LOUISIANA OYSTER LEASE PRACTICES
LOUISIANA WILDLIFE AND FISHERIES COMMISSION

PERFORMANCE AUDIT SERVICES
INFORMATIONAL REPORT
ISSUED FEBRUARY 25, 2015

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LOUISIANA LEGISLATIVE AUDITOR
DARYL G. PURPERA, CPA, CFE

February 25, 2015

The Honorable John A. Alario, Jr.,
President of the Senate
The Honorable Charles E. "Chuck" Kleckley,
Speaker of the House of Representatives

Dear Senator Alario and Representative Kleckley:

This report provides information on current oyster lease practices in Louisiana and how they compare to other oyster-producing states. I hope this report will benefit you in your legislative decision-making process.

We would like to express our appreciation to the management and staff of the Louisiana Department of Wildlife and Fisheries and the Louisiana Wildlife and Fisheries Commission for their assistance during this audit.

Sincerely,

Thomas H. Cole, CPA
First Assistant Legislative Auditor

THC/aa

OYSTER LEASE 2015

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Louisiana Legislative Auditor

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Louisiana Oyster Lease Practices
Louisiana Wildlife and Fisheries Commission

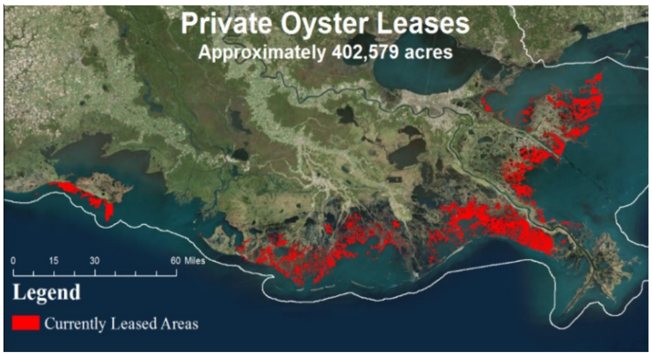
February 2015

Audit Control # 40140021

Introduction

Louisiana Revised Statute (R.S.) 56.425(A) allows the Louisiana Department of Wildlife and Fisheries (LDWF) to lease state-owned water bottoms to private individuals or businesses (lease holders). The state leases state-owned water bottoms for growing and selling oysters on the open market. Currently, LDWF oversees 8,052 oyster leases for a total of 402,579 acres[1] as shown in Figure 1. Louisiana leads the nation in pounds of oysters produced per year. During calendar year 2013, lease holders in Louisiana produced more than 10 million pounds of oysters for a total market value of $40.6 million.

Figure 1



Source: Prepared by legislative auditor's staff using information provided by LDWF staff.

According to state law, oyster lease holders can lease up to 2,500 acres of state-owned water bottoms for $2 per acre per year for a term of 15 years with a right to renew the lease at the end of the term. Oyster leases can be transferred, sold, inherited, sub-leased, or left in the name of an estate. In March 2002, LDWF stopped issuing new oyster leases due to a moratorium declared by the Louisiana Wildlife and Fisheries Commission (LWFC). The purpose of the moratorium is to reduce the state's exposure to potential lawsuits from oyster lease holders because of damages to their oyster leases as a result of coastal restoration activities. This moratorium is still in effect today.

Because Louisiana's oyster lease rate has not changed since 1980 (35 years) and there is currently a moratorium on the issuance of new oyster leases, Louisiana may not be maximizing the revenue it could receive from oyster leasing in Louisiana. As a result, we evaluated how Louisiana's current oyster lease practices compare to other oyster-producing states.

Overall, we found that, when compared to other states, Louisiana's oyster lease rate and application fee are low. In addition, unlike other states, lease holders are not required to produce or cultivate oysters, and Louisiana's law does not specifically address whether or not lease holders can form partnerships and/or have an interest in multiple corporations to exceed the maximum acres allowed. Appendix A contains LWFC's response to the report; Appendix B details our scope and methodology; Appendix C provides a brief history of Louisiana's oyster leases; and Appendix D contains the list of recommendations issued by the Moratorium Lifting Committee.

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[1] Even though the moratorium is still in effect, the number of leases and acres leased periodically changes based on survey revisions due to shore wash or judgments that split leases. Therefore, these numbers are as of July 1, 2014.

