

Promise, Purpose, and Challenge: Putting the RESTORE Act into Context for the Communities and Ecosystems of the Gulf of Mexico

A Report of the Tulane Institute on Water Resources Law and Policy^{1,2}

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The RESTORE Act presents an historic opportunity to invest in the revitalization of the Gulf of Mexico ecosystem on an unprecedented scale. The Act also can provide support for spurring economic recovery for a region hit hard by the BP *Deepwater Horizon* spill of 2010. Though much remains uncertain about how the Act will be funded and put to use, enough is clear to take stock of what the Act can do, what it will not do, and how affected communities and stakeholders might best engage the RESTORE Act process to ensure it fulfills its promise of a revitalized Gulf of Mexico.

Given the unprecedented nature of the RESTORE Act and the hopes and expectations that many have for the Act, it is important to keep in mind what the Act will not and cannot be expected to do. Simply put, the Act does not address, much less solve, the deep ecologic challenges facing the Gulf of Mexico and its associated coastal ecosystems. Nor does it address the longstanding challenges to the sustainability and resilience of the communities of the region, many of which are tied to past and projected environmental trends in the coast and the Gulf. The Act can certainly improve conditions and create greater possibilities for the future, but it will take much more than RESTORE Act dollars to create the intellectual, civic, and financial capacity to achieve the goal of a Gulf and coast that are ecologically, culturally, and economically vibrant and sustainable.

Indeed, it is far more certain that the challenges of participating in the RESTORE Act process—which will stretch on for some years—and ensuring that the Act in fact lives up to its promise will put new demands on communities and stakeholders that the Act does not meet in any way. Those demands and the broader demands of creating sustainable communities and environments will likely have to be met by the sort of civic, academic, and philanthropic investment that helped make the RESTORE Act a plausible public investment.

¹ Principal authors: Mark Davis, Director of the Tulane Institute on Water Resources Law and Policy; Chris Dalbom, Research Fellow; and Marisa Escudero, Research Fellow.

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Clean Water Act fines and civil penalties are just one of several public revenues streams flowing from the Deep Water Horizon but they are the only source of funding covered by the RESTORE Act. Criminal penalties under the Clean Water Act and the cost of restoring natural resources damaged by the spill under the Natural Resource Damage Assessment (NRDA) will also provide additional sums that can address the ecologic impacts of spill. Criminal settlements with BP and Transocean Ltd. have resulted in \$2.55 billion being committed to the National Fish and Wildlife Foundation (NFWF) for natural resource restoration projects in the five Gulf States, half of which is earmarked for barrier island and river diversion projects in Louisiana³.

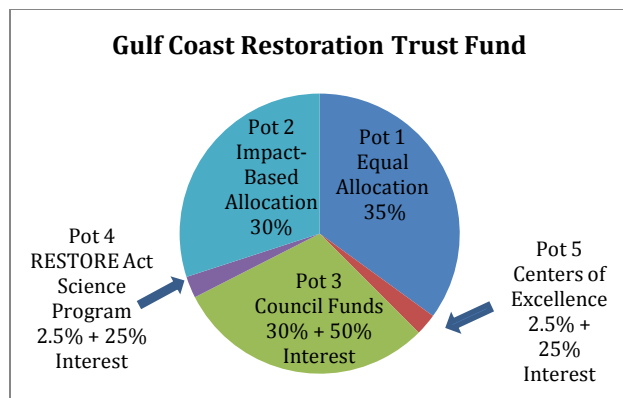
The NRDA process is normally conducted separately from the assessing of fines and penalties. NRDA is not a penalty and is aimed solely at restoring spill damaged resources and compensating the public for any loss of use of those resources. The NRDA process is science driven and controlled by the state and federal agencies charged with being trustees of those resources, often with active participation of the spiller. Under the best of circumstances this process can take years to play out and is largely conducted out of public view. And these are hardly the best of circumstances, so it is unclear just how the NRDA will be played out.

It is important to keep in mind that the RESTORE Act is just one of several moving parts in the *Deepwater Horizon* process and that the pieces will need to be tracked and coordinated by everyone involved. This is new territory for everyone, and patience, persistence and a strong sense of public spirit will be required to see this through to any sort of happy end.

