

The New RESTORE Act Regulations, Notice, and Guidelines from Treasury

Co-Hosted by the Environmental Law Institute
& the Tulane Institute on Water Resources Law & Policy

Webinar

August 28, 2014

Passed in 2012, the RESTORE Act directs 80% of civil and administrative Clean Water Act penalties levied in connection with the *Deepwater Horizon* oil spill to restoration and recovery of the Gulf of Mexico region. The monies collected are placed in a Restoration Trust Fund (RTF), and then channeled through five different “pots” of funding. The Treasury Department is tasked with administering the Restoration Trust Fund, and oversees the grants for two pots of funding. In August 2014, Treasury released several important rules and guidance documents relevant to the administration, distribution of funds, and proposal of projects and programs under the RESTORE Act. This webinar featured a panel of experts to provide an overview of these complex and interrelated documents, with special focus on the Treasury Department’s interim final rule for administering the Restoration Trust Fund.¹

MODERATOR:

- **Teresa Chan**, Staff Attorney, Environmental Law Institute

PANELISTS:

- **Jim Muller**, Bay County RESTORE Act Coordinator
- **Chris Barnes**, Legal Advisor, and **Cameron Long**, Special Assistant, Louisiana Coastal Protection and Restoration Authority
- **Sara Gonzalez-Rothi Kronenthal**, Senior Policy Specialist, National Wildlife Federation
- **Mark Davis**, Senior Research Fellow, Tulane University Law School and **Christopher Dalbom**, Program Manager, Tulane Institute on Water Resources Law and Policy
- **Jim McElfish**, Senior Attorney, Environmental Law Institute

Ms. Chan began by giving some background on the RESTORE Act. After explaining the distribution of funding among the five “pots” or processes, Ms. Chan turned to a [cheat sheet](#) drafted by ELI, which provides an overview of some of the documents that were recently released by entities administering the RESTORE funds. The cheat sheet lists each of the documents, and then provides a brief description, lists which pot(s) of money the document relates to, and whether the public can comment on the document. This webinar primarily focuses on the interim final rule released by Treasury.

¹ To access a recording of the webinar, please visit www.eli-ocean.org/seminars.

Mr. Muller began with a presentation on the Florida county-relevant RESTORE Act coordination efforts. In Florida, Direct Component (Pot 1) funds will go directly to 23 Florida counties. In order to help counties, parishes, and states start accessing funds, Treasury set up a grant program on grantsolutions.gov. Eligible entities can start applying for funds after September 15, 2014, with awards becoming available after October 14, 2014. Treasury will provide grant funding to counties, parishes and states to assist in preparation of multiyear implementation plans for Pot 1. Expressing concern that NEPA would slow down the ability of the counties to complete projects, Mr. Muller supported Treasury's indication that NEPA will not be applied by Treasury to the multiyear implementation plans or grants. Mr. Muller noted that there was a 3% limit placed on administrative costs. Treasury's interim final rule, however, has narrowly defined the term to not include planning activities. Awards from Pot 1 can be passed through to sub-recipients. Sub-recipients are not subject to the 3% administrative cap and administrative cost limits will be governed by OMB uniform guidance. Mr. Muller noted that for Pots 1 and 3, plans must be available for 45 days for public comment. For Pot 3, the spill impact component, the affected Florida counties have created a Consortium to develop an expenditure plan, together with six *ex officio* appointees from the Florida governor. It has not yet been decided who will implement the state expenditure plan, and how the projects will be selected. Mr. Muller noted that as long as a project primarily targets the Gulf Coast, some of its processes are allowed to occur outside the region.