Objective: To determine how Louisiana's current oyster lease practices compare to other oyster-producing states.

We surveyed the oyster lease practices of the top six states that produce Eastern oysters, which is the type of oyster Louisiana produces. These states are Florida, Maryland, Mississippi, North Carolina, Texas, and Virginia. We found the following:

- Louisiana's oyster lease rate is low compared to five of the six states we surveyed. If Louisiana increased its oyster lease rate to $5.20 per acre, the average oyster lease rate of five states we surveyed, the state could generate $1.29 million in additional revenue per year, assuming that the leased acreage remains the same.

- Louisiana's oyster lease application fee is low compared to four of the six states we surveyed. If Louisiana increased its oyster lease application fee, the state could generate additional revenue per year.

- Louisiana law does not require oyster lease holders to produce or cultivate oysters. Five of the six states we surveyed require oyster lease holders to produce or cultivate oysters. Requiring that lease holders produce or cultivate oysters may reduce the potential for "speculative leasing," which is the leasing of state-owned water bottoms for reasons other than producing oysters.

- Louisiana law limits lease holders to 2,500 acres but does not address whether or not oyster lease holders can form partnerships and/or have an interest in multiple corporations in order to exceed this limit. As a result, we identified instances where individuals and corporations shared the same address and together exceeded the 2,500-acre limit. Of the six states we surveyed, four limit the number of acres that can be leased, and two provide clearer requirements in law.

- Louisiana has had a moratorium on the issuance of new oyster leases since March 2002. Lifting the moratorium could generate an additional $1.33 million per year in revenue for Louisiana, assuming all newly-available water bottoms are leased. If the state increases the oyster lease rate to $5.20 per acre as discussed in the first finding, this may generate an additional $3.5 million per year from the new leases.

These practices are discussed in more detail below.

Louisiana's oyster lease rate is low compared to five of the six states we surveyed.

In 1902, the Louisiana Legislature set the oyster lease rate at $1 per acre per year. In 1914, the Legislature gave the Louisiana Wildlife and Fisheries Commission[2] (LWFC) the authority to increase the oyster lease rate up to $5 per acre per year. In 1980, 66 years later, LWFC increased the oyster lease rate to $2 per acre per year. In 1989, the legislature set this oyster lease rate of $2 per acre per year in state law. As a result, LWFC can no longer change the oyster lease rate without legislative action.

Maryland, Mississippi, Texas, and Florida allow their regulatory agencies to determine the oyster lease rate or set a higher lease rate as necessary. North Carolina and Virginia set their oyster lease rates in law. The average oyster lease rate charged by five of the six states[3] we surveyed is $5.20 per acre per year, as shown in Exhibit 1. As stated previously, Louisiana currently leases 402,579 acres to oyster lease holders. If Louisiana increased its oyster lease rate to $5.20 per acre, the state could generate $1.29 million in additional revenue per year, assuming that the leased acreage remains the same.

Exhibit 1
Oyster Lease Rates

State	Total Number of Leased Acres	Lowest Lease Rate* (Per Acre Per Year)
Louisiana	402,579	$2.00
Maryland	3,094	3.50
Mississippi	523	5.00
North Carolina	1,039	10.00
Texas	2,322	6.00
Virginia	109,733	1.50
Average		**$5.20**

*We used the lowest rate for the majority of leased water bottoms in each state.
Source: Prepared by the legislative auditor's staff using information obtained from Louisiana law and other state's laws and regulations.

In addition, we found that oyster leases are sold for a higher amount on the private market than they are leased for by the state. Specifically, we reviewed the bills of sale for 34 oyster leases that LDWF processed in fiscal year 2014 and found that the average selling price was $662 per acre. According to LDWF management, the amount oyster leases are sold for can vary depending on things such as enhancements[4] made to the water bottom impacting current

[2] LWFC is a policy-making and budgetary-control board, with no administrative functions, established to protect, conserve, and replenish the natural resources and the wildlife of the state. LWFC consists of seven members appointed by the governor, subject to confirmation by the Senate.
[3] We excluded Florida's lease rate of $16.73 from the average rate calculations because the rate would grossly inflate the results and we wanted to be conservative in our calculations and comparisons.
[4] An oyster lease holder may have planted oyster seed or cultch (i.e., oyster shell, limestone, and crushed concrete) on their leases. The cultch provides oyster seed larvae a firm attachment site on which to settle and grow into oyster seed and marketable-size oysters.

and future oyster production, type of water bottom, salinity of water, and proximity to the oil and gas activities or coastal restoration projects.

