

Oyster Lease Acquisition and Compensation Program

Draft Recommendations for Improvements



Solicitation of Stakeholder Comments
November 17 and 18, 2020



OLACP Study

OLACP authorizes compensation to lessees when CPRA “acquires” State oyster leases for coastal projects

- CPRA implements OLACP

- CPRA regulations define the compensation under OLACP

Oyster industry, NGO, and other coastal stakeholders have raised questions regarding potential changes to OLACP

- CPRA itself has noted inefficiencies or other issues that could be improved

CPRA Board Chairman Kline directed CPRA to perform a study to evaluate potential improvements

- And propose recommendations for improvements to the CPRA Board

OLACP Study

September 1, 2020 – CPRA issued a solicitation of views to stakeholders

September 21 & 23, 2020 – CPRA held public webinars to solicit stakeholder views

<https://coastal.la.gov/calendar/?y=2020>

October 7, 2020 – Deadline for comments – Stakeholders submitted 4 written comments, and several comments via chat

<https://coastal.la.gov/calendar/?y=2020>

CPRA reviewed and considered these comments, and its own experience

November 6, 2020 – CPRA published its draft recommendations

<https://coastal.la.gov/wp-content/uploads/2020/09/OLACP-Study-Draft-Recommendations-2020-11-06-Final.pdf>

<https://coastal.la.gov/wp-content/uploads/2020/09/OLACP-Study-Draft-Recommendations-2020-11-06-Appendices-Final.pdf>

OLACP Study

These recommendations are only a draft

CPRA requests comments by December 4, 2020

CPRA will consider all comments

CPRA will publish its final recommendations on January 11, 2021

CPRA will present its final recommendations to the CPRA Board on January 20, 2021

Stakeholders may address the CPRA Board regarding the final recommendations

If the CPRA Board approves recommendations requiring regulatory changes, CPRA would then publish a Notice of Intent

Stakeholders could then comment on the proposed changes

Improvements Already Made

Several comments pertain to matters CPRA has already addressed

1. Deny, non-renew, or terminate leases where coastal projects will be done
OLACP acquisition would be unnecessary, and unproductive leases eliminated
2. Provide more information to lessees about coastal projects and impacts
Lessees and potential lessees could better identify suitable oyster cultivation areas
3. Work with DWF to develop and fund an Oyster Strategic Plan
Gov. Edwards and the Legislature requested a Plan to guide the oyster resource and oyster industry to a more productive future

1. MOU with DWF regarding oyster leasing

CPRA and DWF signed a Memorandum of Understanding in 2019 regarding oyster leasing in relation to coastal projects

DWF notifies CPRA of lease applications and upcoming renewals, and areas covered

CPRA notifies DWF of any portions needed for buffer zones, essential for coastal protection (generally within 5 years), or nonproductive for oyster cultivation

As to buffer zones or coastal protection areas, unless DWF disagrees, it will deny the application or renewal

As to potentially nonproductive areas, DWF will investigate and if it agrees, deny the application or renewal

Addresses timeframes, definitions, default conclusions regarding buffer zones and coastal protection areas, and dispute resolution between DWF and CPRA

Over time, the MOU will reduce the need to acquire leases under OLACP

2. Reporting of Coastal Projects and Impacts

CPRA already provides this information, in several different respects, to the extent of its ability

Master Plan: Every 6 years, CPRA publishes draft Plan and project information, holds stakeholder meetings, receives public comment, publishes final Plan, and presents Plan for approval at Legislative hearings

Annual Plan: Similar to Master Plan, except annual with 3-year timeframe

Permits: For each project, CPRA publishes applications, publishes draft reports analyzing impacts of the project and alternatives, holds public meetings, receives public comments, and publishes final reports regarding impacts

There is an array of means by which the public can learn and inquire about projects and their potential impacts

2. Reporting of Coastal Projects and Impacts

Often CPRA simply cannot give the level of detail requested by the oyster industry regarding the degree and location of impacts

- Detailed specifics of projects and their impacts are unknown until an alternative is approved through the permit process

- Modeling that is necessary to determine specific impacts is costly and impossible until specifically funded

But CPRA does publish all planned projects and the information it has regarding potential impacts

2. Reporting of Coastal Projects and Impacts

Oyster Task Force is a quasi-public body that advises the State regarding oyster industry matters

CPRA is required to make annual presentations to OTF regarding the nature, location, and status of current or planned coastal projects

CPRA recommends that it continue to request to make such presentations to OTF

3. Oyster Strategic Plan

CPRA is working with DWF to develop the Oyster Strategic Plan

As directed by Gov. Edwards and requested by the Legislature

DWF has prepared draft Plan, with CPRA assistance, and presented for public comment

