



Integrated Coastal Protection Land Rights Acquisition

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ATTACHMENT D - CPRA LAND
RIGHTS ACQUISITION - MINUTES
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committed to our coast

Integrated Coastal Protection

- Comprehensive Integrated Coastal Protection must proceed in a manner that recognizes the powers and duties of the State and political subdivisions to fund and manage activities that are consistent with the goals of a comprehensive integrated coastal protection plan. La. R.S. 49:214.1
- The legislature has further recognized that a substantial majority of the coastal lands in Louisiana are privately owned and that a significant portion of the projects funded through the Coastal Protection and Restoration Fund either will occur on or in some manner affect private property. Projects funded with public dollars to not create rights in public. La. R.S. 49:214.5.5
- The full police power of the state shall be exercised to address the loss and devastation to the state and individuals arising from hurricanes, storm surges and flooding and to address the rapid, ongoing, and catastrophic loss of coastal Louisiana in order to devote the maximum resources of the state to meet these immediate and compelling public necessities of integrated coastal protection. La R.S. 49:214.5.6

CPRA Jurisdiction

Geographic Jurisdiction – La. R.S. 49:214.2(3)

coastal area – “the Louisiana Coastal Zone and contiguous areas subject to storm or tidal surge and the area comprising the Louisiana Coastal Ecosystem as defined in Section 7001 of 110 Public Law 114 (WRDA 2007)”

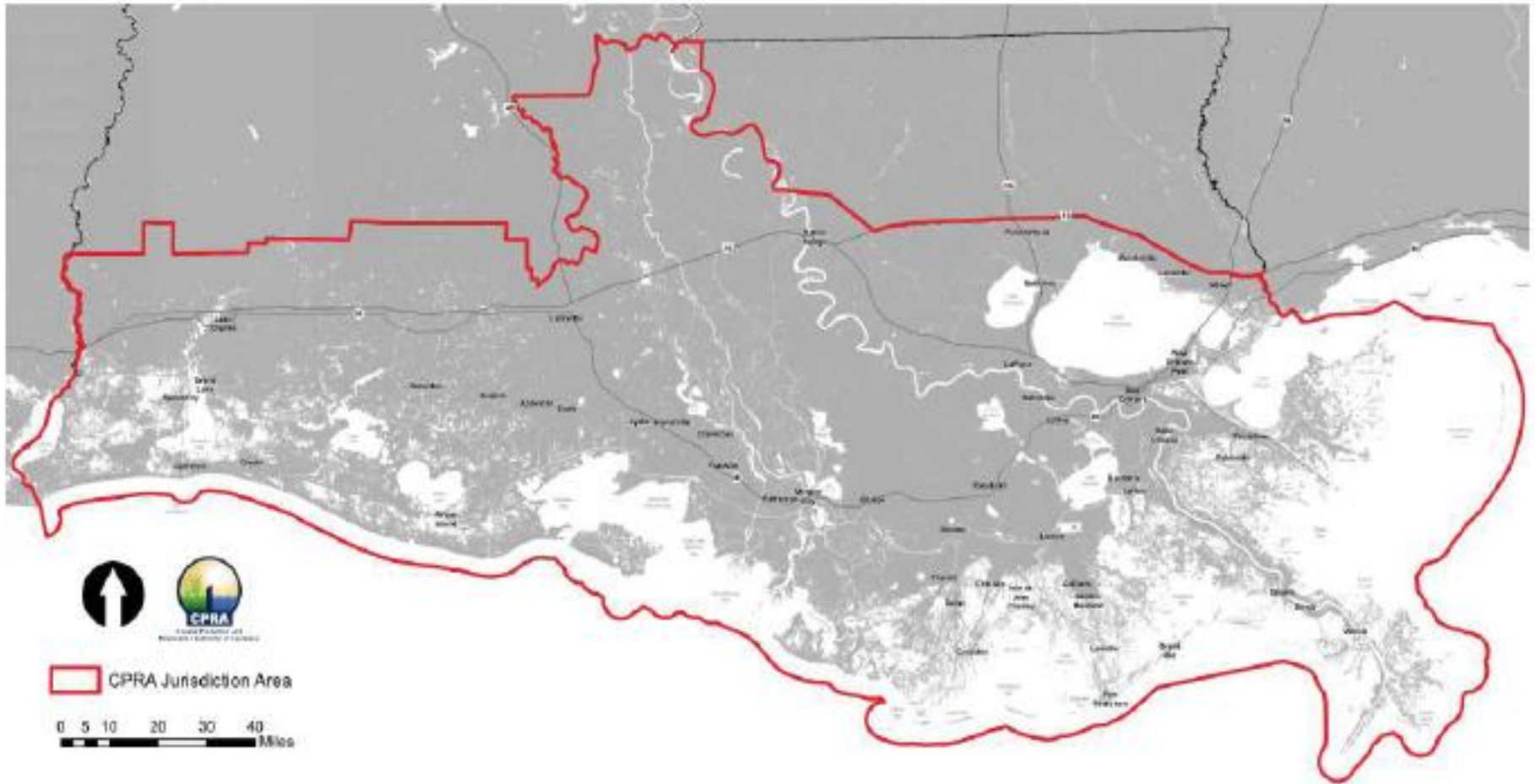
Section 7001 of WRDA 2007 - Louisiana Coastal Ecosystem is defined as “the coastal area of Louisiana from the Sabine River on the west to the Pearl River on the east, including those parts of the Atchafalaya River Basin and the Mississippi River Deltaic Plain below the Old River Control Structure and the Chenier Plain included within the study area of the restoration plan.”