Any proposal to increase the oyster lease rates can be expected to raise concerns and will undoubtedly be met by some opposition. However, oyster lease holders may be more amenable to accept a rate increase if the incremental funds were dedicated for the enhancement of the oyster resources within the state. At the present time, oyster leases generate more than $800,000 in revenue each year, but this revenue is not dedicated for the oyster industry. Instead, the oyster lease payments are deposited in the Conservation Fund for the general purpose of conservation, protection, preservation, management, and replenishment of the state's natural resources and wildlife.

Matter for Legislative Consideration: In order to maximize revenue from oyster leasing, the legislature may wish to consider increasing the lease rates and adjusting as necessary and may wish to dedicate all or a portion of the funds from this increase for the enhancement of the oyster resources within the state, such as planting oyster seed, cultch, etc.

Louisiana's oyster lease application fee is low compared to four of the six states we surveyed.

Louisiana's oyster lease application fee of $40 is lower than four of the six states we surveyed for new oyster leases. The average application fee of other states is $154.17, as shown in Exhibit 2. As a result, if LWFC increases the oyster lease application fee to the average amount of $154.17 of the six states we surveyed and lifted the oyster lease moratorium currently in place in Louisiana, the state could generate additional revenue.[5] The oyster lease moratorium is discussed on page 8 of this report.

Exhibit 2
State Application Fees

State	Application Fee
Louisiana	$40.00
Florida	200.00
Maryland	300.00
Mississippi*	No Charge
North Carolina	200.00
Texas	200.00
Virginia	25.00
Average Fee	**$154.17**

***Mississippi currently has seven leases.
Source: Prepared by the legislative auditor's staff using information obtained from Louisiana administrative code, interviews with other states' regulatory agencies, and other states' administrative codes.

[5] Additional revenue from an increased application fee would depend on the number of new leases resulting from the moratorium being lifted.

Recommendation 1: LWFC should consider revising the application fee for new oyster leases.

Summary of Management's Response: According to the chairman of the LWFC, "the substance of this report will be given due consideration at such time that it is made public and comes before the Commission." See Appendix A for LWFC's full response.

Unlike five of the six states we surveyed, Louisiana law does not require oyster lease holders to produce or cultivate oysters.

> - ***Oyster production*** is the harvesting of oysters.
> - ***Oyster cultivation*** includes transplanting small oysters from one area to another area for the purposes of growing, protecting, or harvesting the oysters; planting oyster seed; or planting cultch (i.e., oyster shell, limestone, and crushed concrete).

Florida, Maryland, Mississippi, North Carolina, and Virginia require oyster lease holders to produce or cultivate oysters. In addition, three of these states - Maryland, North Carolina, and Florida - specifically define what activities satisfy the production and cultivation requirements. For example, North Carolina requires lease holders to produce and market 10 bushels of oysters per acre per year and plant 25 bushels of seed oysters and/or 50 bushels of cultch (i.e., oyster shell, limestone, and crushed concrete) per acre per year. Texas is the only state we surveyed with no production and cultivation requirement. According to the Texas Parks and Wildlife Department, the purpose of the Texas Oyster Lease program is different from other states. Texas' program is not focused on oyster production; rather the program was established to reduce the illegal harvest of oysters growing in contaminated waters.

Three of the five states we surveyed that require oyster lease holders to produce or cultivate oysters also require actual documentation of cultivation or production. Maryland, North Carolina, and Florida verify oyster production and cultivation by requiring lease holders to submit supporting documentation, such as oyster production reports, receipts for seed and cultch purchases, etc. by lease. In these states, failure to produce or cultivate oysters can result in the termination or non-renewal of oyster leases.

