA also recommends authorizing lease-specific determination of harvest efficiency to rebut the 70% presumption, but only if the lessee submits the data required by CPRA to make this determination.

Regulatory amendment would be necessary to implement this recommendation.

## **2. Process Changes.**

### **A. Avoid oyster leases in project planning.**

As projects are being planned, CPRA may not always take the presence of oyster leases, or the locations of oyster resource on those leases, into account. It is possible that at least some projects could be designed to avoid or reduce impacts to oyster leases or areas with significant oyster populations, particularly for aspects potentially allowing more flexibility of location such as borrow siting or access routes. The earlier in the design process this is known, the better for avoiding such conflicts.

CPRA could hold a meeting with the biologist early in the developmental stages of the project to determine if it is possible to alter the design of the project to avoid or reduce oyster lease impacts. Small changes to project designs can sometimes significantly reduce the number of oyster leases impacted by the project design, or avoid reef or shell areas of leases where oysters are in fact growing or capable of cultivation.

This may start by comparing the oyster lease GIS layer to the project design layers, to avoid lease conflicts entirely. If it becomes more of a question of the relative cost of avoiding a lease versus the cost of acquiring the lease, initial biological inspection or assessment may be appropriate to assess where oysters are or may be cultivated on the lease (and thus the likely cost). The likelihood and amount of cost savings would vary from project to project. The cost of acquiring very productive leases (particularly large lease with significant oyster resource) may greatly exceed redesign or avoidance costs; while the cost of acquiring small areas or nonproductive or marginally productive leases, or leases with no oyster resource on them, may not justify redesigning in order to avoid them.

Similarly, project work scheduling may be designed so as to delay work on the lease, in order to enable the acquisition effective date to be pushed back far enough to avoid paying the oyster component.

This is similar to CPRA's normal property rights analysis within the planning process. CPRA has already begun to do this in project planning and development on an informal basis, and has been successful in avoiding portions of leases with significant oyster resource. For example, on the Lake Borgne project (PO-180), preliminary poling was done to enable a borrow area to be moved to avoid leases and oyster resource. CPRA has also been able to phase project work to avoid paying for marketable oysters. Nevertheless, CPRA recommends expressly incorporating this process into its project planning and development procedures.

This is a procedural measure, and so no regulatory amendment is required.

### **B. Truncate BAs when the biologist concludes leases are incapable of supporting oyster cultivation.**

Several public comments suggested completely eliminating BAs when leases are clearly nonproductive.

Some biological assessment is necessary to identify the DIA of the project, as well as to best support the conclusion that leases are nonproductive. Thus, the BA cannot be eliminated entirely. However, it may be possible to truncate BAs in certain circumstances.

Some leases are in areas that the biologist can determine are likely unsuitable for oyster survival and growth based on aerial or satellite imagery, historical salinity and other data, prior BAs in the area, DWF data, or past experience of the biologist. In such situations, the biologist may be able to reach preliminary conclusions regarding the productivity of such leases before inspecting them, by conducting such a “desktop review.” For example, the leases in the DIA of the Bay Denesse project (BS-31) were most likely unproductive and devoid of oysters, based on imagery and other information showing they were largely silted in. This was, in fact, the case – all 265 acres that CPRA acquired were nonproductive and contained no oysters.

Even if a lease is believed to be nonproductive based on such information, the biologist recommended against any fixed rule entirely eliminating the water bottom assessment (i.e., poling) or sampling. The biologist may still need *some* direct assessment in order to confirm that the leases are nonproductive, such as by poling if the water is deep enough, visual inspection if not, or dredge sampling to confirm the absence of oysters. Sufficient data must be obtained to support the biologist’s opinion.

Nevertheless, where the biologist concludes that existing information or a truncated BA is sufficient to determine that a lease is nonproductive or that there are no oysters present, a biological opinion based on such evidence should be sufficient, without conducting a full-scale BA. Any component of the BA, or the full extent of any component, that the biologist concludes is unnecessary to his opinion, should be eliminated.