- Roughly everything south of 30 foot contour line; Officially defined by description and accompanying map in MOU with DOTD defining responsibilities.

Subject Matter Jurisdiction – La. R.S. 49:214.2(10)

integrated coastal protection - “plans, projects, policies, and programs intended to provide hurricane protection or coastal conservation or restoration, and shall include but not be limited to coastal restoration; coastal protection; infrastructure; storm damage reduction; flood control; water resources development; erosion control measures; marsh management; diversions; saltwater intrusion prevention; wetlands and central wetlands conservation, enhancement, and restoration; barrier island and shoreline stabilization and preservation; coastal passes stabilization and restoration; mitigation; storm surge reduction; or beneficial use projects.” [The Kitchen Sink]

Coastal Area Map



Compensation for Use of Private Property Rights

- Compensation paid for the taking of, including loss or damage to, property rights affected by integrated coastal protection project and programs shall be governed by and limited to the amount and circumstances required by the 5th Amendment of the Constitution of the United States of America.
- La. R.S. 49:214.5.6 and Article I Section 4 of the Louisiana Constitution

Acquisition Needs

- Servitude, access rights, and other property interests for numerous projects in the coastal area
 - Limited rights, minimal situations involving full ownership rights
 - Servitudes can be with or without cost to CPRA
 - Full ownership with cost to CPRA
- Needs likely include property rights for tens of thousands of parcels involving multitudes of owners, including those owners located in other states and countries
- Approximately 80–85% of coastal area is privately owned
- CPRA generally acquires servitude interests in property needed for projects at no cost to CPRA – “conservation servitudes light”
- CPRA generally acquires interests from both landowner and State Lands Office for “dual claimed” lands in order to avoid CPRA having projects bogged down in state versus private landowner disputes over land rights, including ownership issues related to erosion of property

Land Rights Acquisition Options

- Survey Notice Statute
- Voluntary, at no cost to State
- Conventional Purchase
- Eminent Domain / Taking

