FUNDING *DEEPWATER HORIZON* RESTORATION & RECOVERY: HOW MUCH, GOING WHERE, FOR WHAT?

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Deepwater Horizon *Restoration & Recovery Funds: How Much, Going Where, For What?*
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Cover Image: Central Texas Coast/Jordan Diamond 2013

Introduction

The *Deepwater Horizon* oil spill was an epic environmental, economic, and human disaster. The explosion of the drilling unit itself led to the deaths of 11 rig workers. The release of millions of barrels of oil[1] into the Gulf of Mexico is the largest offshore release in U.S history and it will takes years to see the full extent of the ecological impacts. In the meantime, the Gulf economy has been repeatedly hit by effects on fishing, tourism, and other coastal-dependent activities.

Recovering and restoring the Gulf of Mexico from the injuries caused by the disaster is an astoundingly complex undertaking. The processes that have been initiated to spur the assessment and treatment of various types of harm at various scales of action are accordingly complex. While it is unknown how much will ultimately be spent to recover the Gulf of Mexico from *Deepwater Horizon*, restoration and recovery funds are steadily accumulating from the parties responsible for the disaster. The monies result from mandates and penalties under numerous statutes, including the Oil Pollution Act, Clean Water Act, and Migratory Bird Treaty Act. Who receives the funds and how they must be spent is determined both by the overarching statute and by the manner of resolution.

So far, we know a number of different entities will receive funds. We don't know if additional entities will be added to the list or the total amount each will receive when all is said and done. Perhaps most importantly, because the funds are coming through different channels and carrying varying obligations, we also don't know whether or how spending will be coordinated.

This white paper focuses on the funds that are being distributed to governmental and nongovernmental entities as a result of the *Deepwater Horizon* disaster for regional restoration and recovery activities.[2] It provides background information on the restoration and recovery funds that have been identified and earmarked to date, including funds that will be flowing through the:

- Oil Spill Liability Trust Fund (OSLTF);

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[1] The quantity of barrels of oil discharged into the water is currently being litigated. In 2011, the U.S. Department of the Interior Flow Rate Technical Group estimated 4.9 million barrels had been released from the well, 0.8 million of which had been captured before entering the marine environment. Marcia McNutt et al., *Assessment of Flow Rate Estimates for the Deepwater Horizon / Macondo Well Oil Spill*, Flow Rate Technical Group Report to the National Incident Command, Interagency Solutions Group (Mar. 2011).

[2] It excludes the funds that are being dispersed to individuals and businesses for economic loss or medical claims because those compensatory monies are provided directly to the claimant to be used at his or her discretion.

- North American Wetlands Conservation Fund (NAWCF);
- National Fish and Wildlife Foundation (NFWF);
- National Academy of Sciences (NAS);
- Restoration Trust Fund, created by the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (the "RESTORE Act"); and
- Natural Resource Damage Assessment (NRDA).

After providing background on each of these processes, the paper explores the bigger questions of how these myriad processes fit together and their potential long-term impacts.

I. Restoration and Recovery Funds: Recipients, Purpose, and Process

The following section summarizes the key funding streams and procedures associated with Gulf restoration and recovery. Organized by recipient, each part summarizes what is known to date about the monies each recipient will receive, how they must be spent, and the procedures for expending them.

A. Oil Spill Liability Trust Fund

Overview

Through various settlement agreements, nearly $1.5 billion is scheduled to be deposited into the Oil Spill Liability Trust Fund ("OSLTF") over the next five years. This amount includes: (1) $45 million from MOEX civil penalties; (2) $100 million from Transocean criminal penalties; (3) $200 million from Transocean civil penalties; and (4) $1.15 billion from BP criminal penalties.

