

STATE OF TEXAS COMMENTS:

MMS Draft Guidelines: Coastal Impact Assistance Program

Issued by Minerals Management Service, U.S. Department of the Interior, March 2006

The complete texts of the comments received are attached to this summary. The comments are arranged by the name of the commenter. The comment summaries are attributed to the commenters who made them. State agency and county government comments are shaded. The comments do not necessarily reflect the views of the State of Texas, Governor Rick Perry or the Coastal Land Advisory Board. Please contact Kathy Smartt, CIAP Team Leader, Texas General Land Office, at (512) 475-1552 or at Kathy.Smartt@glo.state.tx.us for more information about the comments received by the State of Texas.

General Comments:

1. **More funding for Texas counties bordering gulf.** Of Texas' 18 coastal counties, 12 border the Gulf of Mexico. Those 12 counties are most directly affected by coastal erosion. Consideration should be given to providing counties bordering the Gulf of Mexico a greater proportion of CIAP funds. (West Galveston Island Property Owners Association and Galveston County Beach Erosion Task Force)
2. **Final MMS guidelines should include more detailed, specific guidance.**
 - a. **Guidelines too vague.** The guidance document is vague and difficult to interpret, merely restating language in the program's enabling legislation. (Texas Commission on Environmental Quality, Galveston Bay Council, Trust for Public Land, Galveston Bay Foundation)
 - b. **Specific examples of eligible activities needed.**
 - i. Providing examples of eligible activities would assist applicants. MMS should expediently reissue a revised guidance document and again solicit public comment before developing and issuing a final guidance document. (Galveston Bay Council, Trust for Public Land, Galveston Bay Foundation)
 - ii. Texas ports need financial assistance to maintain channels and begin overdue dredging projects. Ports are an important component of the coastal economy, and without sufficient funding many Texas port areas could become a drain on the state economy instead of a positive economic component that produces jobs and revenue for state and local economies. Funds authorized under this program could assist Texas ports in their efforts to conserve, protect and restore coastal areas. (Texas Ports Association, Matagorda County Navigation District #1)
 - iii. Several commenters provided suggested lists detailing the types of projects that should be listed as an authorized use under CIAP. (Katy Prairie Conservancy, Galveston Bay Foundation, Trust for Public Land, Galveston Bay Council)

Section 1: Introduction:

No comments received.

Section 2: Eligible States and Subdivisions:

No comments received.

Section 3: CIAP Program Allocations:

No comments received.

Section 4: CIAP Program Funds:

1. **Clarification needed on dates.** Additional information or clarification should be provided on the following:
 - a target date by which MMS will provide information on the grant process;
 - a draw-down date for funds for each fiscal year to assist entities in establishing administrative procedures. (Texas General Land Office)

4.1. Authorized Uses of Funds:

1. **Include ports as political subdivisions and allow dredging as an authorized use.** Ports should be included as eligible political subdivisions, and dredging of shallow draft channels for commercial ports and fisheries should be an authorized use of CIAP funds. (Texas Ports Association, Matagorda County Navigation District #1)
2. **Guidance document unclear and needs examples.** The guidance document merely restates the language in the Energy Policy Act of 2005 in describing activities eligible for funding. This lack of clarity may impair the ability of local stakeholders and natural resource agencies to develop coastal protection and restoration projects. Specific examples of the types of eligible and ineligible activities for each of Sec. 4.1's funding categories would be helpful. (Trust for Public Land, Galveston Bay Council, Katy Prairie Conservancy, Texas Commission on Environmental Quality, Texas Department of Transportation)
3. **Include comprehensive conservation management plans.** Federally approved comprehensive conservation management plans should be specifically listed as an authorized use of CIAP funds. (Galveston Bay Council)
4. **Required permitting, mitigation or enforcement costs should not be authorized uses.** CIAP funds should not be available to meet federal or state permit requirements, conditions or enforcement orders. Mitigation activities required by an enforcement order or required regulatory effort should not be eligible for funding under CIAP. In particular, CIAP funds should not be used to mitigate Section 404 permit impacts caused by the filling of wetlands. (Galveston Bay Council, Texas Parks and Wildlife Department, Katy Prairie Conservancy, Trust for Public Land, Galveston Bay Foundation, Texas Commission on Environmental Quality)
5. **Funding existing, routine activities should be excluded.** CIAP funds should not be available for activities undertaken as part of existing routine governmental activities (wastewater facility maintenance, beach raking, ongoing litter abatement programs, etc.). Such activities are generally the responsibility of local governments, and funding these activities will not result in improvements in the overall coastal and marine ecosystem. (Texas Commission on Environmental Quality)
6. **Research and monitoring in support of authorized uses yields "direct benefit."** The guidance document should be modified to clarify the definition of a "direct benefit" governing the use of CIAP