CPRA has already begun to do this, such as on the Bay Denesse project, where poling was largely precluded by the shallowness of the water due to siltation and vegetation growth (an airboat had to be used to inspect it), dive samples were eliminated for the same reason, and simple dredge samples were used to confirm the absence of oysters. The biologist concluded that this truncated BA was sufficient to conclude that the leases were nonproductive and that there was no oyster resource on them.

This truncation resulted in significant cost savings, compared to the full BA procedure. Nevertheless, the BA still cost \$22,390, compared to \$19,901 in acquisition payments due to the appraiser’s \$75 per acre minimum value of for nonproductive acreage. Further truncation may have been possible. For example, if the biologist had concluded at the outset that the desktop review was sufficient to conclude nonproductivity, the study area might have been reduced, even less inspection performed, or other cost-reduction measures taken.

The OLACP regulations do not dictate the format or content of the BA (with one exception discussed below), but only require the biologist’s opinions regarding the water bottoms, the oyster populations, and related matters. LAC 43:VII.307(E). The nature and extent of the BA is a matter for determination by the biologist, as to the assessment necessary to support those opinions.

CPRA therefore recommends expressly considering with its biologist means to further truncate BAs, at the outset of each BA, and truncating the BAs to the extent the biologist concurs.

This consideration should include whether the BA warrants truncation and the rationale for this decision; and if so, the minimum-cost assessment activities that the biologist believes would suffice for a biological determination of the water bottoms and oyster crop. However, it must be borne in mind that the truncated assessment may still produce evidence contrary to a preliminary conclusion of nonproductivity, so consideration must be given to minimizing extra cost or time delay if a more extensive or full BA is ultimately necessary.

This is largely a procedural measure, so generally, no regulatory amendment is required. However, the regulations do provide that if a BA is in fact done, samples must be taken “at a minimum” within all leases in the PIA. LAC 43:VII.307(E)(2)(b). CPRA recommends amending this to add an exception to the extent that the biologist determines it is unnecessary to his opinion or can be modified.

### **C. Reduce dive samples from 18 to 9.**

CPRA has chosen to conduct six square-meter dive samples with three replicates per dive (18 total dive samples), to determine the number of oysters present on the water bottom; followed by dredge samples on firm mud areas to confirm the absence of oyster resource there.

However, CPRA’s biologist has concluded that using only *three* dive samples with three replicates per dives (9 total dive samples), with some inside and some outside the DIA, is statistically sufficient to characterize the oyster populations. CPRA’s appraiser has agreed that this is sufficient for the appraisal. Thus, using only 9 total dive samples is sufficient.

CPRA’s biologist estimates that dive sampling generally involves most of the sampling cost, which is about half the total cost of a typical BA. Cutting the number of dive samples by half would not cut the sampling cost in half. However, CPRA’s biologist estimates that doing so would generally reduce the sampling cost by a third. Thus, this measure would cut the total cost of a BA by approximately 16% (1/3 of the 50% sampling cost).

CPRA recommends that by default, only *three* dive samples with three replicates per dives (9 total dive samples) should be taken for a BA. However, in the event that the biologist concludes that additional samples are required in order to support his conclusions, additional sampling would still be permissible.

This is purely a procedural measure, and so no regulatory amendment is required.

### **D. Consider reducing the study area in appropriate situations.**

BAs under the DWF seed ground damage methodology generally cover the Potential Impact Area (PIA), which is usually 1,500’ around the project footprint. CPRA has used this methodology for OLACP, as discussed above, performing BAs over the entire PIA of a project. However, nothing requires it for OLACP. In fact, OLACP acquisition is authorized only in the DIA, which is much smaller than the PIA, usually only 150’ around the project footprint.

If there are leases within the PIA but not the DIA, the result is that CPRA performs a BA for a project where it will not acquire any leases. No appraisal is performed in such instances, but the cost of the BA can be substantial, even though it is unnecessary.

