

Users' Guide to Louisiana's Oyster Lease Relocation Program



Introduction

Louisiana's wetlands are a natural treasure, but unfortunately, recognition of their importance came after thousands of valuable acres of wetlands were destroyed, leaving behind an eroding and unstable coastline. Many activities have contributed to wetland loss, but one of the most detrimental was confining the Mississippi River with a system of levees. Before it was leveed, the Mississippi River provided freshwater and sediment deposits critical for sustenance of Louisiana's wetlands. However, human intervention in nature's scheme of wetland replenishment caused wetlands to deteriorate and subside at a rate faster than they can rebuild. Because there is no longer a constant flow of fresh water and sediment into the marshes, natural compaction and subsidence allow saltwater from the Gulf of Mexico to slowly creep northward, changing the salinity of the water bodies. The United States Army Corps of Engineers (Corp's of Engineers), Louisiana Department of Natural Resources (DNR), and various other state and federal agencies have implemented freshwater diversion programs as one way to help remedy wetland disappearance. These diversion structures divert water from the Mississippi River into wetlands, imitating the once natural overflow of the Mississippi River from its banks.

Saltwater intrusion caused waters that were once too fresh for oysters to become suitable for oyster farming. The State leased many of the new oyster grounds to oyster farmers. The recent implementation of freshwater diversion systems has been successful in returning marshes within the project areas to a semblance of their natural condition. While this is good for coastal restoration, it has been detrimental to oyster farming in the project areas. Many oyster leases are now more fresh than saline, and unable to support oyster growth.

Purpose of Program

The Louisiana legislature, recognizing the potential for conflict between coastal restoration and oyster leasing, mandated the DNR in *R.S. 56:432.1* to develop the Oyster Lease Relocation Program (OLRP) to help offset the harmful effects of coastal restoration on oyster leaseholders within the coastal restoration project areas.

Changes Made For Davis Pond Freshwater Diversion Project

After passage of the legislation that created the OLRP, DNR developed detailed regulations for the program which became effective in December 1998. In July 2000, DNR produced a new set of regulations to carry out the OLRP in the Davis Pond Oyster Influence Area in connection with the Davis Pond Freshwater Diversion Project. The July 2000 regulations are applicable only to the Davis Pond project and supercede the December 1998 rules in so far as there is a conflict with July 2000 rules. Therefore, if an oyster lease is located in the Davis Pond area, the July 2000 regulations apply; if the oyster lease is anywhere else, the December 1998 regulations are still applicable.

Will New Regulations Be Written For Every Project?

Dr. Bill Good at DNR's Coastal Restoration Division stated that the regulations will not change for every project. Davis Pond is a federal project and is not funded through the Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA). He said that DNR is currently developing a set of general regulations for the CWPPRA program, which would apply to all projects affecting oyster leases in that program; however, as other projects are approved, regulations will have to be developed accordingly.

Oyster Lease Relocation Program

Notification

DNR must provide notice to all affected leaseholders in the projected impact area of the coastal restoration project (CRP). First, the notice must include a description and map of the CRP and a copy of the OLRP regulations. Second, it shall inform the leaseholder that he must send written notice of his intention to participate in the OLRP within 30 days of receipt of the notice (under the 1998 regulations, the leaseholder had only 30 days from the date of the notice). Third, it must explain that limited funds are available for the OLRP. Under the 1998 regulations, funds were distributed on a first-come first-served basis; however, under the 2000 regulations, every leaseholder who wishes to participate may do so. Last, the notification must include a response form to be completed and returned to DNR that contains a confirmation of the leaseholder's address, his choice of options under the OLRP, and an authorization for DNR to enter the affected lease to make surveys and assessments. Additionally, the 2000 regulations provide that DNR will publish a list of all affected leaseholders in the state journals of the parishes where the affected leases are located. This notice by publication was not given in the 1998 regulations.

Options

The OLRP provides four options from which the leaseholder may choose: Exchange, Relocation, Retention and Purchase.