Final Plan is expected by December 2020

CPRA will continue to work with DWF to complete it

The Oyster Strategic Plan is not part of OLACP

No proposed measures affect OLACP, except non-renewal of unproductive leases, which is already being addressed

If measures are added that affect OLACP, CPRA will supplement its recommendations as appropriate

Measures Recommended

1. Authorize lessees to retain leases upon waiving all OLACP compensation

Some lessees may prefer to retain a lease, waive OLACP compensation, and take the risk that the lease is permanently impaired

- Increased flexibility to lessees

- Cost savings – assessment and appraisal unnecessary

- Project time savings

Regulatory amendment may be unnecessary, but CPRA recommends it to state the process and conditions

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

When leases are clearly nonproductive, authorizing a flat \$100/acre (\$1,000 minimum) fixed payment could avoid or reduce total cost and time

- Little change to current compensation – minimum appraised value \$50-\$100/acre

- Cost savings – assessment and appraisal unnecessary

- Project time savings

CPRA also recommends eliminating compensation for nonproductive leases

- Would apply after assessment and appraisal; this would avoid costs up front

Regulatory amendment is necessary to authorize exception to the appraisal requirement, and to state the process and conditions

3. Authorize administrative settlements with or without biological assessments or appraisals

When CPRA and lessees agree on the value of productive or marginally productive leases, settlement would avoid or reduce total cost and time

- Likely increase to current compensation – but total cost is reduced

- Cost savings – assessment and appraisal unnecessary or reduced

- Project time savings

CPRA must have sufficient basis to determine compensation and costs

- Limited assessment may still be needed, but avoids remaining cost

Regulatory amendment is necessary to authorize exception to the appraisal requirement, and to state the process and conditions

4. Authorize waiver valuations for small-value acquisitions

Federal law allows agency valuations (“informal value estimates”) in lieu of appraisals, in order to reduce cost and time

Applies to small-value acquisitions, when the agency has a reasonable basis for value

Federal law does not apply to OLACP, but the rationale still applies

Authorizing waiver valuation up to \$25,000 would reduce total cost and time

Likely no change to current compensation – CPRA is very familiar with lease valuations

Cost savings – appraisal unnecessary

Project time savings

Regulatory amendment is necessary to authorize exception to the appraisal requirement, and to state the process and conditions

5. Provide zero value for leases incapable of supporting oyster cultivation

Purpose of State oyster leases is for oyster cultivation

Under the federal and state Constitutions, compensation is limited by the use to which the property can be put “in the reasonably near future”

Constitutions do not govern OLACP compensation, because that is determined by OLACP regulation, but the rationale still applies

Regulatory amendment is necessary to authorize exception to compensation for unproductive leases

6. Reduce the notice period for the oyster component from 1 year to 6 months

OLACP regulations authorize compensation for oysters, in addition to lease value, when CPRA provides less than 1 year's notice of the acquisition

By contrast, when DWF terminates a lease, its leasing regulations allow lessees only 6 months to remove cultch or improvements – including oysters

DWF regulations authorize a 3-month extension, in DWF discretion

Same extension authority is reasonable for OLACP, if it will not impact the project

Regulatory amendment is necessary to change the notice period

7. Expressly authorize harvest efficiency determination in the oyster component of compensation

OLACP regulations authorize compensation for “marketable oysters” when less than 1 year’s (or 6 months’) notice is provided

“Marketable” means “capable of being marketed”

Oysters that cannot be harvested cannot be marketed

Scientific literature demonstrates oyster fishermen can physically and economically harvest 5%-65% of the oysters on the water bottom

This is the “harvest efficiency ratio” – 5%-65%

OTF urged a 70% HER, and CPRA consented

For over a decade, CPRA paid OLACP oyster component based on the 70% HER

Paid lessees for 70% of the standing crop on the water bottoms

7. Expressly authorize harvest efficiency determination in the oyster component of compensation

In 2018, *Bayou Canard* held that the fixed 70% HER is unenforceable

But only because it was a fixed percentage, and so had to be promulgated as a regulation

Court did not rule or suggest that the 70% HER was incorrect

CPRA cannot use the fixed 70% HER without amending the regulations

CPRA is developing a computer model to make lease-specific HER determinations

OTF now asserts a 95% HER

This is contrary to the scientific evidence

7. Expressly authorize harvest efficiency determination in the oyster component of compensation

70% HER is above the ratio based on scientific evidence and prior OTF letter

Paying lessees only for oysters they could physically and economically harvest remains appropriate

There is no public benefit to paying for oysters that would not have been harvested

Regulatory amendment is necessary to expressly authorize 70% HER limit

CPRA recommends implementing it as a rebuttable presumption

CPRA recommends authorizing lease-specific HER determination to rebut presumption