However, this has happened only once, on the Golden Triangle project (PO-163). Also, the design of a project often changes, even after the OLACP acquisition process has begun. For example, on the Queen Bess project (BA-202), originally there were no leases in the DIA, but the project was modified, and ultimately acquisition was necessary (though it was very small, totaling only \$592 in acquisition costs). Additionally, having the BA for the PIA would enable CPRA to consider the impacts of similar project changes, and defend any assertion or claim that lessees may make that there were direct impacts outside the DIA and if so, their extent. This also provides the biologist and the appraiser a firm basis for their conclusions, whereas reducing the study area leaves more avenue for challenging those conclusions.

By contrast, while the PIA is generally 10 times larger than the DIA, studying only the DIA would not reduce the BA cost by this much. Mobilization, sampling, reporting, and other costs besides the bottom assessment (poling) time would not be reduced much, if at all; and even the poling cost would not be reduced very much because it is done by poling at regular intervals on straight lines throughout the study area and the incremental cost of longer poling lines is not very great. The biologist estimates that cutting the line length, even substantially, would reduce the poling cost only by a small amount – say 25%. Since poling constitutes 30% of the BA cost, this would be at most a 7% cost reduction (25% of 30%).

Finally, an MOU between DNR and DWF regarding coastal use permitting provides that DNR will require “a water bottom assessment (unless waived by DWF)” for all permits “affecting state water bottoms” leased by DWF for oyster cultivation. MOU between DNR and DWF for Activities Occurring in or Affecting the Louisiana Coastal Zone, § 3 (2/3/2005). DWF accepts the OLACP BA as satisfying this requirement. Therefore, regardless of OLACP, DWF can require a full BA for CPRA to obtain a permit for the project, and doing this for OLACP satisfies the permitting requirement as well as OLACP.

Accordingly, in general, reducing the BA study area to the DIA, or eliminating it entirely when there are no leases in the DIA, would not be advisable as saving relatively little cost but creating risk of project delay or successful challenge by lessees. It would even be wasteful, if DWF still requires a BA for the full PIA to allow the project permit. However, it may still be possible in some situations to reduce the study area, if the biologist concludes that a smaller study area is sufficient to and support an opinion of water bottom character and oyster populations, *and* DWF agrees to allow the reduced study area (or to waive the BA entirely) for permitting purposes. This is may be the case with obviously nonproductive leases, very small acquisitions, and where there no leases in the DIA.

CPRA therefore recommends expressly considering with its biologist and consulting with DWF as to whether the study area can be reduced, at the outset of each BA.

This is largely a procedural measure, so generally, no regulatory amendment is required. However, the regulations do provide that if a BA is done, samples must be taken “at a minimum” within all leases in the PIA. LAC 43:VII.307(E)(2)(b). CPRA recommends amending this to add an exception to the extent that the biologist determines it is unnecessary to his opinion or can be modified.

## MEASURES CONSIDERED BUT REJECTED

In preparing these draft recommendations, CPRA considered all public comments received. However, CPRA has not recommended several of the proposed measures. These measures generally fall into categories of programmatic changes, which would require statutory change or wholesale revision of OLACP; regulatory changes, which require or are best implemented in the regulations; and changes that are outside CPRA's jurisdiction.

### 1. Programmatic Changes.

#### A. Decline to apply OLACP because it is an allegedly unconstitutional donation.

Some comments asserted that OLACP compensation is an impermissible donation in violation of La. Const. art. 7, § 14 because the leases provide and *Bayou Canard* and *Avenal* held that lessees waive all claims arising from coastal projects. Further, lessees pay only \$3 per acre per year to the State for their leases; and the leased water bottoms are State property and the State should not have to pay far more than this nominal rental to use its own property for the public purpose of combatting coastal erosion and subsidence.

However, statutes are presumed to be constitutional. *W. Feliciana Par. Gov't v. State*, 2019-00878, p. 8 (La. 10/11/19); 286 So.3d 987, 993. CPRA must therefore apply the OLACP statute. Notwithstanding the lease waivers and other points raised by the commenters, compensation under the Program should be interpreted as being for the public benefit of the oyster resource rather than for the personal benefit of the lessee.