The OSLTF was created in 1986, but was not authorized for use until the Oil Pollution Act (OPA) was passed in 1990. Managed by the Coast Guard's National Pollution Funds Center, the OSLTF consists of two funds: the Emergency Fund and the Principal Fund. The Emergency Fund is a $50 million fund used for spill response and to initiate natural resource damage assessments (NRDAs). The rest of its monies comprise the Principal Fund and are used to compensate those harmed by an oil spill when responsible parties cannot pay (or cannot be found) and, when appropriated by Congress, to cover the costs of administering provisions of the OPA.[3]

The OSLTF receives funds from a variety of sources. These sources include a per-barrel excise tax on petroleum, past transfers from previous pollution funds, interest, cost recoveries from responsible parties, and relevant penalties and fines under the OPA, Clean Water Act (CWA), Deepwater Port Act, and Trans-Alaska Pipeline Authorization Act.

To date, each settlement or plea agreement reached with the parties responsible for the spill contains a payment schedule. MOEX's Consent Decree, for instance, called for payment of the

[3] Funded agencies are the U.S. Coast Guard, Environmental Protection Agency, Bureau of Safety and Environmental Enforcement, Pipeline & Hazardous Material Safety Administration, Research and Innovative Technology Administration, Department of the Treasury, Prince William Sound Oil Spill Recovery Institute, and Denali Commission.

$45 million to the United States within 30 days of the trial court's approval, which came in June 2012.[4] Transocean's criminal fines were paid in full within 60 days of the court's acceptance of the agreement on February 14, 2013. Disbursement of the portion of Transocean's civil penalty settlement allocated to the OSLTF, amounting to $200 million plus interest, was triggered when the court approved the partial settlement on February 19, 2013. The Transocean disbursement schedule is as follows: $80 million within 60 days, $80 million within one year, and $40 million within two years.

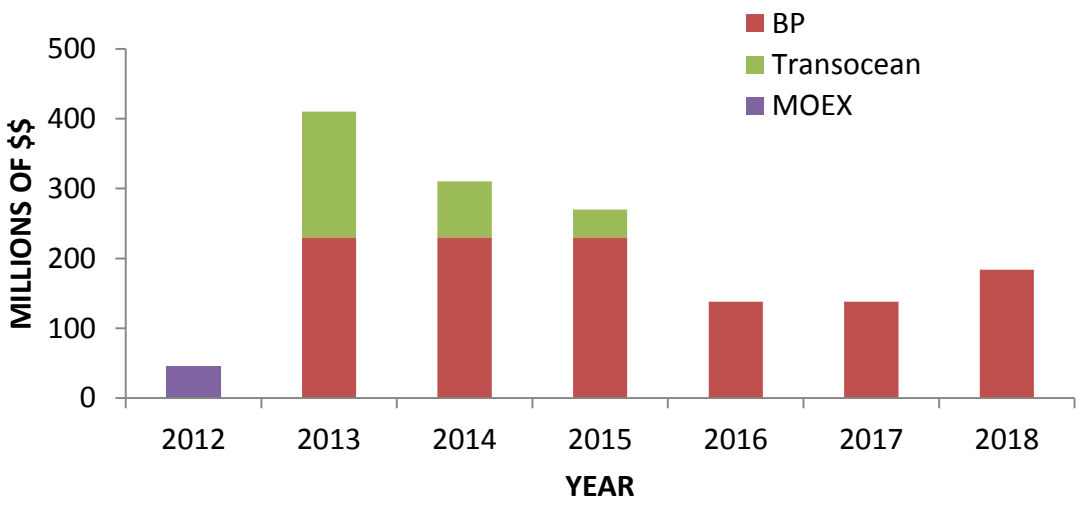
For BP's criminal fines, the disbursement schedule for the funds going to the OSLTF is the same as that for the BP funds going to the North American Wetland Conservation Fund (NAWCF – see next section) and these funds are split on a pro-rata basis (92% to 8%, with the larger share going to the OSLTF). Disbursements started on January 29, 2013. BP must pay $230 million within 60 days, $230 million within one year, $230 million within two years, $138 million within three years, $138 million within four years, and $184 million within five years.

Process

Although the OSLTF is scheduled to receive monies from several sources in connection with *Deepwater Horizon*, it is worth noting that the OSLTF will not be receiving the full extent of funds it would typically receive. This is because the RESTORE Act, passed in July 2012, diverts 80% of any civil and administrative Clean Water Act penalties levied in association with the *Deepwater Horizon* spill away from the OSLTF, and into a Restoration Trust Fund to be used for regional recovery from the oil spill as well as from the impacts of decades of development and other activities (see full discussion of this process *infra*).