Prior to 2001, Louisiana required lease holders to cultivate 10% of leased water bottoms. Act 438 of the 2001 Regular Session removed the cultivation requirement from state law and instead required lease holders to report oyster production to LDWF by harvest area grid.[6] However, LDWF is unable to determine whether a lease is productive using these grids because the areas are too large and include multiple oyster leases. For example, one harvest area grid has 2,271 oyster leases. According to LDWF management, they do not know why the 10% cultivation requirement was removed.

[6] The harvest area grid consists of 66 oyster harvest areas established by LWFC in LAC 76:VII.519.

> ***Speculative leasing** is the leasing of state-owned water bottoms for reasons other than producing oysters (e.g., compensation paid by oil and gas companies to oyster lease holders for oil and gas activities conducted on their leases).*

Requiring that lease holders produce or cultivate oysters may reduce the potential for "speculative leasing." According to a report titled *Economic Analysis of Oyster Lease Dynamics in Louisiana*,[7] oyster lease holders may receive revenue from oil and gas companies[8] for activities conducted on their leased water bottoms in addition to revenue generated from oyster production. According to this report, low lease rates and the potential to generate revenue from oil and gas companies may encourage some individuals to engage in "speculative leasing," or the leasing of state-owned water bottoms for reasons other than producing oysters. Therefore, a cultivation requirement may help ensure state-owned water bottoms are leased for the sole purpose of producing oysters. Raising the oyster lease rate may also help to prevent "speculative leasing."

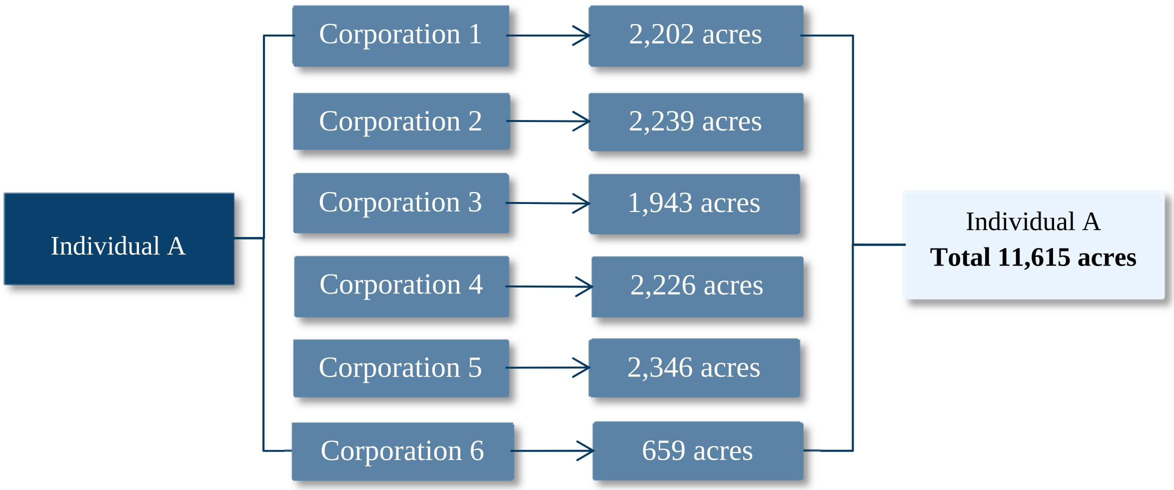
Matter for Legislative Consideration: The legislature may wish to consider imposing a production and cultivation requirement on lease holders to help ensure that state-owned water bottoms are leased for the sole purpose of producing oysters.

Louisiana law does not address whether or not oyster lease holders can form partnerships and/or have an interest in multiple corporations in order to exceed the maximum 2,500-acre limit.

As stated previously, R.S. 56:432 limits the number of acres an individual or business can lease to 2,500 acres. However, state law does not address whether or not an individual or business can form partnerships and/or have an interest in corporations to exceed this limit. We reviewed 8,052 oyster lease records LDWF maintained as of July 2014 and found 36 instances (4,004 lease records) where the lease holders' addresses matched the address of one or more corporations, partnerships, or estates, resulting in more than 2,500 acres total per address. The number of acres associated with 36 of these instances totaled 213,657 acres (53.1%) of the 402,579 acres currently being leased. For example, there was one instance where 12 corporations and one individual all reported the same address for their oyster leases, and the combined acres leased totaled 27,668 acres. This number of acres is 11 times greater than the 2,500 acres allowed by state law. Exhibit 3 shows another example of one individual who appears to have leased 11,615 acres by forming multiple corporations.