Survey Notice Statute

- Act 523 of 2009 Regular Legislative Session enacted La. R.S. 49:214.6.9. which grants authority for integrated coastal protection surveying
- Applies to CPRA and its authorized agents and employees
 - Can include other state, local, or federal project partners if CPRA provides “authorization”
- Authorized persons may enter upon any lands, waters, and premises in the state for the purpose of making such surveys, soundings, drillings, and examinations as may be necessary or convenient for carrying out the purposes of integrated coastal protection
- Entry is not considered trespassing
- Requires written notice be sent five days prior to entry for resident owners and fifteen days prior to entry for nonresident owners
 - Owner = record property owner as reflected in the parish assessment rolls
 - Written notice is provided by certified mail to the last known address of the owner as shown in the current assessment records.
- Landowner is indemnified for any loss or injury resulting from entry upon the property
- Landowner is to be reimbursed for any actual damages resulting to lands, waters, and premises as a result of activities of authorized persons.
- CPRA policy is to provide contact information in notice letters and if landowner requests, will provide at least 48 hours advance notice to landowner before entry onto property.
- Current CPRA notice letter also provides owner with a list of activities that will be conducted on the property and locations thereof on the property.
- Current CPRA policy is to attempt to work with landowners to obtain voluntary survey rights, if circumstances and time constraints allow, and will agree to reasonable accommodations that may be requested by landowners
- Patterned off of similar long existing language in DOTD and Levee surveying statutes

Voluntary

- Benefit of Indemnity
- Benefits of Project to Landowner
- No cost to State
- Quid Pro Quo – equal benefits to state and landowner
- Standard Agreement with Reasonable Accommodations
 - Negotiated conditions
 - Reasonable Accommodations to landowner to allow variety of activities to co-exist on property with integrated coastal protection projects and programs
 - Landowner not allowed to do anything on property “inconsistent with purposes of the project”
 - Recognize the “working coast” concept

Immunity with Cooperation

- The landowners have greater protection under R.S. 49:214.6.10(C) within Act 734 of the 2010 Legislative Session (eff. August 15, 2010). The statute was enacted in response to a request by several landowners and their representatives.
- CPRA attorneys had discussions with Louisiana landowners and worked to convince the legislature that willing landowners should be protected from liability to third parties if the third parties were harmed as a result of the project or project activities.
- La. R. S. 49:214.6.10(C), provides landowners, who without cost to the State, provide land, property, access rights, servitudes, etc. to the State or its political subdivisions, immunity from liability for any damages “resulting from or caused by the construction, operation, or maintenance” of the integrated coastal protection project for which it was granted.

Insurance and Indemnity

- In CPRA's servitude language, the State agrees to require the State's contractors to add the landowners as additional insured under the State's contractors' insurance policies.
- The current servitude language provides that the State will indemnify and hold the landowners harmless for liability arising as a result of the project but not for the landowner's own fault or negligence.
- Typical Immunity Language: "To the extent permitted by Louisiana law, STATE shall, indemnify, and hold GRANTOR harmless against and from all costs, expenses, claims, demands, penalties, suits, fines, and actions of any kind and nature arising from the Project and caused by the actions and fault of STATE or its agents, employees, contractors, successors, assigns and transferees, including any court costs and reasonable and actual litigation expenses and attorneys' fees. However, nothing herein shall be construed as indemnifying or holding GRANTOR or any third person not a party hereto harmless against its own fault or negligence or that of its agents, employees, contractors, successors, assigns and transferees. Should work on said Lands be performed via contract, STATE shall ensure that the contractor lists GRANTOR as additional insured on any policies carried by the contractor, including completed operations coverage. The STATE acknowledges, declares and stipulates that GRANTOR has provided this Agreement at no cost to the STATE under the provisions of La. R.S. 49:214.6.10(C), as amended by Act No. 734 of the 2010 Regular Session of the Louisiana Legislature. This clause shall survive the term of this agreement.

Conventional Purchase

- Pay only for those rights necessary to carry out project
 - Normally a limited servitude
 - Only limited situations where fee title / full ownership would need to be acquired but mineral rights always reserved
- No benefit of immunity statute, immunity provision not applicable
- Generally retain ability to negotiate reasonable accommodations