[4] Since the settlement was reached before the RESTORE Act was enacted, the total amount of MOEX's Clean Water Act civil fines went to the OSLTF.

Figure 1. Payout of settlement monies to the OSLTF from parties responsible for the *Deepwater Horizon* oil spill



B. North American Wetlands Conservation Fund

Overview

As part of BP's Guilty Plea Agreement with the Department of Justice, the company will pay $100 million to the North American Wetlands Conservation Fund (NAWCF). This payment is the fine related to BP's violation of the Migratory Bird Treaty Act.[5]

NAWCF was created in 1989 by the North American Wetlands Conservation Act, and provides matching grants for wetland conservation projects that "benefit…wetlands-associated migratory birds and other wildlife."[6] Funding comes from four different sources, including fines, penalties, and forfeitures collected for violations of the Migratory Bird Treaty Act. For NAWCF matching grants, the Act requires a non-federal match of value equal to or greater than the federal allocation. Generally, federal sources are not eligible as a match.[7]

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[5] Guilty Plea Agreement, Count 13, ¶ 4(b)(i)(B).

[6] U.S. Fish & Wildlife Service, Division of Bird Habitat Conservation, available at http://www.fws.gov/birdhabitat/Grants/NAWCA/index.shtm (last accessed Dec. 30, 2013); see also 16 USC §§ 4401–14.

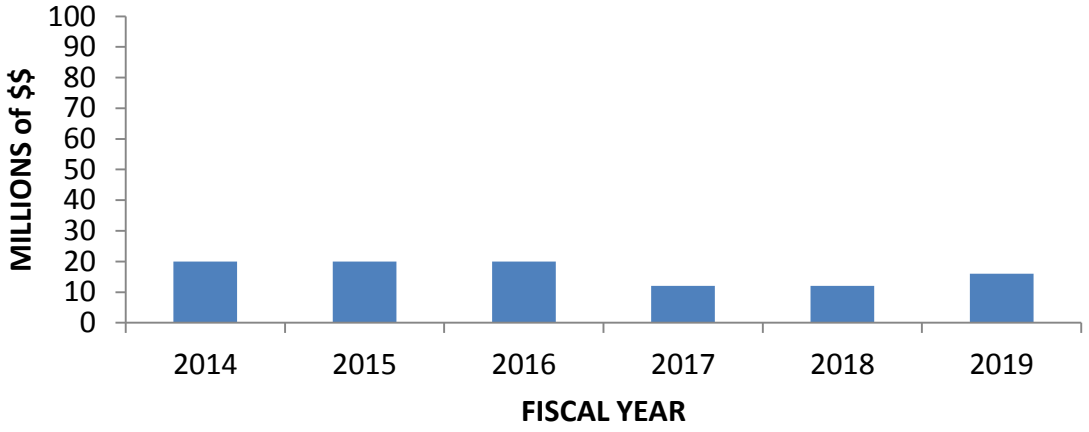
[7] 16 USC § 4407(b). As explained in more detail below, certain RESTORE Act funds may be used to satisfy non-federal cost-share requirements.

Grant requests are submitted through the Division of Bird Habitat Conservation within the U.S. Fish and Wildlife Service (FWS). Proposals are reviewed and ranked by the North American Wetlands Conservation Council (NAWCC), a nine-member council composed of the FWS Director, the Secretary of the Board of the National Fish and Wildlife Foundation (NFWF, see below), and representatives from state fish and wildlife agencies and non-profit organizations involved in wetlands conservation. The Council then recommends projects for final approval to the Migratory Bird Conservation Commission, which includes members of Congress, the Secretaries of Interior and Agriculture, and the EPA Administrator.

BP's payment schedule to the NAWCF is outlined in the BP Guilty Plea Agreement. The company's disbursement schedule for NAWCF is shared with the OSLTF (see above) and split on a pro rata basis (8% to 92%). The plea agreement was accepted and sentencing occurred on January 29, 2013, starting the clock on disbursements.[8]

The FWS is administering these settlement monies through the North American Wetlands Conservation Act grants program, according to the timeline in Figure 2.