Purpose and Structure. The purpose of the RESTORE Act is to redirect 80% of any Clean Water Act civil and administrative penalties assessed as a result of the *Deepwater Horizon* blow out and spill. The premise for this unprecedented redirection of fines and penalties away from the Federal Government to the Gulf States is the vast scope and scale of the injuries to the natural resources, cultures and economies of the five Gulf States. The bill seeks to implement recommendations by the White House Oil Spill Commission and the Secretary of the Navy, Ray Mabus, who was directed by the President to develop recommendations for responding to the *Deepwater Horizon* catastrophe.

³ In the case of Transocean, these funds are to be paid to NFWF over a two year period under the terms of the plea agreement. Under the terms of its plea agreement, BP shall pay \$2.4 billion to NFWF over a five year period. In both cases, the use of funds in Louisiana is intended to remedy harm to resources where there has been injury to, or destruction, loss, or loss of use of those resources resulting from the spill. The potential for overlap or duplication with the Natural Resource Damage Assessment will necessitate careful coordination between NFWF, the State of Louisiana and the NRDA trustees to avoid the undesirable effect of either NFWF or the NRDA limiting the reach and impact of the other.

The amount of funds at stake is not settled and will depend on the outcome or settlement of the ongoing litigation between the United States and BP and the other Deep Water Horizon defendants. On the high but not necessarily probable end, the figure could be up to \$20 billion⁴. The lower end of the range, which as speculated by some to be as low as \$5 billion, is harder to peg since it is a function of disputed spill volumes, disputed levels of negligence, and the settlement strategies of the various parties.



Whatever the ultimate sum is, any redirected monies would be deposited in a special Gulf Coast Restoration Trust Fund (Trust Fund) at the Department of the Treasury. Trust Fund dollars are divided into five separate pots to be disbursed in the manner prescribed by the Act subject to procedures developed by the Department of the Treasury (in consultation with the Secretaries of Commerce and the Interior).

Those procedures will be generally applicable to all distributions from the Trust Fund and shall include, at a minimum:

1. Procedures to assess whether the programs and activities funded by the Trust Fund, including those carried out by Gulf States and coastal political subdivisions comply with “applicable requirements”⁵ which could include not only those set forth in the Act but other laws and regulations such as the Administrative Procedures Act, the National Environmental Policy Act and others.
2. Auditing requirements to ensure that funds are spent as intended⁶.
3. Procedures for identifying and allocating funds to pay the costs of administering the Trust Fund⁷.

The Treasury procedures were to be released within 180 days after the adoption of the Act, after previous public notice and comment. The 180th day was January 17, 2013. Those procedures have yet to be published for review and comment. Given the circumstances that should not be surprising, but until they are promulgated no funds can flow from the Trust Fund for any purpose, except possibly for administrative expenses.

⁴ Based on a spill volume of 4.9 million barrels less 810,000 barrels of recovered oil times the maximum penalty of \$4,300 for gross negligence.

⁵ Section 1602 (e)(1).

⁶ Section 1602(e)(2).

⁷ Section 1602 (e)(3).

Pot 1. State and Local Allocation. Thirty-five percent (35%) of the amounts received by the Trust Fund will be divided among the five Gulf States in equal shares to spend on “eligible activities”⁸ for the ecological and economic restoration of the Gulf Coast Region (GCR).⁹ The GCR is defined to include the “coastal zones” of the Gulf States as defined in the Coastal Zone Management Act (CZMA) plus any lands, waters or watersheds that are within 25 miles of those coastal zones, and all federal waters of the Gulf.¹⁰

In Louisiana, 70% of its allocation will go to the State via the Coastal Protection and Restoration Authority.¹¹

Thirty percent (30%) will go to parishes in the coastal zone as defined in the CZMA according to an allocation formula in the Act.¹²

In Florida 100% of the funds will go to counties, with 75% going to the 8 counties that were disproportionately impacted by the *Deepwater Horizon* spill. The remaining 25% will go to the other “nonproportionately impacted” counties.¹³

As a condition of receiving Pot 1 funds, a Gulf State or coastal political subdivision¹⁴ must

1. Agree to abide by any conditions imposed by the Treasury¹⁵.

Projects/Programs must satisfy these requirements to obtain certification and receive Pot 1 Funds:

- Designed to restore & protect the natural resources, ecosystems, fisheries, marine & wildlife habitats, beaches, coastal wetlands, or economy of GCR
- Carries out one or more Eligible Activities or Tourism/Seafood Promotion
- Selected after public participation
- If a natural resources protection or restoration project, it is based on best available science.