Ms. Barnes and Mr. Long then spoke on behalf of the Louisiana Governor's Office of Coastal Activities. Mr. Long focused on Treasury regulations related to Pot 1. Unlike other Gulf states, in Louisiana, 70% of funds go to the state's Coastal Protection and Restoration Authority, while the remaining 30% go directly to the parishes in the coastal zone. In July 2014, Treasury issued a Louisiana-specific proposed rule that specified the allocation of funds to the coastal parishes. Under the RESTORE Act, funds to the parishes are distributed based on a formula: 40% are based upon the weighted average of miles of the parish shoreline oiled, another 40% is based upon the weighted average population of the parish, and the final 20% is based upon the weighted average of the land mass of the parish. The Treasury rules provide a specific allocation for each parish, which will then be applied when funds are distributed from the Restoration Trust Fund. To be eligible to receive funds, the parish chief executive must certify to the Governor of Louisiana in satisfactory form that the parish has completed a comprehensive land use plan. The plan must be consistent with or complementary to the most recent version of the state's coastal master plan. The next step would be for the parish to apply for funds from Treasury using the grantsolutions.gov website. Parishes would use this platform to submit a grant application and multiyear implementation plan to Treasury. Ms. Barnes stated her support for revisions in the interim final rule for Pot 2, which now makes clear that projects solely focused on economic activity are ineligible for grant funds.

Ms. Gonzalez-Rothi Kronenthal focused on the permissible geographic scope and eligible activities for projects under the Treasury regulations. The Gulf Coast region is defined as the coastal zones of each of the five Gulf states under the Coastal Zone Management Act, the adjacent land, water, and watersheds within 25 miles of the coastal zones, and all federal waters. The Coastal Zone Management Act gave states the authority to define their own coastal zones. For Pots 1, 2, and 3, activities are eligible for funding to the extent they are "carried out" in the Gulf Coast region. The interim final rule explains the term "carried out," noting who gets discretion to carry out activities and where the activities must take place. Under Pot 1, the activities would be carried out by the entity applying for the grant, whether that would be a county, state, or coastal parish. Under Pot 2, the Council would carry out the activity. Finally, under Pot 3, the authority would be given to the entity developing the state expenditure plan.

The interim final rule also clarifies the scope of what can be done with the funding streams. The RESTORE Act provides four statutory prioritization criteria for Pot 2, all of which relate to the ecological health and long-term resilience of the Gulf of Mexico. The Treasury proposed rule, however, said that the Council may use funds for both ecological and economic restoration. In the interim final rule, Treasury referred back to the four statutory prioritization criteria and specified the distinction between Pots 2 and 3, reaffirming the prioritization of ecological restoration for Pot 2.

Mr. Davis and Mr. Dalbom began by discussing the creation of Centers of Excellence under Pot 5, and detailed the process, how it's shaping up under current regulations, and where it stands in relation to the interim final rule. The interim final rule clarifies that, in order for states to receive funds, the selection process must be competitive. Additionally, there may be more than one Center of Excellence in each state. Treasury will develop the application and finalize guidelines for the selection process. States must demonstrate that the rules and policies, including the competitive selection process, are published and available for public review and comment for a 45-day period. A number of states have designated a Center of Excellence in advance of the interim final rule. They may be able to maintain their current selections of Centers of Excellence, so long as they can adequately prove to Treasury that the selection process was fair and competitive. Mr. Dalbom recommended that there be more clarification on the selection process in order to avoid conflicts of interest. Mr. Davis stated that there seems to be an inconsistency between the guidance documents that have just been released and the interim final rule. The guidance documents still state that Centers of Excellence must be located in the coastal region, while the rule itself makes no mention of location, and only emphasizes that the work benefits the coastal region.

Mr. Davis also addressed the definition of administrative costs. The interim final rule defines administrative costs more narrowly than the proposed rule; now, administrative costs refer to the costs of general management needed to execute an eligible project. The burden will be placed upon the local government or state to explain why costs are allocated to a program specifically versus allocated to the administration of the program. Mr. Davis asserted that this would benefit the grant recipient, who would be able to make the designation first.