Figure 2. Availability of funds from BP Guilty Plea for NAWCA Grants, by federal fiscal year



Process

Under the terms of the BP Guilty Plea Agreement, funds to NAWCF are designated "for the purpose of wetlands restoration and conservation projects located in states bordering the Gulf

[8] The disbursement schedule is as follows: $20 million within 60 days of sentencing, $20 million within one year, $20 million within two years, $12 million within three years, $12 million within four years, and $16 million within five years.

of Mexico or otherwise designated to benefit migratory bird species and other wildlife and habitat affected by the Macondo oil spill."

Since the plea agreement does not set out a process for disbursing these funds, FWS has created one. Applicants need to show that their project(s) will benefit a migratory species affected by the spill. FWS and NAWCC have recently finalized the relevant "affected species" list.[9] Approved projects will not be limited to the Gulf region, as they can be used to benefit a species at any stage of its migratory cycle. The funds will be split among the United States (70%), Canada (27%), and Mexico (3%) for fiscal years 2014 and 2015.[10]

C. National Fish and Wildlife Foundation

Overview

As part of the criminal plea agreements that BP and Transocean reached with the federal government, the National Fish and Wildlife Foundation (NFWF) will receive a total of $2.544 billion, with BP paying $2.394 billion and Transocean paying $150 million.[11]

NFWF is a private, non-profit organization chartered by Congress in 1984 "to protect and restore fish and wildlife and their habitats." NFWF is governed by a Board of Directors, which

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[9] *See* North American Wetlands Conservation Council, *North American Wetlands Conservation Act United States Standard Grant: 2014 Proposal Instructions*, at 4, 49–50, http://www.fws.gov/birdhabitat/grants/nawca/standard/us/files/proposalinstructions.pdf.

[10] *See* Minutes from July 9, 2013 Meeting of North American Wetlands Conservation Council. The minutes note that the Act limits funding for projects outside the United States at 30-60% of the total non-coastal funds. The Council recommended maintaining the existing allocation for non-BP funding; and for the BP funding, allocating 70% of the funds to projects within the United States and 30% for projects outside of the United States (27% to Canada, 3% to Mexico). During discussion of the recommendations, the Council noted that the current allocation was established early in the program, and that "[t]he BP funding is different from other sources of NAWCA funding and will have greater public scrutiny associated with it." Allocating the minimum 30% to non-U.S. projects for the first 1-2 years of the program was determined both to meet NAWCA requirements and the BP settlement biological standards.

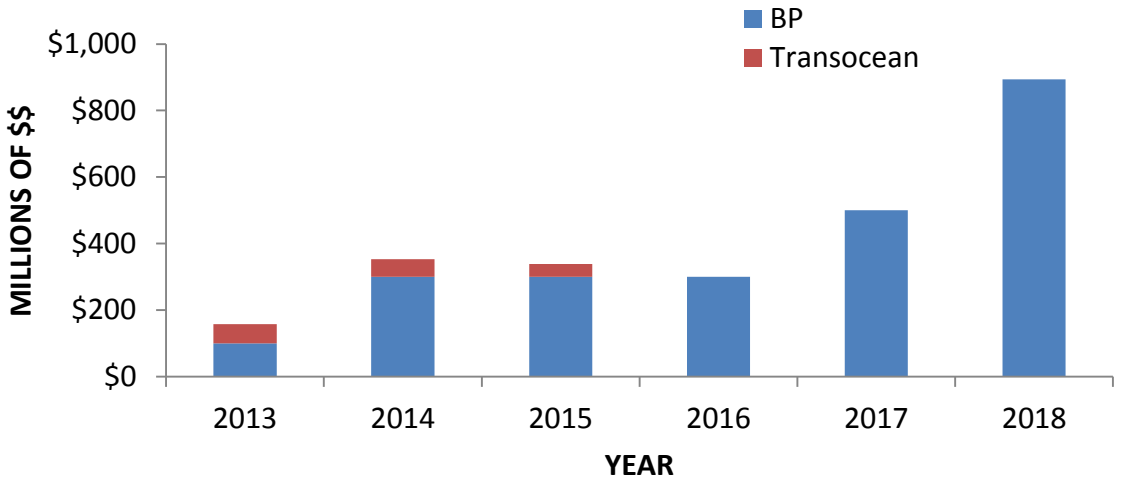
[11] NFWF has also received other monies related to the spill. In 2010, NFWF received $22 million from BP, which were the proceeds from the sale of oil recovered at the wellhead during the oil spill. This money was directed to NFWF's Recovered Oil Fund for Wildlife (see BP website, Gulf of Mexico Restoration, "National Fish and Wildlife Foundation projects," available at http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/restoring-the-environment/national-fish-and-wildlife-foundation-projects.html). In addition, in 2013, NFWF received $55 million from Halliburton. While this contribution was made at the time that Halliburton agreed to plead guilty to destroying evidence related to the oil spill, the contribution was not tied to the terms of the guilty plea agreement and is not earmarked for a particular use.