⁸ These “eligible activities” are defined in Section 1603(3). Sec. 1603 of 112 PL 141 amends Section 311 of the Federal Pollution Control Act (33 USC 1321). Subsection (3) of Sec. 1603 adds subsection (t) to 33 USC 1321. For consistency’s sake, references to 33 USC 1321(t) will be cited as Sec. 1603(3).

⁹ Sec. 1603(3)(1)(A).

¹⁰ Sec. 1603(1)(C)(33).

¹¹ Sec. 1603(3)(1)(D) (i)(1) and (F)(ii).

¹² Sec. 1603(3)(1)(D)(i)(II).

¹³ Sec. 1603(3)(1)(C).

¹⁴ This is an example of the potential for confusion created by the variety of terms used in the Act when referring to the rights and duties of local governments under the Act. A literal reading of the Act would suggest that local governments with a coast line contiguous with Gulf (i.e., “coastal political subdivisions”) are required to meet these conditions whereas the Act provides for distributions to parishes and counties in the coastal zone, a term that in both Louisiana and Florida extends well beyond those subdivisions contiguous to the Gulf. It seems inconceivable that the Act intended those political subdivisions to be exempt from the conditions and oversight imposed on “coastal political subdivisions”.

¹⁵ Sec. 1603(3)(1)(E).

2. Develop and submit a multiyear plan of projects and activities to be funded by the Trust Fund (The Act does not specify whether this plan is to be submitted to the Treasury or the Gulf Coast Council¹⁶. It is hoped that the Treasury’s procedures will clarify this). In Louisiana, it is clear that the 2012 Master Plan for Coastal Protection and Restoration will be the basis for this plan, but it remains to be seen whether it would need additional refinement to comply with project use, milestones and projected completion dates to satisfy this requirement.
3. Certify that the projects or activities to be funded are for one of the ecologic or economic purposes allowed in the Act, that they were selected based on “meaningful public input”, based on the best available science (in the case of a natural resource protection or restoration project), and in compliance with applicable state and local contracting and bid laws¹⁷.
4. In the case of Louisiana only, coastal political subdivisions¹⁸ must also certify to the Governor that the parish has a comprehensive land use plan (albeit without any guidance from the Act as to what the nature or status of that land use might be)¹⁹.

The multiyear implementation plan *may* include the following:

- Milestones
- Projected completion of each activity
- Mechanism evaluating success rate for helping restore and protect GCR

The issuance of these procedures and the compliance with the various conditions will take a fair amount of time, so no one should be expecting dollars to either flow into or out of the Trust Fund imminently.

Pot 2. Gulf Coast Ecosystem Restoration Council Allocation. Thirty percent (30%) of the Trust Fund, plus 50% of the interest earned by the Trust Fund, will be given to the Council for distribution for projects and programs that would restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, coastal wetlands, and economy of the Gulf Coast.²⁰ Using the best science the Council is charged with developing a proposed comprehensive plan (within 180 days after enactment and public review and comment)²¹ and

¹⁶ Sec. 1603(3)(1)(E).

¹⁷ Sec. 1603(3)(1)(E).

¹⁸ This is another example of the potential for confusion created by the variety of terms used in the Act when referring to the rights and duties of local governments under the Act. A literal reading of the Act would suggest that local governments with a coast line contiguous with Gulf (i.e., “coastal political subdivisions) are required to meet these conditions whereas the Act provides for distributions to parishes and counties in the coastal zone, a term that in both Louisiana and Florida extends well beyond those subdivisions contiguous to the Gulf. It seems inconceivable that the Act intended those political subdivision to be exempt for the conditions and oversight imposed on “coastal political subdivisions”.

¹⁹ Sec. 1603(3)(1)(D).

²⁰ Sec. 1603(3)(2)(B)(i).