[7] Keithly, Walter R., Jr., and Kazmierczak, Richard F., Jr., *Economic Analysis of Oyster Lease Dynamics in Louisiana*. Report to the Louisiana Department of Natural Resources. October 1, 2006.
[8] Oil and gas revenue may include compensation paid by oil and gas companies to oyster lease holders for activities associated with producing oil and gas (e.g., rig movement or installing pipelines), maintenance of existing structures (e.g., repairing a pipeline), or search for potential new oil and gas sources.

Exhibit 3
Example of an Individual Obtaining More than 2,500 Acres of Oyster Leases



Source: Prepared by legislative auditor's staff using information provided by LDWF staff.

These examples could indicate that some lease holders may be forming partnerships or have an interest in multiple corporations to acquire more acreage than allowed by law. Similar to Louisiana, Mississippi, North Carolina, Texas, and Virginia limit the number of acres a lease holder can acquire. Unlike Louisiana, however, Mississippi and North Carolina specifically define when a partnership or corporation's leased acreage should be included in the acreage limit total for a lease holder. The other two states, Florida and Maryland, also differ from Louisiana in that lease holders are limited to leasing only the number of acres that they can actively cultivate.

Matter for Legislative Consideration: The legislature may wish to clarify whether or not the number of acres leased by partnerships and corporations should be included toward the 2,500-acre limit.

Louisiana has had a moratorium on the issuance of new oyster leases since March 2002. Lifting the moratorium could generate an additional $1.33 million per year in revenue for Louisiana, assuming all newly-available water bottoms are leased.

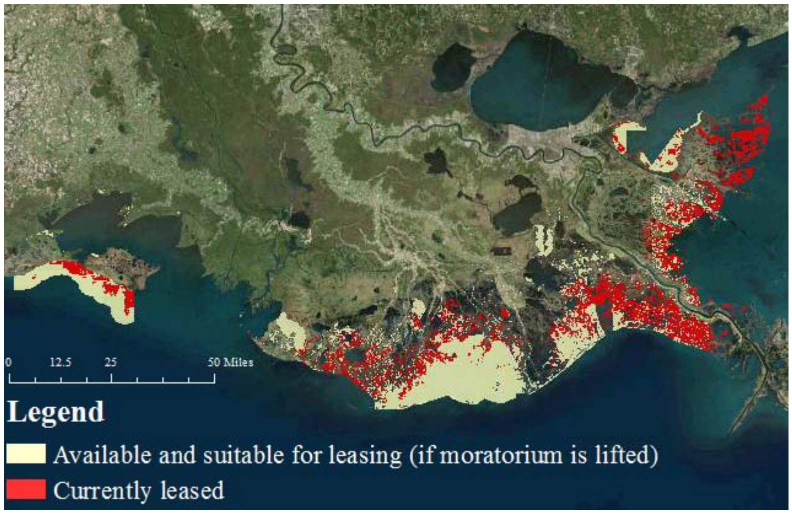
In March 2002, LWFC declared a moratorium on the issuance of new oyster leases. According to Louisiana Administrative Code (LAC) 76:VII.505, the moratorium was put in effect to reduce the state's exposure to potential lawsuits from lease holders. At that time, lease holders were suing the state for damages from coastal restoration projects. For example, one major lawsuit that was filed against the State and the Louisiana Department of Natural Resources (LDNR) was from lease holders over damages caused by the operation of the Caernarvon Freshwater Diversion located on the east bank of the Mississippi River in Plaquemines parish. In response, the Louisiana Legislature passed R.S.56:427.1 in 2000, which holds the state free and harmless from any claims arising from coastal restoration projects. However, the moratorium was placed in 2002 because of ongoing litigation. The Supreme Court of Louisiana eventually ruled in 2004 that the state was not liable for damages to oyster leases; however, the lawsuit and associated appeals lasted several years.