La. Const. art. 9, § 1 and the Louisiana Supreme Court in *Save Ourselves, Inc. v. La. Environmental Control Commission*, 452 So.2d 1152, 1157 (La. 1984) require protection and conservation of natural resources and balancing of environmental, economic, social, and other factors. "The legislature shall enact laws to implement this policy." La. Const. art. 9, § 1. In enacting OLACP, the Legislature sought to protect, conserve, and replenish the oyster resource. CPRA recognizes that payment through OLACP assists in preserving the oyster industry by enabling oyster lessees to recover from acquisition of their leases for integrated coastal protection, and that in turn, the oyster industry furthers the oyster resource. Eliminating compensation to the lessees would impair their ability to cultivate oysters, and thus impair the resource. Further, the Legislature considers the oyster industry and its activities to be a benefit to the State and its citizens. La. R.S. 56:421(A).

Consequently, there is a public interest in CPRA paying compensation under OLACP. The facts that the payment is called "compensation" and measured by lease and oyster value do not impair the existence of a public purpose for it, any more than does the fact that it is called "acquisition" when obviously the State cannot literally acquire its own water bottoms or leases.

**B. Convert OLACP to an oyster seed ground improvement program funded by CPRA.**

Some comments proposed that for the same reasons as the comments that OLACP is an unconstitutional donation, instead of paying OLACP compensation to lessees, the funds should be spent on public seed grounds to benefit the entire oyster industry.

The same reasons addressed above regarding eliminating OLACP also support continuing to pay the compensation to lessees – the OLACP statute is presumed to be constitutional, and CPRA has concluded that paying the compensation to the lessees furthers the oyster resource and the public interest in it, along with the oyster industry, which the Legislature considers to be of public benefit. Using OLACP compensation on the seed grounds would be contrary to the OLACP statute, which provides for compensation to the oyster lessees when their leases are acquired. Further, eliminating payment to the affected lessees and instead spreading it over all lessees (all of whom have equally waived all claims arising from coastal projects) would disproportionately disadvantage the affected lessees.

Additionally, this proposal would require entirely new oyster cultivation projects that have never been included in the Master Plan, or even considered by CPRA. Leaving oyster cultivation to the lessees leaves this in the hands of those with the relevant expertise, as well as economic incentive to do it well. By contrast, oyster cultivation is outside of CPRA's expertise. Devolving responsibility for it to CPRA would entail adding staff to administer it, or hiring a contractor to do so and incurring that significant cost while still requiring CPRA to obtain staff sufficiently trained to oversee such an effort.

**C. Convert OLACP to an oyster lease relocation program.**

One comment suggested converting OLACP into a relocation program for oyster leases displaced by coastal projects. This would be a reversion to the greatly problematic Oyster Lease Relocation Program that OLACP successfully replaced, and which was massively more expensive than OLACP. Acts 2006, No. 425. Further, oyster lease relocation is outside of CPRA's expertise, and so would require CPRA to retain additional staff or incur significant contractor cost to administer. This would also be contrary to the OLACP statute, which requires compensation, not relocation (and again, repealed the previous program for relocation). Finally, relocation instead of acquisition has great potential to delay projects, as often occurs under the federal relocation assistance program, and the avoidance of which was a fundamental purpose of OLACP in the first place. Additionally, even when the prior relocation program was in existence, relocation was rarely utilized by the lessees.

**D. Require payment of OLACP compensation as reimbursement for performing lease improvements, rather than as direct payment.**

One comment suggested that to ensure OLACP compensation is in fact used for the benefit of the oyster resource, OLACP compensation should be paid only as reimbursement for actual expenditures by the lessees in furtherance of the oyster resource instead of direct payments to lessees.

As addressed above, CPRA has concluded that paying the compensation to the lessees furthers the oyster resource and the public interest in it, as well as the oyster industry. Additionally, the proposal would require experience regarding the oyster industry that CPRA lacks, and would be administratively burdensome and costly due to the additional bureaucracy required to implement it. The proposal would require CPRA to add staff to administer such a program and determine whether “qualified” lease improvements (which are usually underwater and not easily visible) had in fact been made. Alternatively, CPRA would have to hire a contractor to do so and incur that significant cost, while still having to add staff sufficiently trained to oversee such an effort. This would increase the cost of OLACP. The State already has insufficient funds for needed coastal projects, and CPRA considers the existing compensation method, modified as recommended herein, to be appropriate.