consists of 30 members who are approved by the Secretary of the Interior. The Board includes the leaders of FWS and the National Oceanic and Atmospheric Administration (NOAA).[12]

Since it was established, NFWF has supported over 12,000 conservation projects in the United States, its territories, and abroad.[13] These include projects focused on freshwater, forests and grasslands, and ocean and coastal ecosystems.[14] To fund these projects, NFWF has received financial commitments from various sources, including federal appropriations and private donations. Prior to the BP and Transocean settlements, NFWF had received a total of roughly $2.1 billion in financial commitments.[15] The $2.544 billion that NFWF will receive from BP and Transocean will therefore exceed the total amount NFWF has received over its entire history.

NFWF will receive the settlement monies over the next five years, with the majority being received in 2017 and 2018 (see Figure 3).

Figure 3. Payout of settlement monies to NFWF from BP ($2.394 billion) and Transocean ($150 million)

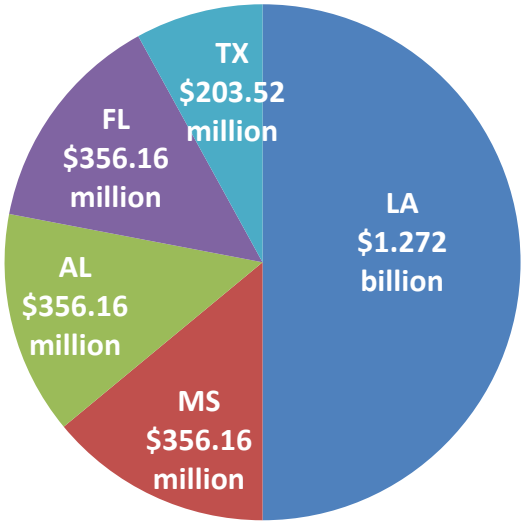


The plea agreements set out how the funds will be spent in each of the five Gulf states on restoration projects. Half the money ($1.272 billion) will go to Louisiana. The other half will be split among the other four Gulf states: Alabama, Florida, and Mississippi will each receive 14%

[12] NFWF Press Release, NFWF Expects to Receive Funds from BP Settlement (Nov. 15, 2012).
[13] See NFWF, Protecting Species, available at http://www.nfwf.org/Pages/whatwedo/home.aspx (last accessed Oct. 8, 2013).
[14] NFWF, Protecting Species, available at http://www.nfwf.org/Pages/whatwedo/home.aspx (last accessed Oct. 8, 2013).
[15] *See* NFWF, About NFWF, http://www.nfwf.org/whoweare/Pages/home.aspx (last accessed Apr. 18, 2014).

of the total funds ($356 million each), and Texas will receive the remaining 8% of funds ($204 million) (see Figure 4).