Eminent Domain / Taking

- State policy decision generally not to expropriate property rights for coastal protection and restoration projects. Expropriation used only for levee and hurricane protection projects at local level under Corps of Engineers agreements mandating local acquisition of LERRDs.
 - **Last resort**
 - Numerous undeterminable and absent owners
 - Inability to negotiate reasonable conditions or payment for conventional acquisition
 - “Friendly” quick take (unable to negotiate price but landowner willing to give up property voluntarily)
 - Limited time needed to acquire property, i.e. emergency situations or other time constraints imposed by outside factors. For levees, appropriation may be used {not eminent domain}
- Acquire only property rights necessary to accomplish project
- No benefit of immunity provision
- No ability to negotiate reasonable accommodations
- Compensation limited to that allowable under the 5th Amendment to the U.S. Constitution
 - These costs may be considerable and have the potential to kill a project

Other Property Rights Issues

- Dual Claimed Lands
 - Private property owner claims land this is designated as a water bottom by State Lands and thus also claimed by State.
 - Acquire from both
- La. Constitution Art. VII Sec. 14
 - “Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.”
- State Use v. Private Property Rights
 - Quid Pro Quo
 - Private property owner’s right to deny access
- CPRA builds projects, typically for 30 years

Act 199 of 2017 Regular Session

- Enacted in response to USACE policy under Chapter 12 Real Estate Regulations of requiring fee title / full ownership as standard estate for ecosystem restoration projects and perpetual estates for mitigation projects. Standard policy failed to adequately recognize working coast and landowner needs.
- Amended R.S. 49:214.5.5 to provide that no full ownership interest in property shall be acquired for “integrated coastal protection” through any method by State, CPRA, levee districts, levee authorities, sponsoring authorities, political subdivisions, or any other state, local or federal authority or their agents or employees.
 - Except:
 - Greater interest is voluntarily offered and agreed to in writing by at least 75% of ownership in property, or;
 - Acquiring entity proves by clear and convincing evidence a greater interest is necessary to carry out the purposes of the project.
- Further amended R.S. 49:214.5.5 to provide that access rights, rights of use, servitudes, easements or other property interests for integrated coastal protection, including compensatory mitigation and ecosystem restoration purposes, shall not be in perpetuity and must be for a “fixed term” not to exceed “the life of the ... project” except where voluntarily offered and agreed to in writing by 75% of ownership.
- Fixed term has been used in at least one USACE ecosystem restoration project servitude / easement to mean “until deauthorization of the project”. Additional non-standard estates are currently under review by CPRA, with approval of landowners, for future use on USACE projects. **Progress being made.**
- Act also provides that acquisitions for integrated coastal protection projects do not authorize the acquisition of privately owned mineral interests and requires reservation of mineral interests under R.S. 31:149. No acquisition can transfer or extinguish litigious rights of the owners of the property.

Coastal Mineral Agreements Regulations

- Acts 2006, No. 626: amended La. R.S. 41:1702(D)(2) to allow “acquiring authorities” to enter into coastal mineral agreements and authorized DNR to promulgate rules and regulations to carry out the statutory provisions.
- Purpose was to provide ability to enter into agreements with landowners to establish agreements concerning mineral and surface rights relative to existing lands and lands that reemerge through reclamation projects as potential means to facilitate the development, design, or implementation of plans or projects for coastal conservation, restoration, protection, or management, including hurricane protection or flood control.
- “acquiring authorities” as defined by Article 149 of the Louisiana Mineral Code (La. R.S. 31:14) includes:
 - 1. Public entities including the United States, State of Louisiana, or subdivision, department, or agency of the U.S. or State of Louisiana;
 - 2. a legal entity with the authority to expropriate or condemn; and
 - 3. a non-profit entity under Sections 503(c) and 170 of the IRS Code operating as a public charitable organization and certified by the Secretary of Natural Resources to be a state or national land conservation organization

Coastal Mineral Agreement Regulations

Delays in Carrying Out La. R.S. 41:1702(D)(2)

- Regulations must be promulgated before entering into such agreements.
- AG Opinion No. 07-0137 put halt to regulations since the opinion essentially made the use of such agreements legally unfeasible since perpetual mineral interests not available.
- Authority to enter into these agreements transferred from DNR to CPRA upon creation of CPRA in 2009 and subsequent statutory revisions.
- Proponents of Coastal Mineral Agreement statute recently urged CPRA to request that the AG re-evaluate Opinion No. 07-0137.
- AG Opinon No. 15-0134
 - Currently eroded lands that are now State-owned water bottom:
 - perpetual mineral interest agreement is valid only for such time as the land remains “emergent.”
 - HOWEVER
 - Existing, privately-owned coastal lands:
 - Perpetual mineral interest agreements may not be affected by future changes in the location of the shoreline due to such forces as erosion, subsidence, or sea level rise.