In any event, the OLACP statute expressly requires CPRA to “issue payment to the leaseholder in the full amount of its determination of compensation.” La. R.S. 56:432.1(B)(3). Accordingly, converting to a reimbursement program would be contrary to the OLACP statute.

#### **E. Pay for indirect impacts from diversions as well as direct impacts.**

One public comment suggested paying lessees for indirect impacts, as well as direct ones, and specifically regarding impacts from freshwater or sediment diversions. The OLACP statute limits payment to dredging, direct placement of material, or activities for construction or maintenance of a project, which is all direct impact. La. R.S. 56:432.1(B). There is no authority under the OLACP statute to pay for indirect impacts. To the contrary, in the same act in which OLACP was enacted, Act 425 of the 2006 Reg. Sess., the Legislature expressly *precluded* claims arising from “diversions of fresh water or sediment” and rejected such an extension of the Program. La. R.S. 56:427.1.

Statutory amendment would therefore be necessary to authorize compensation for indirect impacts. Any such amendment would eliminate the express limitation of compensation to direct impacts, which was a fundamental purpose of the statute, and would be directly counter to this purpose. Further, the Louisiana Supreme Court in *Avenal* expressly held that claims for diversions are precluded under La. Const. art. 9, § 1, so any such amendment would appear to be unconstitutional. Finally, the cost of paying for indirect impacts would be enormous, running to the billions of dollars, at a time when the State already has insufficient funds to construct the existing Master Plan.

## **2. Regulatory Changes.**

### **A. Do not pay the oyster component in addition to the lease component.**

One comment suggested that it is double payment to pay for marketable oysters on a lease in addition to the lease value, such that the oyster component of compensation should be eliminated.

However, oysters are a crop, analogous in many ways to more traditional plant crops (though there are differences, including State ownership of the oysters until they are harvested). Under the measure of just compensation applicable to coastal projects, standing crops are valued in addition to the land on which they are grown, unless the farmer is able to harvest that crop.

NICHOLLS ON EMINENT DOMAIN, § 13.13[6]. Harvesting oysters requires time and appropriate conditions. The original 1-year notice period triggering payment under the oyster component was selected to allow sufficient time for lessees (oyster farmers) to harvest the oysters, although as recommended above, six months is sufficient for this purpose. Accordingly, it is reasonable under just compensation principles to pay for the oysters in addition to the lease value.

OLACP is not constrained by just compensation requirements except to the extent of the measure of compensation promulgated by CPRA in the OLACP regulations, since Title 56 of the Revised Statutes fully defines the nature and extent of the property rights afforded by a State oyster lease and OLACP is part of Title 56. *Avenal*, 886 So.2d at 1095. Accordingly, CPRA *can* eliminate compensation for marketable oysters by regulatory amendment. However, CPRA considers this payment to be reasonable because the oysters *are* the oyster resource and so paying compensation for them furthers that resource, as addressed above. As noted above however, CPRA is suggesting reducing the time limit for triggering compensation for the oysters from one year to six months as a means for addressing the commenter's concerns.

**B. Pay for cultch planted by the lessee, in addition to the lease component.**

One comment suggested that lessees should be paid the value of cultch they have added to leased water bottoms, in addition to the market value of the lease itself.

The Louisiana Supreme Court has suggested that “In some situations, as in a long-term lease in which the lessee has made significant improvements, the lessee may have a greater interest than the owner in restoring damaged property.” *Inabnet v. Exxon Corp.*, 93-0681, p. 20 (La. 9/6/94); 642 So.2d 1243, 1255, n. 15. However, this language (which was dicta, not a holding) pertains to whether the lessee or the State as owner of the leased water bottoms would have the superior interest in suing private third parties for damages to improvements on those bottoms. No such claim is valid against the State: ten years later, the Court held that “the rights granted [under the oyster leases] have never been recognized by this Court as anything other than rights granted against third parties to the leases, such as oil companies, not against the State.” *Avenal*, 886 So.2d at 1100.