funds. “Direct benefit” should include, but not be limited to, the assessment, research, mapping and monitoring of coastal or marine resources and habitats in support of authorized activities. (Texas Sea Grant Program)

7. **Define “direct benefit” and allow states to apply for funding for preplanning.** Additional information or clarification should be provided on the following: the term “direct benefit” should be clearly defined in the guidance document and states should be allowed to apply for and receive an allocation of CIAP funds to conduct preplanning work for potential state CIAP projects. (Texas General Land Office)
8. **Acquisition of water rights should be an allowed use of funds.** Texas has failed to adequately address the issue of freshwater inflows to its bays and estuaries. The guidance document should clearly provide for the use of CIAP funds to acquire senior water rights and the deposit of those rights in the Texas Water Trust to enhance water availability and make sufficient water available in drought situations to ensure the health and productivity of Texas’ coastal resources. (Coastal Conservation Association Texas)
9. **Include air quality research as an authorized use of funds.** CIAP funds should be available as a source of funding for research critical to attaining federal air quality standards. While the program guidelines are broadly stated, additional language to ensure that air quality research is an acceptable use is suggested. (Harris County)

4.2.1. Cost Sharing or Matching of Funds:

1. **No funds matching should be required.** MMS is encouraged to employ a policy that no matching funds be required for projects funded under CIAP, but to consider leveraging and partnerships in the evaluation of projects. (Galveston Bay Foundation, Trust for Public Land, Galveston Bay Council) A section in the grant application should be provided to solicit such information. (Galveston Bay Foundation, Trust for Public Land) A statement clarifying the fact that no matching funds will be required to qualify for this program should be added to the beginning of this section to provide a more complete context for the remaining discussion in this section. (National Wildlife Federation)
2. **CIAP funds should be allowed to enhance a previous federally funded project.** The guidance document should be modified to clarify whether CIAP funds may be used in a previous federally funded project to make it larger or more efficient. (West Galveston Property Owners Association, Galveston County Beach Erosion Task Force)
3. **Ability of entities to use CIAP funds to match other federal funds should be set forth in MMS Final Guidelines.** The requirement that states and coastal political subdivisions (CPSs) submit a letter with grant applications authorizing the use of CIAP funds for the required non-federal match or cost share to agencies that require matching funds is unreasonable. Differing funding applications will make this requirement nearly impossible to coordinate, placing a burden on states, CPSs and federal agencies. It is unlikely that any federal agency will be able to respond to numerous requests to provide documentation of matching requirements. The use of CIAP funds for matching purposes should be provided in the final guidance document and not left to the discretion of individual federal agencies. (Coastal Bend Bays and Estuaries Program)

4.2.2. Funds Distribution Limitation:

1. **Infrastructure percentage should be increased.** The 23 percent limitation on infrastructure projects is inadequate. That cap should be increased to 35 to 40 percent. In addition, dune walkovers should

be included in the definition of infrastructure. (West Galveston Island Property Owners Association, Galveston County Beach Erosion Task Force)

2. Activities that enhance coastal natural resource protection should not be considered “infrastructure” for the 23 percent limitation.

a. Land acquisition for conservation, protection and restoration of coastal areas is not “infrastructure.”

