

MEMO

RE: FREEPORT/MOSAIC SETTLEMENT AGREEMENT

DATE: April 8, 2021

Background

Over the last decade, coastal Louisiana parishes have filed a total of 42 lawsuits against more than 200 energy companies. The parishes allege that the defendants' federally authorized oil and gas exploration and production activities caused coastal land loss. Defendants named in these lawsuits range from major oil and gas companies like Freeport, Chevron, and BP, to dozens of smaller operators.

In March 2021, Louisiana Attorney General Jeff Landry announced that he agreed to the terms of a settlement proposed by one of the defendants, Freeport McMoRan. The Freeport settlement purports to provide \$100 million in funds paid over 20 years. It calls for three initial payments totaling \$23.5 million (Y1: \$15M, Y2: \$4.25, Y3: \$4.25) to be placed in a Coastal Zone Recovery Fund for coastal restoration projects that will generate environmental credits, the sale of which will be used to offset Freeport's remaining \$76.5 million obligation. **However, the agreement is designed such that Louisiana's coast could see little of the money from the settlement.**

This session, the Legislature will be asked to consider bills (SB 233 & HB 569) establishing the framework for the Coastal Zone Restoration Fund and the environmental credit scheme. The proposals only guarantee that 60% of the funds will be dedicated to the Coastal Master Plan. The remainder of the funds, to the extent they materialize, could be used for pet projects within the settling parishes. Further, Freeport's entire initial payment of \$15 million could be used by the state to indemnify private parties for damage to property and natural resources.

Attorneys involved in the litigation have stated that it is their hope that the Freeport settlement will bring other defendants to the bargaining table.¹ Parties like Freeport can walk away from these questionable claims for pennies and trial lawyers will eventually collect their fee, but there's no guarantee the coast will benefit. Louisiana's Legislature should not endorse settlements that amount to an ATM for trial lawyers.

Parties to the Agreement:

- Participating Parishes
- State of Louisiana (Attorney General Jeff Landry and DNR Secretary Tom Harris)
- Freeport/Mosaic

"Participating Parishes" include Plaintiff and non-Plaintiff parishes.

Plaintiffs: Plaquemines, Cameron, Jefferson, St. John the Baptist, Vermilion, St. Bernard

Non-Plaintiffs: Iberia, St. Mary, Terrebonne, Lafourche, St. Charles, St. Martin

¹ Melinda Deslatte and Kevin McGill, Louisiana AG backs \$100M deal in Freeport McMoRan coastal damage suit. Insurance Journal, March 5, 2021, *available at* <https://www.insurancejournal.com/news/southcentral/2021/03/05/604118.htm#:~:text=Attorney%20General%20Jeff%20Landry%20has,could%20become%20a%20landmark%20agreement.&text=The%20settlement%20already%20had%20the%20backing%20of%20Democratic%20Gov.>

Plaintiff Parishes are represented by John Carmouche.² The 6 additional parishes are included, per Carmouche, because they have prepared a damage model in case of a settlement. St. Mary, St. Martin, and Iberia parishes are represented by Jones Swanson Huddell & Garrison.³ All 12 participating parishes must agree to the settlement for it to take effect.

Settlement Terms

- Freeport/Mosaic Parties agree to pay \$100 million in the aggregate into a Coastal Zone Restoration Fund.
 - The payment schedule, attached as Exhibit E, calls for an upfront payment of \$15 million, and yearly payments of \$4.25 million from 2023 through 2042.
 - After 2024, when \$23.5 million cash has been paid into the Fund, Freeport could be reimbursed for its payments with revenue generated from the sale of credits. The agreement anticipates that the environmental credit scheme will be operational by 2024. (Exhibit E, 3(a)-(e).
 - Per the agreement, payments to the fund are to be invested in coastal restoration projects, which will be designed to generate environmental credits that can be used to reimburse payments to the Freeport/Mosaic Parties. (Exhibit E, (1)).
 - Freeport’s entire \$100 million obligation could be reimbursed through the sale of credits. (Exhibit E, (3)(e)).
- The Freeport/Mosaic parties will be dismissed with prejudice from the litigation upon payment of the initial \$15 million. (MOU 3, III. E., Dismissal of Litigation and Release of Claims)
- Freeport’s payment obligations beyond the initial \$15 million are terminated if:
 - Participating Parishes/State abandon efforts to establish the Fund; or
 - Legislation to establish the fund is not passed by the 3rd anniversary of the Effective Date of the settlement. (MOU 3, III D. Termination of Payment Obligations)
- The settlement resolves the Freeport/Mosaic Parties’ potential liability for future private landowners’ claims for damage to property and natural resources. (MOU 2)
 - Requires the Fund to indemnify Freeport up to \$15 million (the amount of Freeport’s initial investment) for judgments asserted against Freeport/Mosaic by private landowners in the operations areas. (MOU 7, L. Landowner Claims).
- The Freeport/Mosaic parties are entitled to certain “favored party” provisions in recognition of the fact that they were first to settle and establish the Fund:
 - The Freeport/Mosaic Parties shall receive preferential payment from the sale of environmental credits.
 - Freeport/Mosaic is indemnified from claims made by co-defendants against Freeport and against the state for private landowner claims.
 - Freeport/Mosaic Parties shall not be responsible for payment of or contribution to attorney fees for Participating Parishes or the State in connection with this Litigation.