Mr. McElfish then spoke about how the National Environmental Policy Act (NEPA) could be applied to each of the RESTORE pots. NEPA is a fundamental environmental law that requires an environmental analysis to be conducted prior to any major federal action that may significantly affect the environment. It provides a framework for considering alternatives to a proposed action, it can identify mitigation measures to make a project more environmentally sensitive, and it provides an element of public input. NEPA applies to most federal funding programs, including federal grants made to states. NEPA analysis can apply during program set-up, during the submission of a grant or portfolio of projects, or during the project approval and implementation stage.

Mr. McElfish explained that the interim final rule takes the position that the review of multiyear implementation plans or individual grants will not require NEPA review. Treasury does not mandate that a NEPA assessment occur at either the plan level or the project level in order to receive Pot 1 or Pot 5 funding, unless the project requires some other kind of federal permit or license. For Pots 2 and 3, the Council completed a programmatic environmental assessment; it is unclear whether an additional assessment will be made when the funded priorities list is developed. Finally, for Pot 4, NOAA did not provide an environmental assessment for its science framework in 2013, but it has indicated plans to

conduct an environmental assessment for its science plan; it is possible that NEPA will apply statutorily to many individual projects, but NOAA will be able to invoke categorical exclusions.

Condensed Questions & Answers

What changes did the interim final rule make to public participation requirements, and what might that mean for those who are undertaking the commenting process?

Mr. Muller stated that changes made to the public participation requirements would not significantly change Florida's plans, but merely affect the length of time the commenting period is open. Florida has strong public access laws, so all public meetings are advertised online and through email lists. He stated that he advocates for transparency as early in the process as possible. Ms. Barnes noted that the commenting period has increased from 30 days in the proposed rule to 45 days in the interim final rule, but in general, Louisiana's existing public engagement infrastructure allows for robust outreach efforts on an ongoing basis. She went on to state that the Governor's office may supplement some of its outreach efforts for other coastal issues to make them specific to RESTORE.

Regarding NEPA for Pot 1: if Treasury does nothing more than it has done in the draft Treasury NEPA directive, does that treatment make some grant-making decisions vulnerable to challenge?

Mr. McElfish replied that a decision may be vulnerable to challenge if Treasury does not do anything further to define a categorical exclusion. There is one paragraph in the newly released NEPA guidelines that allow Treasury on a case-by-case basis to assert that an activity is not subject to NEPA. These guidelines are open for public comment until October 21st, so the if members of the public want further clarification, they have the opportunity to ask for it.

Do you see any more impediments or steps needed to be taken before RESTORE funds can begin to flow?

Ms. Gonzalez-Rothi Kronenthal spoke about the need for a final funded priorities list to be released by the Council. Beyond just commenting on the interim final rule, the public should ask, at any public commenting forum available, how the Council plans to evaluate projects submitted for funding under Pots 2 and 3. Ms. Barnes said that funds will flow at different times, depending on which Pot they are being dispersed from. Once the Treasury regulations are finalized and the project application process is complete, Pot 1 funds should move relatively quickly. Pot 2 funds will be a little farther behind, as the Council is still developing a funded priorities list. With Pot 3, only planning funds will be released at this time. The rest will not be released until the Council develops an allocation among the five Gulf states. Mr. Muller commented that, since the bulk of the BP money has yet to arrive, it will be a while before the majority of funds will be dispersed. He estimates that it will be about six months before they will have a multiyear implementation plan ready for Treasury. Mr. Davis stated that it is still unclear what the administrative burdens are going to be on the Council for Pot 2. The Council still needs to release some information on how it plans to conduct its business, in addition to releasing a prioritized plan. He also asserted that when looking at the compliance requirements that Treasury has put out for recipients of dollars, it is clear that monies will not flow in a consistent way, as some entities are more prepared than others. He finished by saying that he hoped the Council would be clearer about its own administrative obligations, and not just promulgate regulations.

THIS SEMINAR WAS MADE POSSIBLE BY GENEROUS SUPPORT FROM THE WALTON FAMILY FOUNDATION AND THE NAOMI AND NEHEMIAH COHEN FOUNDATION.