◆ Exchange

A leaseholder with a lease in the CRP area may choose to exchange his lease for another lease not located in a CRP area. Both the leaseholder and the Louisiana Department of Wildlife and Fisheries (LDWF) must agree on the exchange lease. The exchange must be a "continuance of comparable operations for the leaseholder." Exchanged leases begin a new term. DNR will reimburse the leaseholder for all application and survey costs. Under the 1998 regulations, DNR was responsible for all application and survey costs, limited to survey costs for two leases.

If the leaseholder elects to exchange his lease, DNR will contact LDWF. The acreage of the exchange leases may not exceed the acreage of the affected leases by more than 10 percent. The leaseholder must submit an application for an exchange lease within 30 days of DNR's receipt of the leaseholder's initial response form. An application for an exchange lease must be accompanied by a written request from the leaseholder to cancel his affected lease on December 31 of the calendar year immediately following the application for the exchange lease. If the affected lease will expire prior to December 31 of the calendar year immediately following the application for exchange lease, DNR shall request that LDWF issue a one-year lease for the affected lease. The 2000 regulations state that if the leaseholder does not submit an application for exchange within the required 30-day period, or after applying for an exchange lease, fails to obtain one before the expiration date of the affected lease, the leaseholder is deemed to have chosen to retain the affected lease as if he had chosen the retention option (discussed below). The retention becomes effective December 31 of the calendar year following the last date allowed for submission of the application, and the request for cancellation of the affected lease shall be deemed withdrawn. The 1998 regulations do not contain this provision.

◆ Relocation

If the leaseholder chooses to relocate his lease, it must be relocated outside the CRP impact area. The affected lease will be assessed to determine the amount of cultch material allowable to establish the new lease. The leaseholder will be notified of DNR's determination of the amount of cultch material allowable to relocate the affected lease and the dollar amount of reimbursement DNR will pay the leaseholder for placing the cultch on the replacement lease and for the relocation of living seed oysters from the affected lease. (Under the 1998 regulations, the assessment process used a "Cultch Currency Matrix" to calculate the amount of cultch material and the

reimbursement amount. Also, under the 1998 regulations, the leaseholder was reimbursed for costs of marking the lease as required by DWF, surveying up to two leases, and application fees in addition to the relocation of cultch and live seed oysters.) The leaseholder then has 30 days to accept the reimbursement offer, request that DNR purchase the lease under the purchase option, or appeal DNR's assessment of the affected lease.

If the leaseholder accepts the reimbursement offer, he has 90 days from acceptance to notify DNR of the location of the replacement lease and the date the leaseholder will place the cultch on the replacement lease. The date of cultch placement must be within 12 months of the leaseholder's acceptance of the reimbursement offer. However, under the 2000 regulations, DNR may extend this period for good cause. Upon placement of the cultch material, the leaseholder must certify in writing to DNR where, when and how much cultch was placed. Along with this certification, the leaseholder must send the receipts for the actual cost of the placement. The leaseholder will be reimbursed for the actual cost, but not in excess of the amount of reimbursement previously determined by DNR.

If at the time of the reimbursement offer, the leaseholder of the affected lease does not have a replacement lease, the leaseholder will be reimbursed for application fees, survey expenses, and marking costs of a replacement lease, the size of which may not exceed the affected lease by 10 percent. The leaseholder is usually allowed one year to relocate, but depending on the progress of the coastal restoration project, it may be more or less than one year. If it is less than one year, and the leaseholder is unable to remove all of his living oysters as a result of the project, he may seek compensation for his losses. If the leaseholder is allowed more than one year, he may continue to remove oysters during the existence of the lease term if he will sign a hold-harmless agreement declaring the oyster lease subordinate to any coastal restoration projects.

◆ **Retention**

The leaseholder may choose to retain the affected lease for the duration of the lease term, but must do so without compensation. In addition, the leaseholder must consent to a hold-harmless agreement in which he agrees that the lease is subordinate to any coastal restoration projects and that the leaseholder accepts the risk of operating the lease in an area affected by a coastal restoration project. If a leaseholder chooses to retain his lease and later changes his mind, he may choose one of the other three options within one year of choosing the retention option by requesting DNR's approval to pursue a different option. DNR must "make every reasonable effort" to fulfill the request, but may deny the request if funding is not available. The request to pursue a new option must be made, at the latest, within one year of the opening of the Davis Pond Freshwater Diversion Project. Under the 1998 regulations, there is no specified time in which to make a request to change options.