Moreover, cultch is a component part of the leased waterbottom, and so the value of the cultch is included in the value of the lease on which the cultch is located. La. C.C. arts. 462, 463, 465, 469. Further, under the measure of just compensation applicable to coastal projects, such component parts are compensable only to the extent they contribute to the market value of the thing that they are a part of, so again, the cultch is included in the lease value. NICHOLLS ON EMINENT DOMAIN, §§ 13.01[16], 13.02, 13.07[2]. Accordingly, the value of any cultch is already included in the lease payment. Furthermore, lessees can and do remove the cultch, as the DWF regulations discussed above recognize, so paying them for it would be duplicative.

Also, it is often difficult to distinguish between natural and added cultch, and lessees typically have no records as to how much cultch they have added, or where they added it. Compensation for cultch is therefore impractical, as well as duplicative. Finally, any such payments would be very expensive both to determine and to pay. The State already has insufficient funds to construct the existing Master Plan, and CPRA considers payment for the lease itself to be sufficient to fulfill the public purpose for OLACP compensation.

**C. Require proof of productivity in the past.**

One comment suggested authorizing only a nominal payment under OLACP, or refusing to pay the oyster component of OLACP compensation, unless the lessee demonstrates actual productivity in the past.

Current leasing regulations do not require reporting or trip tickets by lease, and lessees therefore do not gather or maintain documentation of actual harvest at the present time. Requiring such documentation would therefore preclude compensation under OLACP. CPRA does not consider this to be appropriate for the reasons given above, including the benefit of OLACP compensation to the oyster resource.

Further, under this proposal, the only evidence of production would be unreliable anecdotal evidence from the lessees, which is a problematic basis for compensation. By contrast, the BA provides clear and scientifically valid evidence of any standing crop of oysters and the productivity of the lease. Also, as to the oyster component of compensation, CPRA simply pays for the oysters that are there upon inspection (less harvest efficiency); *prior* production is irrelevant. As to the lease component, the appraiser values the lease according to its oyster production *potential* (productivity), so actual prior production is not the determinative factor.

Settlements, fixed in-lieu payments, and valuation waivers can significantly decrease total costs, as recommended above. Regardless, tying compensation to evidence of production is not feasible, given existing reporting requirements, which are outside of CPRA authority.

**D. Require lessees to bear the burden of proving value.**

Some comments suggested shifting the burden of proving lease value to the lessee, including proving that actual harvest has occurred.

The OLACP statute places the burden on CPRA to determine compensation. La. R.S. 56:432.1(B)(2). Therefore this proposal is contrary to the statute. Further, lessees do not maintain records of harvest by lease, as explained above, so requiring this would be effectively deny OLACP compensation.

Further, among the key benefits sought by OLACP are speed and certainty, which would be jeopardized if the onus were placed on lessees instead of CPRA to establish value. Lessees may easily delay projects if they failed to move forward with a valuation on CPRA's time schedule, which would not be unexpected. In fact, lessees may use such delays or the possibility of delay to extract above-market settlements, prevention of which was a chief reason for OLACP's enactment.

**E. Fund oyster lease acquisition for private coastal restoration projects.**

One comment suggested that CPRA pay for private coastal restoration. The State already has insufficient funds to construct its own projects under the existing Master Plan, and lacks funds to pay for private coastal projects as well. Private coastal restoration is laudable and beneficial to the public, but by definition it is privately funded.

### **3. Measures Outside CPRA Jurisdiction.**

Several public comments suggested measures that are outside the jurisdiction of CPRA, and therefore cannot be implemented by CPRA:

- Raise oyster lease rates;
- Reimpose a requirement to actually cultivate a lease in order to maintain it;
- Require reporting of oyster harvest by lease instead of by meaningless zones;
- Require reporting of oyster cultivation efforts other than harvest, by lease;
- Require lessees to collect data on productivity, even if it is not required to be reported;
- Convert public seed grounds to leasable areas;
- Create new oyster production areas by planting cultch; and
- Promote alternative oyster culture.

Implementation of these suggested measures would be under the jurisdiction and authority of DWF or the Louisiana Legislature.

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