- i. The draft guidelines are unclear as to whether infrastructure projects include land acquisition for purposes other than “public facilities or systems needed to support commerce and economic development.” This section should be amended to clarify that issue and should also provide that land acquisition for purposes other than infrastructure, such as conservation, protection, or restoration of coastal areas, be allowed; mitigation of natural resource damage; and implementation of federal comprehensive conservation management plans are not subject to the 23 percent limitation on funds distribution. (Coastal Bend Bays and Estuaries Program, *Environmental Protection Agency*)
- ii. Land acquisition for the purposes of coastal habitat preservation, mitigation of natural resource damages and natural-resource-related acquisition projects should be specifically exempted from the definition of infrastructure. (Galveston Bay Council, Texas Parks and Wildlife Department, Trust for Public Land)
- iii. It is unclear whether resource protection/restoration activities are allowable activities. Of particular interest is which of these activities would be considered “infrastructure” for the purpose of the act and therefore subject to the 23 percent cap. At this time, the guidance offers little clarity on whether land purchases for conservation purposes, intertidal marsh restoration projects, or erosion control efforts to protect marshland would fall under the 23 percent cap. (Bayou Preservation Association)

b. Activities that protect and restore coastal natural resources should not be considered “infrastructure.”

- i. The current definition of “infrastructure” in the draft guidance document would include parks, trails and land acquisitions and would make such activities subject to the 23 percent limitation. This provision is in conflict with the intent of the Energy Policy Act of 2005, and the guidance should be amended to clarify that land acquisition for conservation purposes is not subject to the 23 percent limitation. (National Wildlife Federation, Katy Prairie Conservancy)
- ii. No voluntary activity involving the protection or restoration of coastal natural resources for the long-term health of the ecosystem should be considered infrastructure. (Galveston Bay Council)
- iii. Construction associated with marsh restoration is included as infrastructure and subject to the 23 percent limitation. On-the-ground protection of coastal natural resources should not be constrained by the 23 percent cap because those activities accomplish the purposes of the CIAP. (Katy Prairie Conservancy)
- iv. Voluntary best management practices, designed to abate nonpoint source pollution and other voluntary watershed management practices associated with either TMDL

implementation or other watershed-based plans, should be exempted from the 23% infrastructure limitation. (Texas Commission on Environmental Quality)

- v. Most activities involving the on-the-ground restoration of coastal natural resources should be allowed, as this is a primary goal of CIAP. (Galveston Bay Foundation, Trust for Public Land, Katy Prairie Conservancy)
- vi. The current definition of “infrastructure” should be amended to allow beach nourishment projects to receive CIAP funding without affecting the 23 percent limitation. Improvements constructed on state parkland should not be considered infrastructure, and projects in which the investment of CIAP funds is \$100,000 or less should not be considered infrastructure. A project required by the Americans with Disabilities Act and supported with CIAP funds should not be considered infrastructure. (Sidney McClendon)

c. Onshore vs. offshore infrastructure

- i. The definition of “onshore infrastructure” should specifically exclude the following: beach nourishment and similar activities, restoration of dunes without a structural core, construction of parks, recreational piers, walkways, trails and land acquisition. If such activities are excluded from the onshore infrastructure definition, the guidelines should clarify how the cost of constructing facilities that are both onshore and offshore should be prorated to determine the 23 percent limitation on onshore infrastructure. If more than 50 percent of a project is located below mean high water, the entire project should be considered offshore for purposes of the 23 percent limitation. In the event that beach nourishment, dune restoration, construction of parks, recreational piers, walkways, trails and land acquisition are excluded from the infrastructure definition, funding for recurring operating costs of such facilities should be excluded from the definition as well. (Texas General Land Office)
- ii. The guidance document also defines breakwaters as infrastructure, but does not distinguish between onshore breakwaters and those constructed offshore. Offshore breakwaters and other rigid erosion control structures are critical to the protection of intertidal wetlands, grasslands, forests and other coastal habitat. The placement of such structures implements the purposes of the Act, and the guidance document should be clarified to provide that offshore breakwaters and other erosion control structures are not subject to the 23 percent limitation. (Galveston Bay Council)