Proposed Coastal Zone Recovery Fund Legislation

Two substantially similar bills proposing the framework required by the settlement were filed for consideration during the 2021 Regular Session, SB 233 and HB 569. These bills create the Coastal Zone Recovery Authority (CZRA) within the office of the governor, provide for the CZRA’s executive board

² A judge will determine the fee owed to plaintiffs’ counsel. See Tyler Bridges, Coastal lawsuit settlement with Freeport-McMoran delayed; will go to parishes in February, lawyer says. The Times Picayune, Jan. 17, 2020, available at https://www.nola.com/news/environment/article_7aa8977c-38bd-11ea-b2cf-634a6f97adfe.html

³ *Id.*

membership and responsibilities, establish a permanent trust fund in the state treasury, and create subaccounts for the fund.

Both bills grant broad authority to the CZRA board to implement the settlement agreement. Of particular interest, the legislation grants the board sweeping authority to establish guidelines, rules, and regulations for the environmental credit bank program, including assigning value to the credits.

The bills provide for the creation of four accounts within the Coastal Zone Recovery Fund.

1. Coastal Master Plan Integrated Coastal Protection Account
 - 60% of the funds are allocated to this account.
 - Funds in this account are to be used to implement integrated coastal protection projects and programs in the coastal master plan.
 - In turn, these projects generate environmental credits.
2. Restoration, Protection, and Remediation Account
 - Bills are silent as to percent allocated to this fund.
 - Funds shall be used for restoration, protection, and remediation projects consistent with the coastal master plan.
 - These projects also generate environmental credits.
3. Resilience Account
 - Bills are silent as to percent allocated to this fund.
 - Funds shall be used for projects that increase the capacity of individuals, communities, and systems to survive and adapt against the impacts of weather disasters and coastal land loss.
 - Resilience projects can include:
 - Roadways, including evacuation routes and industry access corridors
 - Hardening and adaptive measures for key industry and community assets
 - Establishment of pipeline corridors
 - Utility upgrades—stormwater, sewer, electrical, telecommunications utilities
 - Non-structural risk reduction measures.
4. Land Rights Account
 - Bills are silent as to percent allocated to this fund.
 - Funds are to be used to acquire access rights, rights of use, servitudes, or easements and to settle potential private landowner claims, per the terms of the private settlement agreement.

Environmental Credit Generation

Profits from the sale of environmental credits could be used to reimburse Freeport for its entire \$100 million obligation. Freeport's initial payment of \$23.5 million can be considered seed money to fund projects pursuant to Coastal Master Plan Integrated Coastal Protection Account and the Restoration, Protection, and Remediation Account. The projects funded by those plans create environmental credits which can be sold to generate the remaining \$76.5 million of Freeport's obligation under the settlement.

As discussed above, both bills proposed this session grant the CZRA broad authority to create the environmental credit program, including the authority to assign value to the credits. A document outlining potential future market crediting opportunities that could be used to create and sell environmental credits is attached as Appendix A to the Conceptual Framework document provided with the MOU. The drafters discuss the environmental credit projects established in the U.S., including market potential and market

limitations for each. For the most part, the limitations outweigh the banks' potential as credit-generating opportunities.

Furthermore, studies show that environmental credit generating schemes fail to deliver on their promises of creating revenue and reducing environmental harm. For example, a similar scheme in California delivered only \$8.2 million of an expected \$600 million in credit sales associated with a high-speed rail.⁴ A study of the Regional Greenhouse Gas Initiative, a cap-and-trade program for nine northeastern and mid-Atlantic states that promised to cut carbon dioxide emissions from power plants by 30% from 2020 levels by 2020, confirmed that carbon emissions in the participating states were reduced at the same rate as emissions in non-participating states.⁵

⁴ Patrick J. Michaels, California's cap-and-trade train wreck. March 17, 2017, *available at* <https://www.cato.org/commentary/californias-cap-trade-train-wreck>

⁵ Institute for Energy Research, Is the regional greenhouse gas initiative having an impact? September 19 2017, *available at* <https://www.instituteforenergyresearch.org/uncategorized/regional-greenhouse-gas-initiative-impact/>