²¹ Sec. 1603(3)(2)(D)(i). This plan was released on January 29, 2013, twelve days after the close of the 180 period.

then an initial five-year Comprehensive Plan for achieving those ends by July 6, 2013.²² That plan is to be updated every five years.²³

As part of the Comprehensive Plan, and subject to available funding, the Council is required to prioritize projects for the first three years on what appears to be an exclusively environmental basis, including albeit measures that better allow those ecosystems to support robust economies and assisting in mitigating or adapting to the impacts of climate change²⁴. It is not clear what priorities, if any, would apply to years four and five of the plan.

The Council must always consider Best Available Science when selecting project/program.
Best Available Science is science that

- Maximizes the quality, objectivity, and integrity of information, including statistical information
- Uses peer-reviewed and publicly available data AND
- Clearly documents and communicates risks and uncertainties in the scientific basis for such projects

Initial Comprehensive Plan Pot 2 Restoration Priorities for the First Three Years:

- Projects/programs making the greatest contribution to restoring & protecting natural resources, ecosystems, fisheries, marines and wildlife habitats, beaches and coastal wetlands of GCR
- Large-scale projects and programs that would *substantially contribute* to restoring and protecting natural resources, ecosystems, fisheries, marines and wildlife habitats, beaches and coastal wetlands of GCR
- Projects contained in existing state comprehensive plans for the restoration and protection of natural resources, ecosystems, fisheries, marines and wildlife habitats, beaches and coastal wetlands of GCR
- Projects that restore long-term resiliency of the natural resources, ecosystems, fisheries, marines and wildlife habitats, beaches and coastal wetlands *most impacted by the Deepwater Horizon oil spill.*

²² Sec. 1603(3)(2)(D)(ii)(I).

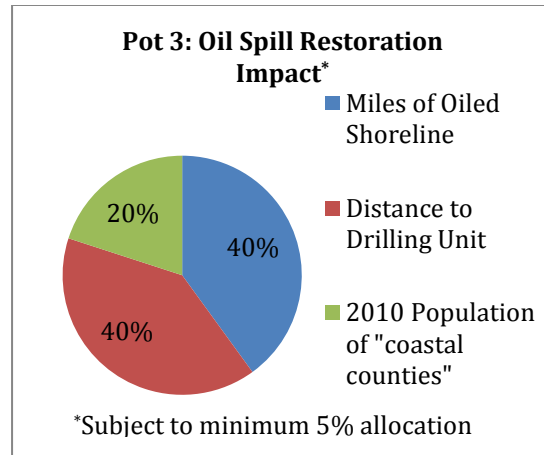
²³ Sec. 1603(3)(2)(D)(ii)(V).

²⁴ President Barack Obama, Executive Order 13554, October 5, 2010.

Pot 3. Oil Spill Restoration Impact

Allocation. Thirty percent (30%) of the Trust Fund is to be distributed to the Gulf States for projects, programs, and activities to improve the ecosystems or economy of the GCR.²⁵

These allocations are to be based on a formula that factors in the proportionate amount of a State's shoreline that was oiled in the *Deepwater Horizon* spill (40%), the distance of a State's oiled shoreline from the *Deepwater Horizon* rig (40%), and the average population of a State's coastal counties (and one would presume coastal parishes)—however that term is ultimately defined (20%).²⁶



To receive these funds, a State must submit a plan to the Council that explains how it will spend the funds. Presumably, this could be the same plan as that developed for Pot 1, though that Pot 1 plan need not reference the Council's Comprehensive Plan. These funds can be used to fund any project, program, or activity that:

1. Is eligible for funding under Pot 1.
2. That contributes to the overall economic and ecologic recovery of the Gulf Coast.
3. Takes into consideration, and is consistent with, the goals and objectives of the Council's comprehensive plan.²⁷

The Act does not make clear just what the term "overall health of the Gulf Coast" means, but it presumptively must mean that the projects need to have a broader impact than would be required under Pot 1, otherwise the requirement would be meaningless.

A State may not use more than 25% of its funds from this Pot for infrastructure projects unless it can show that ecosystem restoration needs in the State would be met by that infrastructure or that the additional investment is needed to actually mitigate impacts of the *Deepwater Horizon* spill on the ecosystem or economy.²⁸

In Louisiana, where the Coastal Protection and Restoration Authority is the designated developer of the State plan, the 2012 Master Plan for Coastal Protection and Restoration will certainly be the basis for the plan required for this Pot by the Act.