Figure 4. NFWF funds to be spent in each state on restoration projects



Under the terms of the criminal plea agreements, these monies are to be used "[t]o remedy harm and eliminate or reduce the risk of future harm" to natural resources in the Gulf. For Louisiana, that means using the money for projects focused on "creat[ing] or restor[ing] barrier islands off the coast of Louisiana and/or… implement[ing] river diversion projects on the Mississippi and/or Atchafalaya Rivers." NFWF is required to consider Louisiana's Coastal Master Plan and the Louisiana Coastal Area Mississippi River Hydrodynamic and Delta Management Study in determining projects.

For the other Gulf states, the monies must be spent on projects that "remedy harm" to resources injured by the oil spill. NFWF has indicated that, in determining these projects, it may consider whether the proposed projects:

- Advance priorities in natural resource management plans;
- Are in "reasonable proximity" to oil spill impacts;
- Are cost-effective and maximize environmental benefits;
- Are science-based; and
- Produce measureable and meaningful conservation outcomes.[16]

[16] See NFWF, Gulf Environmental Benefit Fund: Frequently Asked Questions ("What will be the criteria for selecting projects in Alabama, Florida, Mississippi and Texas?"), http://www.nfwf.org/gulf/Pages/Gulf-FAQ.aspx (last accessed Apr. 25, 2014).

Process

NFWF has established the Gulf Environmental Benefit Fund in order to administer its settlement monies. Under the terms of the settlement, NFWF is required to consult with state and federal resource managers to determine which projects should be funded and to "maximize the environmental benefits of such projects." NFWF has begun consultations in each of the Gulf states, as well as with FWS and NOAA (see Table 1). It is important to note, however, that NFWF retains ultimate authority in determining which projects will be funded.

Although NFWF is not statutorily required to seek public input, it has nonetheless indicated that the public may suggest projects, with each state responsible for collecting these suggestions.[17]

The states have approached this responsibility in different ways. For example, Louisiana does not have a separate submission process for NFWF projects: the public may submit ideas for restoration projects at public meetings, including the monthly Coastal Protection and Restoration Authority (CPRA) Board meetings, as well as to a designated email address.[18]

In contrast, Mississippi, Florida, and Alabama have online project submittal forms. In Mississippi, project ideas for all the restoration processes can be submitted through the same portal.[19] In Florida, while projects may be suggested specifically for NFWF funding, the state has indicated that it will also consider project proposals that have been previously submitted for funding under the RESTORE Act and the NRDA process.[20] Alabama's project submission form may be used to submit project suggestions for RESTORE Act (state or Council) or NFWF funding; it notes that suggestions for NRDA projects should be submitted through the federal NRDA project submission portal that is maintained by NOAA as part of the Trustee Council.[21]

As of this writing, Texas has yet to launch a website, and it is not clear how it plans to solicit suggestions for projects.[22]

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[17] See NFWF, Gulf Environmental Benefit Fund: Frequently Asked Questions ("How can organizations or agencies propose projects for funding?"), http://www.nfwf.org/gulf/Pages/Gulf-FAQ.aspx (last accessed Dec. 30, 2013).

[18] See CPRA, Oil Spill Restoration, available at coastal.la.gov/our-work/restoration-planning (last accessed Nov. 15, 2013).

[19] See Making Mississippi Whole, Submit Project Ideas, http://www.restore.ms/submit-project-idea/ (last accessed Apr. 18, 2014).

[20] See Florida DEP, Deepwater Horizon Oil Spill Response & Restoration, available at http://www.dep.state.fl.us/deepwaterhorizon/default.htm (last accessed Apr. 14, 2014).

[21] See Alabama Coastal Restoration, http://www.alabamacoastalrestoration.org/nfwf.aspx (last accessed Apr. 18, 2014). The federal portal for submitting project proposals to the NRDA Trustee Council is available at http://www.gulfspillrestoration.noaa.gov/restoration/give-us-your-ideas/ (last accessed May 1, 2014).

[22] The publicized URL for the Texas portal is www.restorethetexascoast.org, but the site is under development.

In November 2013, NFWF announced its first phase of funding, which includes 22 projects spread across the five Gulf states. The total cost of these projects is approximately $112.5 million, designated for projects in Louisiana (approx. $67.9 million), Florida (approx. $15.7 million), Alabama (approx. $12.6 million), Texas (approx. $8.8 million), and Mississippi (approx. $7.5 million). A wide variety of projects will be funded in this phase, including initial planning activities related to barrier island and river diversion projects in Louisiana, as well as oyster restoration, bird conservation, and watershed restoration projects.