Coastal Mineral Agreement Regulations

Scope

- All agreements are **completely voluntary** on the part of CPRA and are **not** intended to replace existing methods of acquiring land rights for CPRA projects.
- Additional tool to potentially facilitate the development, design, or implementation of plans or projects for coastal conservation, restoration, protection, or management, including hurricane protection or flood control.
- Two agreement types:
 - Between CPRA and coastal land owner
 - Between coastal landowner and “acquiring authority” with CPRA approval
- Surface right in favor of CPRA or acquiring authority in exchange for guarantee that existing mineral rights connected to existing land will be unaffected by future erosion and/or for guarantee that future mineral rights connected to eroded land that re-emerges as a result of a CPRA project will be conveyed back to former landowner until such time as the emergent land re-erodes.

Coastal Mineral Agreement Regulations Concerns

- These agreements are completely voluntary. CPRA is not required to solicit proposals. Interested parties should submit proposals to CPRA.
- The regulations state that proposals will be sent to CPRA.
 - CPRA suggests proposers, whether landowners, land trust organizations or combinations thereof, work together with CPRA at the beginning of development of the proposal to assure all requirements are met and that proposals will benefit CPRA programs.
- Qualification of Land Trust and other requirements.
- Separation of mineral rights from surface rights (e.g. skin in the game).
- Legacy Liability
- CPRA traditionally is not interested in owning surface rights. Real estate interests have been servitudes necessary for implementing projects and programs.

Coastal Mineral Agreement Regulations Comments

- Comment Period extended a second time to March 20, 2019.
- Comments must be submitted in writing to:
 - Harry Vorhoff, counsel for CPRA
P.O. Box 44027
Baton Rouge, LA 70804
- Comments submitted today will be recorded but will not be considered official comments. All official comments must be submitted in writing for official consideration.
- No requests for public hearing have been submitted prior to the submission deadline.

QUESTIONS

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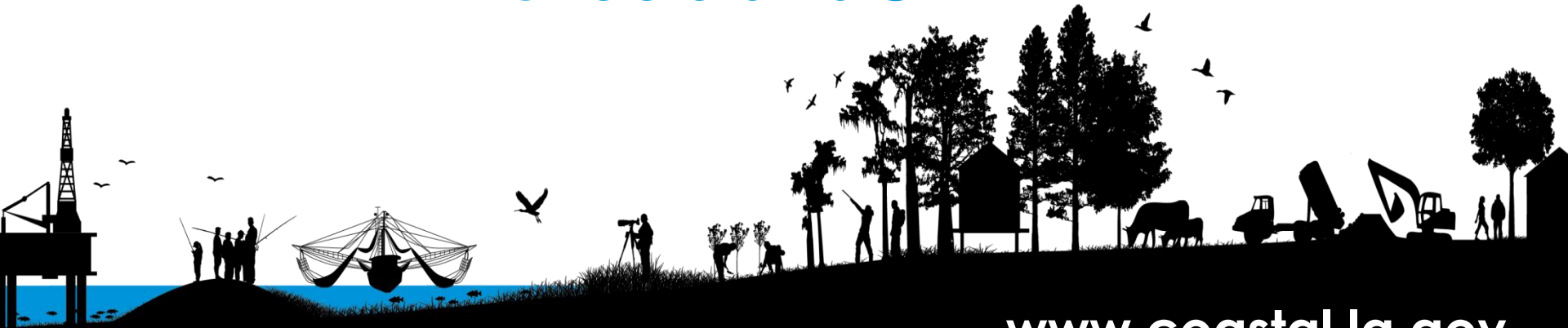
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