Pot 4. Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology Program. Two and a half percent (2.5%) of the Trust Fund is to be used to establish the Gulf

²⁵ Sec. 1603(3)(3)(B)(i).

²⁶ Sec. 1603(3)(3)(A)(ii).

²⁷ Sec. 1603(3)(3)(B)(i)(I-III).

²⁸ Sec. 1603(3)(3)(B)(ii).

Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology Program (RESTORE Act Science Program).²⁹ Additionally, 25% of the income generated by the Trust Fund's interest will also help fund this program. The Administrator of the National Oceanic and Atmospheric Administration (Administrator), in consultation with the Director of the US Fish and Wildlife Service (Director), was required to, and did, establish the RESTORE Act Science Program within 180 days after the Act's enactment.³⁰ In carrying out this program, the Administrator and Director shall consult with both the Regional Gulf of Mexico Fishery Management Council and the Gulf States Marine Fisheries Commission (Commission).³¹ During each fiscal year, the funds made available for the program may be transferred to the Commission for the purpose of establishing a Gulf of Mexico fisheries monitoring and research program.³²

The purpose of the RESTORE Act Science program is research, observation, and monitoring that ensures the long-term sustainability of the Gulf's ecosystem, fish stocks and habitats, and recreational, commercial, and charter fishing. The program sunsets once all allocated funds are spent. Funds may be spent each fiscal year on the following:

1. Marine and estuarine research.
2. Marine and estuarine ecosystem monitoring and ocean observation.
3. Data collection and stock assessments.
4. Pilot programs for fishery independent data and reduction of exploitation of spawning aggregations.
5. Cooperative research.

Any and all marine, estuarine, aquaculture and fish species in State and Federal waters of the Gulf of Mexico are eligible. However, priority is given to integrated, long-term projects that both build on related research activities and address the present and future information needs of marine ecosystem, fishery, or wildlife management.³³ Duplication of research and other projects is not strictly forbidden but discouraged.³⁴ The Administrator shall consult with the Director and develop a plan to coordinate the projects and activities among this program, existing Federal and State science and technology programs in the five Gulf Coast States, and the centers of excellence established by the RESTORE Act.³⁵

In general, no more than three percent (3%) shall be used for administrative purposes.

Additional restrictions preclude spending funds on the following:

1. Existing or planned research led by the National Oceanic and Atmospheric Administration (NOAA), unless grant recipient agrees in writing.

²⁹ Sec. 1604 (h).

³⁰ Sec. 1604(b)(1).

³¹ Sec. 1604(b)(4).

³² Sec. 1604(b)(3).

³³ Sec. 1604(d)(1)-(2).

³⁴ Sec. 1604(e).

³⁵ Sec. 1604(f).

2. Implementing existing regulations or initiating new regulations promulgated by NOAA.
3. Developing or approving a new, limited access privilege programs for fisheries under the jurisdiction of South Atlantic, Mid-Atlantic, New England, or Gulf of Mexico-Fishery Management Councils.

Once the funds are available, NOAA and its partners will prepare a detailed program implementation plan. In the interim, the team has developed the following guideline principles:

1. Require an ecosystem approach, considering the entirety and connectivity of the system.
2. Integrate and build on existing research, monitoring, and modeling efforts and plans such as Natural Resource Damage Assessment science; Gulf of Mexico States' Centers of Excellence; Gulf of Mexico Research Initiative; and the Gulf Coast Ecosystem Restoration Strategy; and avoid duplication of effort.
3. Leverage existing partnerships among federal, state, academic, and non-governmental organizations. Develop new partnerships as appropriate.
4. Work within a management and policy framework developed with other entities in the Gulf, including the Fishery Management Council and the Fisheries Commission.
5. Design a scalable and modular approach that adapts to funding availability.

NOAA has identified the following high-level focus areas to guide strategy and funding priorities:

1. "State of health" for the Gulf, incorporating environmental, socio-economic, and human well-being elements and ecosystem indicators, including those for fisheries
2. Integrated analysis and synthesis of data to understand connections and produce policy relevant materials
3. Ecosystem processes, functioning and connectivity to support restoration and fisheries science
4. Holistic, next-generation approaches and tools for observing, monitoring, and data integration including those for fisheries and other natural resources

Funding decisions under this program will be based on three factors. First is scientific excellence, which is determined through peer review. Secondly, funding is based on the relevance to the program's overall mission of research, observation, and monitoring that ensures the long-term sustainability of the Gulf's ecosystem, fish stock and habitats, and recreational, commercial, and charter fishing. The final criterion is stewardship.