In early April 2014, NFWF announced two additional projects: $144.5 million to fund the "second increment" of a barrier island restoration project in Louisiana,[23] and up to $3.6 million for Mississippi to develop a restoration plan for the state's coastal natural resources.[24] Additional projects are expected to be approved in late 2014.[25]

Table 1. Federal and state natural resource management agencies that NFWF is consulting[26]

Federal	U.S. Fish and Wildlife Service National Oceanic and Atmospheric Administration
Louisiana	Louisiana Coastal Protection and Restoration Authority
Alabama	Alabama Department of Conservation and Natural Resources
Florida	Florida Fish & Wildlife Conservation Commission Florida Department of Environmental Protection
Mississippi	Mississippi Department of Environmental Quality
Texas	Texas Parks and Wildlife Department Texas Commission on Environmental Quality Texas General Land Office

[23] NFWF Press Release, NFWF Approves Additional $144.5 Million for Louisiana Barrier Island Restoration (Apr. 3, 2014), available at http://www.nfwf.org/whoweare/mediacenter/pr/Pages/gulf-la-pr-14-0403.aspx.

[24] NFWF Press Release, NFWF to Support Development of Mississippi Coastal Restoration Plan (Apr. 8, 2014), available at http://www.nfwf.org/whoweare/mediacenter/pr/Pages/NFWF-to-Support-Development-of-Mississippi-Coastal-Plan.aspx.

[25] See, e.g., NFWF, Gulf Environmental Benefit Fund in Alabama, available at www.nfwf.org/gulf/Pages/GEBF-Alabama.aspx (last accessed Apr. 28, 2014).

[26] See NFWF, Gulf Environmental Benefit Fund: Frequently Asked Questions, available at www.nfwf.org/Pages/gulf/Gulf-FAQ.aspx (last accessed Sept. 16, 2013).

D. National Academy of Sciences

Overview

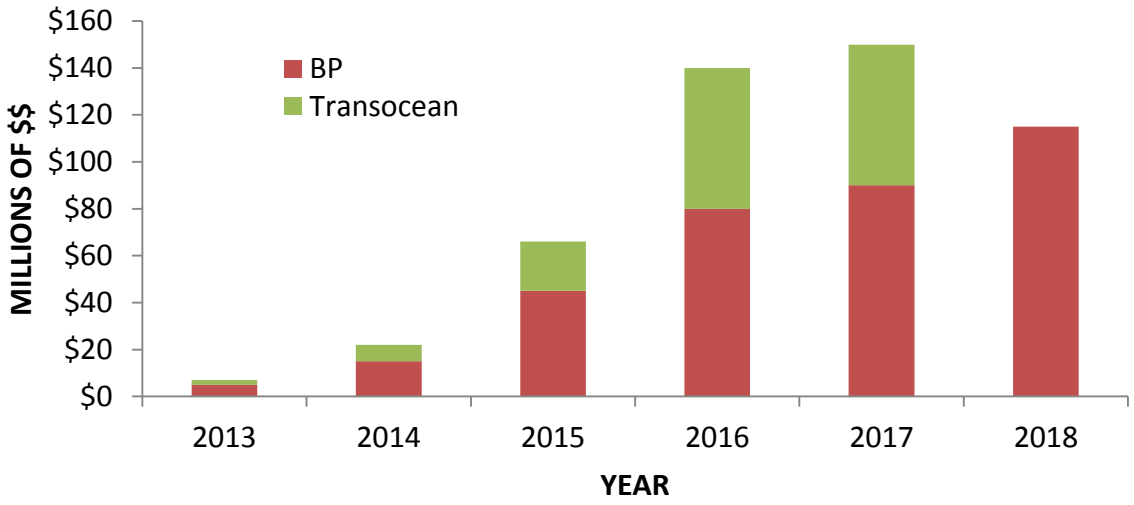
As part of the criminal plea agreements that BP and Transocean reached with the federal government, the National Academy of Sciences ("NAS") will receive a total of $500 million, with BP paying $350 million and Transocean paying $150 million. NAS is a private, non-profit institution chartered by Congress in 1863 to "provid[e] independent, objective advice to the nation on matters related to science and technology."[27] NAS, together with the National Academy of Engineering and Institute of Medicine, are honorific bodies to which senior scientists, engineers, and medical experts are elected in recognition of their accomplishments. The National Research Council is the operating arm of the three bodies, and draws on these and other experts to carry out most of the science policy and technical work of the institution.