In 2008, Act 808 directed the LWFC to develop rules in conjunction with the Moratorium-Lifting Committee[9] to lift the moratorium on new oyster leases. In 2010, the Committee finalized recommendations to lift the moratorium, which needed to be enacted prior to LWFC lifting the moratorium. Most of recommendations could be implemented by LWFC rule. However, two recommendations - liability exemption for pre-existing oil and gas activity and re-evaluation of state ownership of leased water bottoms prior to oyster lease renewal - require legislative action. See Appendix D for the list of recommendations issued by the Moratorium Lifting Committee. Despite several attempts since then, none of the bills that would address these two recommendations have passed.

Lifting the moratorium could generate an additional $1.33 million per year in revenue for Louisiana, assuming all newly-available water bottoms are leased. If the moratorium was lifted, approximately 666,457 acres of state-owned water bottoms would be available and suitable for lease, as shown in Exhibit 4. Using Louisiana's current oyster lease rate of $2 per acre per year, lifting the moratorium could generate up to $1.33 million in additional state revenue per year, assuming all newly-available water bottoms are leased. If the state increased the oyster lease rate to $5.20 per acre as discussed earlier in this report, lifting the moratorium could generate an additional $3.5 million per year from these new leases.

[9] The Moratorium-Lifting Committee was composed of a representative from LDWF, LDNR, Oyster Task Force, Louisiana Landowner's Association, Louisiana Oil and Gas Association, and Louisiana Mid-Continent Oil and Gas Association.

Exhibit 4
Available and Suitable Areas
for Private Oyster Leases
(approximately 666,457 acres)



Source: Prepared by legislative auditor's staff using information obtained from LDWF, the Louisiana Department of Natural Resources, the Louisiana Department of Health and Hospitals, and the Office of State Lands.

Lifting the oyster lease moratorium would affect multiple stakeholders, including the oyster industry, LDWF, the Coastal Protection and Restoration Authority (CPRA), and oil and gas companies. However, certain issues need to be addressed prior to lifting the moratorium. For example, concern exists that new leases would be issued in or near the areas where future coastal restoration projects might take place. This may negatively affect productivity of the leases and investments made by lease holders on their leases. Specifically, freshwater diversion projects that introduce freshwater into marshes and wetlands to stop coastal erosion may affect water salinity covering oyster leases, leading to decreased production or loss of oysters in these areas. Introducing freshwater may also increase the concentration of harmful bacteria in some areas, preventing any oyster harvesting in these areas. Therefore, LWFC should work with stakeholders to determine the most effective way to lift the moratorium. One of the possibilities suggested by LDWF is to lift the moratorium in phases, allowing time to address arising issues and concerns. Another possibility is to lift it initially only in certain geographical areas with no current or planned coastal restoration projects.

Matter for Legislative Consideration: The legislature may wish to consider the two recommendations proposed by the Moratorium-Lifting Committee so that the oyster lease moratorium could be lifted by LWFC.

Recommendation 2: LWFC should consider enacting rules addressing recommendations proposed by the Moratorium-Lifting Committee so that the oyster lease moratorium can be lifted.

Summary of Management's Response: According to the chairman of the LWFC, "the substance of this report will be given due consideration at such time that it is made public and comes before the Commission." See Appendix A for LWFC's full response.

APPENDIX A: LOUISIANA WILDLIFE AND FISHERIES COMMISSION'S RESPONSE

LOUISIANA WILDLIFE & FISHERIES COMMISSION

Pat Manuel, Chairman

Billy Broussard Ronny Graham
Bart Yakupzack Ed Swindell

Dan Davis, Vice Chairman

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February 9, 2015

Daryl Pupera, CPA, CFE
Director
Louisiana Legislative Auditor
P.O. Box 94397
Baton Rouge, LA 70804-9397

RE: Louisiana Oyster Lease Practices

Dear Mr. Pupera,

The Wildlife and Fisheries Commission has received a copy of your preliminary performance audit on Louisiana's Oyster Lease Practices. As with all matters that fall under the purview of the Commission's authority, the substance of this report will be given due consideration at such time that it is made public and comes before the Commission.

On behalf of myself and the Wildlife and Fisheries Commission, I thank you for the opportunity to review and comment on the preliminary report.