Pot 5. Centers of Excellence Grants. Two and a half percent (2.5%) of the total funds made available each year from the Trust Fund and 25% of the interest earned by the Trust Fund are to be made available to Gulf Coast States in equal amounts to award competitive grants to nongovernmental entities and consortia in the GCR (including public and private universities) to conduct research on the GCR.³⁶

³⁶ Sec. 1605(a), Sec. 1604(h), Sec. 1605(c)(1).

Entities or consortia in each state may submit applications for centers of excellence grants to the state "at such time, in such manner, and containing such information as determined by the state."³⁷ In Louisiana, the state's duties will be carried out by the CPRA,³⁸ though it will likely forge a relationship with another organization such as The Water Institute of the Gulf or some other entity with grant-making experience to assist in carrying out the grant program. In the State of Mississippi the Governor has designated a consortium of four state public universities as "the Center of Excellence"³⁹ for purposes of the RESTORE Act though at this time it is not clear exactly how that designation relates to the competitive grant requirement of this Pot. The procedures that the Treasury Department eventually releases could contain provisions setting guidelines and accountability measures for this Pot. Accordingly, it is too early to know with any certainty how the grant program under this Pot will ultimately look.

That said, it is clear that each Gulf Coast State is to award grants giving priority to applicants with the broadest cross-section of participants with interest and expertise in any of these disciplines:

1. Coastal and deltaic sustainability, restoration and protection, including solutions and technology that allow citizens to live in a safe and sustainable manner in a coastal delta in the GCR;
2. Coastal fisheries & wildlife ecosystem research and monitoring;
3. Offshore energy development, including research and technology to improve sustainable and safe development of energy resources in the Gulf of Mexico;
4. Sustainable and resilient growth, economic and commercial development in the GCR;
5. Comprehensive observation, monitoring, and mapping.⁴⁰

Each center of excellence must focus on science, technology, and monitoring in at least one of these listed disciplines.⁴¹

The states will have to report information regarding all grants to the Council annually.⁴² Those reports will include the amount, discipline or disciplines supporting the grant, and recipients of the grants. If a grant is awarded to a consortium, the membership of that consortium must be reported, as well.⁴³

The Act specifies that centers of excellence grants shall be awarded "to entities and consortia in the Gulf Coast Region," but it is unclear whether or not every member of a consortium must be

³⁷ Sec. 1605(c)(2).

³⁸ Sec. 1605(b), referencing Sec. 1603(3)(1)(F).

³⁹ "Gov. Bryant Names Center for Gulf Studies as RESTORE Research Center of Excellence," March 7, 2013, press release. <http://www.governorbryant.com/gov-bryant-names-center-for-gulf-studies-as-restore-research-center-of-excellence/>.

⁴⁰ Sec. 1605(c)(3), Sec. 1605(d).

⁴¹ Sec. 1605(d).

⁴² Sec. 1605(c)(4).

⁴³ Sec. 1605(c)(4)(A).

located in the GCR. Although the Act reads as though these centers may not conduct any research outside of the GCR, it seems unlikely that was the intent of Congress. This is particularly true considering that the Act includes institutions of higher learning as entities eligible for centers of excellence grants, but no university limits its research to the GCR.

Transparency and Public Participation The ultimate success of the RESTORE Act in the Gulf and as a model for future spills will turn in large part on how it is perceived by the public and the degree to which it engages the diverse constituencies that drove its enactment. The RESTORE Act has three areas where it addresses transparency, notice and public comment, and public participation.

1. Transparency

Transparency is discussed only in reference to Council actions that require a vote. The RESTORE Act requires all appropriate actions of the Council, including significant actions and associated deliberations, to be made available to the public via electronic means.⁴⁴ This must be done prior to any vote; however, neither “appropriate” nor “significant” actions are defined in the Act.