But only if lessee provides the detailed information about its harvesting equipment, methods, and costs that CPRA requires to make such a determination

8. Process change: Avoid oyster leases in project planning

In planning projects, it may be possible to design them to avoid leases or lease areas with significant oyster resource

Even if lease cannot be avoided, it may be possible to reduce the impact

Project work could be phased to allow longer notice periods

E.g., consult lease map databases, or obtain biologist input, in the planning phase

Similar to consulting property ownership or pipeline databases in planning phase

CPRA is already beginning to do this informally

Avoided the most productive areas of some leases

Phased some work to lengthen notice period, avoiding oyster component of compensation

CPRA recommends expressly incorporating this process into its project planning and development procedures

9. Process change: Truncate assessments when the biologist determines it is appropriate

In some situations, biologist will not need the full assessment to determine that a lease is nonproductive or has no oysters

“Desktop review” may clearly demonstrate that oysters do not or cannot grow there

Biologist may conclude from partial assessment that nothing further is needed

Any assessment component, or the full extent of any component, that the biologist concludes is unnecessary to his opinion, should be eliminated

Regulatory amendment is necessary to authorize eliminating sampling, but otherwise the form of the assessment is determined by the biologist

CPRA recommends expressly considering means to truncate assessments with the biologist, at the outset of each assessment

CPRA is already beginning to do this

10. Process change: Reduce dive samples from 18 to 9

CPRA has chosen to take 18 dive samples per project to determine the number of oysters present on the water bottoms

CPRA's biologist advises that 9 samples is usually sufficient to make this determination

This would reduce the assessment cost by approximately 16%

CPRA recommends requiring only 9 samples per project, by default

If biologist concludes additional samples are needed, this would remain permissible

OLACP regulations do not address the number of samples needed, so regulatory amendment is unnecessary

11. Process change: Consider reducing the study area

Assessments cover “Potential Impact Area,” typically 1,500’ around footprint

OLACP applies only in “Direct Impact Area,” typically 150’ around footprint

In rare situations, there are leases in PIA, but none in DIA

Reducing study area to DIA would save only about 7% of assessment cost

Information from PIA is useful if project changes or to defend claims by lessees in PIA

DWF requires assessment of PIA for CPRA to obtain its coastal use permit anyway

Reducing study area may be appropriate if biologist concurs *and* DWF waives or reduces its requirements

CPRA recommends considering with biologist and DWF whether study area can be reduced, at outset of each assessment

Regulatory amendment is necessary to authorize eliminating sampling, but otherwise the form of the assessment is determined by the biologist

Measures Considered But Rejected

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

Comment urges that under the leases, *Bayou Canard*, and *Avenal*, lessees waive all claims arising from coastal projects

Also that State should not have to pay to use its own property for coastal protection

Statutes are presumed to be constitutional

Comment is contrary to OLACP statute

OLACP compensation should be interpreted as being for public benefit of the oyster resource, not personal benefit of the lessee

Oyster industry furthers the oyster resource, by cultivating oysters

Compensation furthers preservation of oyster industry, by enabling lessees to recover

Eliminating compensation would impair lessees' ability to cultivate oysters – and the resource

Legislature considers the oyster industry to be a benefit to the State

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

Comment urges similar rationale to unconstitutional donation comment

Statutes are presumed to be constitutional

Comment is contrary to OLACP statute

OLACP compensation should be interpreted as being for public benefit of the oyster resource, rather than personal benefit of the lessee

Also, comment would require CPRA to develop new oyster cultivation projects

- Oyster cultivation is outside CPRA expertise

- Would require additional staff and cost to administer

3. Convert OLACP to an oyster lease relocation program

Comment urges return to previous Oyster Lease Relocation Program

OLACP was enacted specifically to *replace* OLRP

OLRP was very expensive and time-consuming when used – yet was rarely used

Comment is contrary to OLACP statute

Comment would require CPRA to develop lease relocation capability

Oyster cultivation is outside CPRA expertise

Would require additional staff and cost to administer

Likely to delay coastal projects

Federal relocation program is major source of project delay

4. Convert OLACP compensation to reimbursement for lease improvements, instead of direct payment

Comment urges similar rationale to unconstitutional donation comment

Statutes are presumed to be constitutional

Comment is contrary to OLACP statute

OLACP compensation should be interpreted as being for public benefit of the oyster resource, rather than personal benefit of the lessee

Also, comment would require CPRA to develop lease improvement capability

- Oyster cultivation is outside CPRA expertise

- Would require additional staff and cost to administer

5. Pay for indirect impacts from diversions, as well as direct impacts

Comment is contrary to:

OLACP statute

La. R.S. 56:427.1, which precludes claims arising from diversions

La. R.S. 56:423, which subordinates oyster leases to integrated coastal protection

Avenal, holding claims for diversions are precluded under La. Const. Art. 9, § 1

Lease waiver clauses expressly, specifically, and at length preclude claims arising from diversions

Cost would be enormous

6. Do not pay the oyster component in addition to the lease component

Comment suggests this is double payment

Federal law compensates standing crops in addition to land

Matter of fairness, because it takes time and effort to grow crop to maturity

Federal law does not apply to OLACP, but the rationale still applies

Oysters are similar in nature to agricultural crops, though not exactly

Compensation for oysters is reasonable because oysters *are* the resource

Compensation for the oysters furthers the resource

Oyster component will be paid less often, under other recommendations

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

Comment urges that lessees make large expenditures for cultch

State owns the water bottoms, into which such improvements are incorporated

Inabnet raised possibility lessees might have superior interest to State in suing oil and gas operations for damages to water bottoms lessees had improved

But *Avenal* held that no such right had ever been recognized against the State

Value of cultch is already included in market value of lease

Lessees can and do remove cultch

Difficult to distinguish natural from added cultch – lessees lack records

Cost would be significant – both to determine, and to pay

8. Require proof of productivity in the past

Comment urges nominal compensation, or eliminating oyster component, unless lessee demonstrates actual productivity from the lease in the past

Lessees lack lease-specific documentation of oyster production

Existing DWF leasing and DHH health regulations do not require it

Requiring such evidence would effectively preclude OLACP compensation

Determining past productivity would rely on anecdotal claims from lessees

Assessment and appraisal rely on *verifiable* data – count of existing crop, and lease productivity potential

9. Require lessees to bear the burden of proving value

Comment is contrary to OLACP statute

Lessees lack lease-specific documentation of oyster production

Requiring such evidence would effectively preclude OLACP compensation

Determining past productivity would rely on anecdotal claims from lessees

Assessment and appraisal rely on verifiable data

Likely to delay coastal projects

CPRA must retain control of project schedule – speed was primary purpose of OLACP

Lessees would lack incentive to pursue acquisitions speedily

Lessees may use possibility of delay to extract above-market settlement

10. Fund lease acquisition for private coastal projects

CPRA already has insufficient funds for its own projects

Private coastal restoration is laudable

But by definition, it is privately funded

10. Measures outside CPRA jurisdiction

- Raise oyster lease rates
- Reimpose requirement to actually cultivate a lease in order to maintain it
- Require reporting of 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 not required to be reported
- Convert public seed grounds to leasable areas
- Create new oyster production areas by planting cultch

Study Timeline

INITIAL PUBLIC COMMENT PERIOD

9/1 – 10/7

- 9/1 CPRA announces study and participation opportunities
- 9/21 Solicitation of Views Webinar
- 9/23 Solicitation of Views Webinar
- 10/7 Stakeholder comments due to CPRA

DRAFT RECOMMENDATIONS DEVELOPMENT

10/8 – 11/5

- CPRA reviews comments, recommendations, and proposed solutions
- CPRA evaluates program implementation
- CPRA prepares draft recommendations for improving the program

PUBLIC FEEDBACK ON DRAFT RECOMMENDATIONS

11/6 – 12/4

- 11/6 CPRA releases draft recommendations
- 11/17 Webinar to present draft recommendation & solicit stakeholder feedback
- 11/18 Webinar to present draft recommendation & solicit stakeholder feedback
- **12/4 Comments due to CPRA from stakeholders**

FINAL RECOMMENDATIONS DEVELOPMENT

12/5 – 1/11/21

- 1/11/21 CPRA releases final recommendations and submits to CPRA Board
- 1/20/21 CPRA presents recommendations to CPRA Board at Board Meeting

Submission of Views and Recommendations

Propose your views, recommendations, and solutions via:

- Email to coastal@la.gov
- Voicemail message to (225) 342-4968
- Chat during 11/17 & 11/18 Webinars

**Deadline for submission is
December 4, 2020**

This presentation is available at
<https://coastal.la.gov/calendar/>

The image shows a Zoom chat window on the right side of the screen. The chat window is titled "Chat" and has a close button (X) in the top right corner. Below the title bar, there is a "To:" dropdown menu set to "Everyone". Below that is a text input field with the placeholder "Enter chat message here". A large blue arrow points downwards from the chat window towards the "Chat" button in the meeting controls at the bottom of the screen. The meeting controls at the bottom include buttons for "Mute", "Stop video", "Share", a red "X" button, "Participants", "Chat", and a three-dot menu.

Mute

Stop video

Share

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Participants

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