Sincerely,

Pat Manuel

Edwin "Pat" Manuel
Chairman

APPENDIX B: SCOPE AND METHODOLOGY

We produced this informational report under the provisions of Title 24 of the Louisiana Revised Statutes of 1950, as amended. Our review focused on Louisiana's current oyster lease practices as of fiscal year 2014 and how they compare to other oyster-producing states. In some cases, we extended our scope to include historical and/or current information.

To gather information to address our objective, we performed the following steps:

- Obtained information on the current oyster lease moratorium.
- Reviewed applicable state laws and regulations.
- Interviewed the Louisiana Department of Wildlife and Fisheries (LDWF), the Coastal Protection and Restoration Authority, the Louisiana Department of Natural Resources, the Louisiana Oil and Gas Association staff, and representatives from the oyster industry.
- Interviewed authors of the *Economic Analysis of Oyster Lease Dynamics in Louisiana* report.
- Attended the Louisiana Wildlife and Fisheries Committee and the Louisiana Oyster Task Force meetings.
- Obtained and analyzed current Louisiana oyster lease data.
- Surveyed the top six states that produced the most Eastern oysters.
- Reviewed applicable state laws and regulations for surveyed states.
- Obtained and analyzed oyster lease bills of sales for fiscal year 2014. We reviewed a total of 176 bills of sale that LDWF processed in fiscal year 2014 and excluded 142 bills of sale because they did not list the full price the lease was sold for and/or the sale was between related parties (i.e., both buyer and seller have the same last name, the same address, etc.).

APPENDIX C: BRIEF HISTORY OF LOUISIANA'S OYSTER LEASES

Act No. 153 of 1902	• Created a state Oyster Commission of Louisiana (Commission) as a state department and vested it with full control of the oyster industry of Louisiana; • Allowed any person, firm, or corporation, a bona fide resident of the state, to lease up to 20 acres for up to **15 years**; • Established an annual rate of $1 per acre; and • Allowed the transfer of the oyster leases to other parties.
Act No. 52 of 1904	• Made the oyster leases inheritable; and • Granted the right of first refusal to the current lease holder at the expiration of the lease term.
Act No. 178 of 1906	• Increased the size limit for each person or corporation to 1,000 acres; • Required lease holders to **cultivate at least 10% of leased water bottoms** annually starting after five years from the beginning of the lease; and • Established an annual rate of $2 per acre for the renewed leases, but left the annual rate for new leases at $1 per acre for the first 15 years.
Act No. 54 of 1914	• Authorized Commission to set an annual rate for oyster leases in the amount of no less than $1 and not more than $5.
Louisiana Register 5:468 of 1979	• Commission fixed an annual rate for oyster leases at **$2 per acre** (effective January 1, 1980).
Act No. 925 of 1981	• Granted lease holders the right to maintain an action for damages against a person who harms oyster beds under lease.
Act No. 504 of 1989	• Directed Commission to maintain the annual oyster lease rate for oyster leases at $2 per acre.
Act No. 1304 of 1995	• Established the Oyster Lease Damage Evaluation Board to promulgate rules and regulations for compensation for actual damages caused to the leased water bottoms.
Act 107 of 2000	• Required that all oyster leases and renewals of oyster leases hold state harmless for coastal restoration project impacts.
Act 438 of 2001	• Removed the cultivation requirement for oyster lease holders.
Act No. 449 of 2003	• Increased the oyster lease size limit to **2,500 acres** but limited new lease applications to 1,000 acres.

APPENDIX D: MORATORIUM-LIFTING COMMITTEE'S 2009 RECOMMENDATIONS

Recommendations Requiring Legislation:
• Liability exemption for pre-existing oil and gas activity • Re-evaluation of state ownership of leased water bottoms prior to lease renewal
Recommendations that Could be Implemented by Rule:
• Biological assessments in conjunction with Coastal Use Permit applications (LDWF and the Louisiana Department of Natural Resources) • 90-day landowner contest period for new leases (LWFC and the Louisiana Office of State Lands) • 90-day lease application withdrawal period (LWFC) • Rent-delinquent leases become new leases (LWFC) • 500-foot expansion of existing leases (LWFC) • Lottery system for new leases, after lifting (LWFC)
Source: Prepared by legislative auditor's staff using information provided by the Coastal Protection and Restoration Authority staff.