3. **Guidance should allow funding for maintenance of CIAP-funded facilities.** The guidance document provides that infrastructure funding does not include maintenance or operating costs of facilities or systems even if such facilities are constructed with CIAP funds. CIAP funds should be made available to support maintenance of facilities installed with CIAP dollars to protect the original investment of federal funds. (Sidney McClendon)
4. **Limitation percentage should apply to individual awards only, not fiscal years.** The 23 percent limitation should apply to individual awards, not individual fiscal years. A project funded under a CIAP grant may run for a multi-year period and combined funding from individual awards could total in excess of the 23 percent cap during a single fiscal year. (Texas General Land Office)
5. Clarification needed on what falls under 23 percent cap. The draft guidelines are unclear on this point, specifically as to where land acquisition for conservation purposes fall. It also is unclear whether construction associated with marsh restoration fits under the cap. (Galveston Bay Foundation, Trust for Public Land)

4.3. Compliance with Authorized Uses of Funds:

1. **Alternatives to the enforcement of the authorized uses provision should be considered.** MMS may determine that an entity has expended CIAP funds for an unauthorized use, while the grant recipient disputes that finding. As currently drafted, the guidance document would suspend all funding to that entity until the disputed funds have been repaid or the dispute has been otherwise resolved. The guidelines should provide a mechanism for resolution of such disputes such as mediation or arbitration before imposing a freeze on all CIAP grants held by the entity. (Texas General Land Office)

4.4. Incurring Costs Before Plan Approval:

No comments received.

4.5. Escrow Account:

1. **Need clarification on amount of funding that can be drawn down in advance.** The guidance document should clarify the amount of funding an entity may draw down in advance. Clarification on the treatment of interest earned on escrowed funds should also be provided. (Texas General Land Office)

4.6. Sub-Grants and Project Funding:

1. **Need better mechanism for including projects not submitted with state plan.** The requirement that sub-grants and their projects be explicitly described in the state plan may be cumbersome and make it difficult for the development of new projects for the program. A mechanism to include new projects not identified at the time the state plan is developed and submitted should be provided. The addition of new projects should not require a full amendment to the state plan. (Coastal Bend Bays and Estuaries Program)
2. **Clarification needed on project location and sub-grantee identification.** Additional information or clarification should be provided on the following: Does a state plan have to identify sub-grantees and their projects to make them eligible for funding? Sec. 4.6 provides that all projects do not have to be undertaken solely within the coastal zone. May the governor or state administrator of the state CIAP program limit CIAP projects to the state's coastal zone? (Sidney McClendon)
3. **Geographic location of CIAP projects**
 - a. Because of the many types of infrastructure, such as roads, tank farms, pipelines and industrial development, that support and result from OCS activities, granting states the latitude to use CIAP funds outside the state's coastal zone should be maintained in the final guidance document. (Texas Parks and Wildlife Department)
 - b. While some flexibility should be granted regarding the geographic location, projects should be limited to those in coastal counties with a direct coastal nexus such as improvement of coastal water quality. (Texas Commission on Environmental Quality)

4.7. Time Limitation of Funding:

No comments received.

5. CIAP Plan:

No comments received.

5.1. Plan Submittals:

1. **The guidance document should provide clarification for the requirements of the “draft” plan and the “final” plan.** It is unclear whether a final plan must include any substantive elements not required in the draft plan and whether a final plan could be submitted without the prior submission of the draft plan. The term “draft” should be replaced with “proposed” in reference to the first plan submission. The “proposed” plan will be released for public comment and MMS review and the “final” plan will be the version incorporating the state’s response to comments. Additional information on the timeframe for an MMS response to the submission of a proposed state plan is needed. Additional information is also needed on the amount of time a state will have to submit a final plan following MMS’ review and response to the proposed plan. (Texas General Land Office)
2. **MMS should not accept final state plans prior to January 1, 2007.** Citizens and private organizations will need additional time to understand the requirements of the CIAP program and learn of the program’s provisions and details. (West Galveston Island Property Owners Association, Galveston County Beach Erosion Task Force)

5.2. Plan Required Components:

No comments received.