2. Notice and Public Comment

The following actions require notice and public comment as outlined in the RESTORE Act. First, the Secretary of the Treasury, in consultation with the Secretary of the Interior and Secretary of Commerce, shall establish procedures necessary to deposit amounts in, and expend amounts from, the Trust Fund after providing notice and an opportunity for public comment.⁴⁵ As noted earlier, those Treasury procedures are still pending.

Second, the publication of the draft and proposed Comprehensive Plans required for Pot 2 are to follow prior public input review and comment.⁴⁶

Although the Council has released its proposed initial Comprehensive Plan, as noted above, it was not done in strict compliance with the true deadlines and public review requirements of the Act. Going forward, the Council has expressed its support for public engagement and promised to post specific meeting times and locations for public engagement on its website: www.restorethegulf.gov. This interactive website will also allow the public to submit comments. Eight public listening sessions have been held by the Council across the Gulf region soliciting input into the Comprehensive Plan. The Council will then review the comments and issue out the initial Comprehensive Plan. Additionally, the Council is responsible for updating the Comprehensive Plan every five years, which will also require notice and public comment.⁴⁷

⁴⁴ Sec. 1603(3)(C)(vi)(IV).

⁴⁵ Sec. 1602. (e).

⁴⁶ Sec. 1603(3)(2)(D)(i)(I).

⁴⁷ Sec. 1603(3)(2)(D)(ii)(V).

3. Public Participation

The RESTORE Act imposes public input duties on the Gulf Coast States, on entities within the states responsible for carrying out duties, and coastal political subdivisions before selecting a program or project that will receive funding. The Act also requires selection to be based on meaningful public input, including broad-based participation from individuals, businesses, and nonprofit organizations.⁴⁸

The RESTORE Act in Practice

Writing and passing legislation is one thing—a hard thing. Successfully and satisfactorily implementing complex legislation like the RESTORE Act is quite another thing—and an even harder thing. At this point, very little of the Act can actually be implemented. Although the settlement between the Department of Justice and Transocean included \$1 billion in civil penalties and should place \$320,000,000 in the Trust Fund by April 22,⁴⁹ no money can be deposited into or disbursed from the Trust Fund until the Department of the Treasury finalizes its procedures. Once the Department of Treasury procedures are completed, money could start to flow into the five pots listed above.

Nonetheless, preparations have begun. In December 2012, as directed by both the RESTORE Act and an executive memo from the White House, the Gulf Coast Ecosystem Restoration Task Force wrapped up its activities and yielded to the newly formed Council.

Although the Council was tasked with developing a proposed comprehensive plan by January 7, 2013 (180 days after enactment and public review and comment), it published “The Path Forward to Restoring the Gulf Coast: A Proposed Comprehensive Plan” on January 29, 2013 without previous public review and comment apart from that done in connection with the Gulf of Mexico Regional Ecosystem Restoration Strategy released in December 2011 by the Gulf Coast Ecosystem Restoration Task Force and the Council’s first meeting in Mobile, AL on December 11, 2012. “The Path Forward” is basically a restatement of what is already set forth in the RESTORE Act for the Comprehensive Plan. However, in addition to incorporating Task Force Strategy goals, as dictated by the Act, “The Path Forward” did take the additional step of adding an economic goal to what the Act states is a “proposed plan to restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region”—a step that has received criticism in some quarters.⁵⁰ The Council, on the other hand, viewed this step as in keeping with the overall aim of creating an integrated approach to Gulf restoration. The fact that the language of the Act lends support to both positions reveals much about the complexities involved in drafting the Act and the differing understandings and

⁴⁸ Sec. 1603 (3)(1)(E)(ii)(III).

⁴⁹ This date is based on language in the Transocean plea agreement stating that the first payment must be paid within 60 days of the date of entry of the plea. That plea was accepted by Judge Milazzo of the Eastern District of Louisiana on February 14, 2013.

⁵⁰ The inclusion of an economic goal in this plan was roundly criticized by a number of national environmental organizations and Senator Mary Landrieu as being in conflict with the intended purposes of the Plan and Pot 2 funding uses. <http://thelensnola.org/2013/01/31/eco-vs-econo-11th-hour-dispute-over-plan-to-spend-20b-in-bp-fines-2/>.

expectations that exist around the Act. Regardless, the real lesson taught by this episode is that the interpretations of the Council will be the ones that determine how the Act will be construed and implemented and that if one wants to reconcile one's views of the Act with the Council it will take engagement with the Council.