◆ **Purchase**

If DNR determines that it is more cost-effective to purchase the lease, the leaseholder may request that DNR purchase the lease and any improvements. DNR is not required to do so and its ability to purchase is subject to the availability of funds. If DNR purchases the lease, the purchase price may not exceed the amount determined by DNR for placement of the cultch material under the relocation option, not including seed oyster relocation, marking the lease, surveying or application fees.

If DNR purchases the lease, it will be cancelled on December 31 of the year of purchase, and may not be leased again for oyster growing. The leaseholder may, at his own risk and expense, remove live oyster resources from the lease prior to cancellation of the lease. If the leaseholder does not have time to reasonably remove the oyster resources from the lease prior to cancellation, he may seek compensation for his losses. Under the 1998 regulations, the leaseholder had until cancellation of the lease or until the implementation of the coastal restoration project, whichever came first, to remove oyster resources. However, under the 1998 regulations, the leaseholder was not allowed to seek compensation for any oysters that could not be removed prior to the deadline.

Payment and Funding

Under the 1998 regulations, participation in the program was on a first-come, first-served basis and was most likely to leave some leaseholders unable to participate in the OLRP without compensation of any kind. The 2000 regulations remedied this problem by allowing all interested leaseholders who met the requirements to participate in the program. If sufficient funds were unavailable to pay each leaseholder the full amount determined under the program, the leaseholder would receive a partial payment up front. DNR reserved a pool of funds until all leaseholders' applications were received. When all applications were processed, DNR would then pay each participating leaseholder an amount in proportion to the value of their lease based on the amount of bottom suitable for oyster production from the reserved funds. With this system everyone gets some compensation, but the amount depends on how many leaseholders participate.

Nonetheless, all payments under the OLRP are subject to the state of Louisiana's receiving funds for the program from the Corps of Engineers as part of the State's compensation for each coastal restoration project. Thus, if the State of Louisiana does not receive money from the Corps of Engineers, then the State does not have any funds for the OLRP. However, with the Davis Pond project, enough funds were available to pay all participating leaseholders the full value of their leases as determined by DNR.

Appeals

If the leaseholder chooses to appeal DNR's determination of reasonable and allowable costs, he must send a written request for reconsideration within 30 days of DNR's determination. DNR will only reconsider if the leaseholder has substantial technical data showing DNR made a mistake in measuring the affected lease for assessment or evidence that DNR's determination of reasonable and allowable compensation is in error. The leaseholder must include in his appeal the basis for reconsideration and a written report of the technical information supporting that basis. DNR shall notify the leaseholder of its decision within 45 days of receipt of the request.

Hold Harmless Agreement

Each person or entity with a property interest in an affected lease and who is participating in the OLRP must execute a hold-harmless agreement stipulating that this person agrees to hold the United States of America, Corps of Engineers, State of Louisiana, DNR, and LDWF harmless regarding the oyster lease. It must specify that full and fair compensation has been made in total satisfaction of all claims relating to past, present, and future oyster damages regarding the affected lease. The hold-harmless agreement under the retention option must also provide the leaseholder the right to choose another option within the time available. Under the 1998 regulations, the hold harmless agreement was not as thorough, and was only required by those leaseholders who chose the retention option or those who chose the relocation option and wished to remove oyster resources beyond the one-year time limitation.

Note

This pamphlet is a users' guide to the OLRP. The guide is not an official copy of the law and regulations and should not be relied on as such. It contains a summary of the statutes and regulations governing the OLRP. It follows the July 2000 regulations and notes the major differences between the July 2000 regulations and the December 1998 regulations. The full text of the regulations is available from Sea Grant Legal Program. This document is current through July, 2002. If you have any questions concerning this guide, contact Sea Grant Legal Program at (225) 578-5931 or visit us online at www.lsu.edu/sglegal/.