5.2.1 Designated State Agency:

1. **Designate Coastal Land Advisory Board as CIAP lead.** The Coastal Land Advisory Board should be designated the lead state agency for Texas CIAP implementation and administration. (West Galveston Island Property Owners Association, Galveston County Beach Erosion Task Force)

5.2.2. Designated Contact for Subdivision:

No comments received.

5.2.3. Governor’s Certification of Public Participation:

No comments received.

5.2.4. Coordination with Other Federal Resources/Programs:

No comments received.

5.2.5. Plan Implementation Program:

No comments received.

5.2.6. Proposed Project Lists:

No comments received.

5.2.7. Proposed Project Descriptions:

No comments received.

5.3 Minor Changes and Amendments to a Plan:

1. **Need clarification on process for minor changes to state plans.** Clarification is needed on the process that will be followed in cases when a state submits a minor change, but MMS determines a plan amendment is needed instead or otherwise objects to the submission. Clarification of how MMS will inform the designated state agency of the approval of a minor change submission is also needed. Clarification is needed that the submission of a Tier 2 project listed on the state project list will, in all instances, be a minor change. Clarification should be provided that the addition or removal of any project to the project list, including a previously unlisted Tier 2 project, is a plan amendment. (Texas General Land Office)

5.3.1 Minor Changes to a Plan:

1. **Minor change example confusing.** Example 2 of minor changes would be more understandable if it simply referred to the movement of projects between Tiers 1 and 2 as minor amendments. (National Wildlife Federation)
2. **Additional information needed on making changes to project funding.** Additional information is needed on whether the guidelines will establish a dollar value or percentage limit on changes to the total amount of individual project funding and the ability of the designated state agency to transfer funds among projects. (Sidney McClendon)
3. **Need clarification on budget amendments.** Clarify that budget amendments of up to 10 percent of an individual grant will be considered a minor change and provide additional guidance to what extent will minor changes to grants be considered amendments or minor changes to plan. (Texas General Land Office)

5.3.2 Amendments to a Plan:

1. **Confusing example.** Example 2 of the amendments would be more understandable if it simply referred to an addition or removal of a project from the Proposed Project List. As currently drafted, the example suggests that it is the combination of an addition and a removal that constitutes an amendment. (National Wildlife Federation)

6. CIAP Plan Review and Approval:

1. **Need strengthened appeals process because of vague guidance.** The lack of specificity in the draft guidance makes it difficult to determine if certain projects would qualify for funding under CIAP or would fall within the 23 percent infrastructure limitation. Because of this, MMS should strengthen and formalize the appeals process alluded to in this section and give significant deference to the state during any appeal. (Texas Commission on Environmental Quality)

7. Performance and Financial Reports:

1. **Require semiannual, not quarterly, reporting.** MMS should require semiannual rather than quarterly performance and financial reports to reduce the administrative costs to states. (Texas General Land Office)

8. CIAP Plan Compliance with Authorities:

No comments received.

8.1. Environmental Review:

1. **Clarification needed on reimbursements related to permitting costs.** Clarification is needed on the circumstances under which MMS will reimburse funds for permitting costs prior to the issuance of final permits for a project. In addition, MMS should provide additional information listing the categories or types of projects that will be assigned to three National Environmental Protection Act categories: categorical exclusion, Finding of No Significant Impact or further environmental review. (Texas General Land Office)

8.2. Consistency for Federal Assistance:

1. **Clarification needed on whether MMS approval of plan is subject to CMP consistency review.** Clarification is needed on whether MMS approval of a state's final plan is a federal agency activity requiring a federal consistency determination that a state coastal management agency must concur with or object to. The commenter suggests the federal Coastal Zone Management Act would require a consistency determination upon the decision to provide federal assistance for a particular project, not for approval of the state CIAP plan itself. Suggested language is provided in the comments from the Texas General Land Office. (Texas General Land Office)

Appendices A. – F.

No comments received.