Apart from the timing of the Treasury procedures, the substance of those procedures and accountability measures will be essential to understanding how the Act will be implemented. The current silence from Treasury is the biggest source of uncertainty about the Act. Beyond the straight forward tasks of developing procedures for how the Trust Fund dollars will be distributed and accounted for, there are issues of how certain portions of the Act will be interpreted that will go to the heart of how the Act is employed.

For example, the Act directs funds to, and imposes certain duties on, local governments in a number of places, but other than defining "coastal political subdivisions" the Act does not clearly define or reconcile the use of terms such as parishes in the coastal zone, coastal counties, affected counties, disproportionately impacted counties, and nondisproportionately impacted counties. It is no real surprise that with so many drafters involved in crafting the Act that it is not a seamless easy read. But now that it is time to put the Act to work, it will fall to the Treasury, the Department of Commerce and the Council to provide clarifying interpretations that keep faith with the aims of the Act. The Council has stated its intention of producing a draft Comprehensive Plan for public review and comment this spring in order to complete the initial Comprehensive Plan by July 6, 2013, as required by the Act.

In fairness, it has to be noted that it was not easy or perhaps even possible for the Council or the Department of the Treasury to have fully complied with the timetables set forth in the Act. Until the RESTORE Act is funded there were—and are—no funds available to support the administrative effort to draft those plans and procedures. Moreover, the 180 day period coincided with the Presidential election, a fiscal cliff, agency transitions and a budgetary sequestration.

The Path Ahead

The time between now and the first anniversary of the Act will be critical to the formation of the RESTORE Act program and its relationship with the communities of the Gulf and the public at large. Since there is no precedent for this, care, patience, and a strong measure of public input and accountability will be required if the Act as implemented is to match up with the public-spirited aspirations that drove its enactment. If it turns out to be too cumbersome and timid to do ecologic restoration and enhancement work on a scale and pace to matter, it will be a critical opportunity missed. If it becomes essentially an economic development and state/local block grant program it will likely be viewed as a betrayal. If it does good work but loses contact with and the faith of the public it will likely never be replicated—though spills and other disasters certainly will be. And if the Act is perceived as having taken care of the needs of the Gulf region and ecosystem, thus freeing the nation to turn its attention and resources—public, civic, and philanthropic—elsewhere, it will be a failure.

In the best sense of the term, the RESTORE Act is a civic experiment, a noble one. It has great promise but its outcome is hardly certain. It will require constant nurturing and reinforcement from the broad

and unlikely constituency that convinced Congress to enact the Act in remarkably difficult times. The pressures to temper its fundamental mission to restore and enhance the Gulf ecosystem, to expand the uses of RESTORE dollars, and to truncate the role of the public and oversight entities will be immense. Those pressures may be rooted in real needs and good intentions, which will only make the ongoing civic guardianship of the Act more necessary and important.

Meeting this ongoing responsibility will come with community level and civic burdens that the Act will not—cannot—meet. The Act envisions ongoing and robust public engagement, but without the corresponding capacity to engage communities and stakeholders it will not be possible. The Act charts a course for bold and sweeping actions to improve the condition of the Gulf ecosystem and its associated economies, but those actions will bring changes to the communities of the Gulf—good and bad—that the Act is not equipped or even empowered to deal with. Those burdens will fall on others and will lead to continued if not expanded demands on the limited resources of non-governmental organizations, volunteers and philanthropy.

There are also many challenges facing the Gulf and its communities that the Act leaves untouched. Some of those are chronic challenges rooted in history and culture. Some are manifestations of regional, continental or global factors, such as climate change, the management of river systems, and the broader economy.

Ultimately the success of the RESTORE Act depends on the chemistry of purpose, context, and capacity. The path ahead will stretch for years and be influenced by obvious but uncertain events—like the outcome of the pending *Deepwater Horizon* litigation and each new hurricane season—as well as events that cannot be foreseen. But the course that is set in the coming months will be the most critical factor. Success will not just happen, it will have to be earned.

Questions, comments and requests related to this Report should be directed to:

Mark Davis, msdavis@tulane.edu , 504-865-5982