NAS will receive the designated monies over the next five years (see Figure 5), with the majority of funds coming between 2016 and 2018. These monies will be used to establish an endowment to fund a 30-year "program focused on human health and environmental protection[,] including issues relating to offshore oil drilling" and the production and transportation of hydrocarbons in the Gulf and the outer continental shelf.[28] The program, which has been named the "Gulf Research Program," will seek to foster collaborative and cross-cutting approaches to research, education, and environmental monitoring in these areas, especially where they intersect.

[27] National Academy of Sciences, Mission, available at www.nasonline.org/about-nas (last accessed Sept. 16, 2013).

[28] Agreement between BP Exploration and Production, Inc. and the National Academy of Sciences, Exhibit B-1 to the Guilty Plea Agreement of BP Exploration and Production, Inc., paras. 3-4.

Figure 5. Payout of settlement monies to NAS from BP ($350 million) and Transocean ($150 million)



Process

In June 2013, NAS announced the appointment of an advisory group to "create a strategic vision and guide the program's development and implementation."[29] The advisory group includes 24 members and is chaired by Barbara Schaal, Dean of the Faculty of Arts and Sciences at Washington University. In July 2013, the advisory group began a series of meetings intended to help determine the focus of the program.[30] Meetings have been conducted both virtually and on location in the Gulf states, and will continue into mid-2014.[31] The initial plan is expected to be made available in spring 2014.[32] The advisory group will serve until September 2014, at which time NAS will appoint a board to oversee implementation and guide program activities over time.[33]

[29] NAS, Office of News and Public Information, available at http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=06072013 (last accessed Mar. 6, 2014).
[30] *Id*.
[31] See NAS, Gulf Research Program, http://www.nationalacademies.org/gulf/events/index.html (last accessed Mar. 6, 2014).
[32] *Id.*
[33] *Id.*; see also Agreement, para.10.

E. Restoration Trust Fund

Overview

In September 2010, Secretary of the Navy Ray Mabus recommended that Congress pass legislation directing a portion of any Clean Water Act civil penalties levied in response to *Deepwater Horizon* toward regional restoration.[34] Absent such legislation, all of the penalty monies would have gone to the Oil Spill Liability Trust Fund (see above). After a collaborative effort, such legislation passed both houses of Congress on June 29, 2012.[35] President Obama then signed the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (more commonly known as the RESTORE Act) into law on July 6, 2012.

The RESTORE Act creates the new Gulf Coast Restoration Trust Fund (RTF), which will receive 80% of the civil and administrative penalties paid to the United States under the CWA by the parties responsible for the *Deepwater Horizon* oil spill. The RTF will support activities that achieve ecological and economic restoration to help the Gulf of Mexico recover from harm caused by *Deepwater Horizon* and other impacts.

Overseen by the Department of the Treasury, the RTF supports five restoration processes:

- **Direct Component** – 35% of the Fund goes directly to the five Gulf states, either to the state leads or to coastal political subdivisions,[36] in equal shares, to aid ecological and economic restoration and recovery of the Gulf Coast region.
- **Gulf Coast Ecosystem Restoration Council** – 30% of the Fund (plus 50% of the interest earned on it) goes to a regional Gulf Coast Ecosystem Restoration Council to support the development and implementation of a science-based comprehensive plan to restore and protect Gulf Coast natural resources, as well as other Council activities.
- **Spill Impact Component** – 30% of the Fund goes to the five Gulf states based on a formula that takes into account their respective amount of shoreline oiled, distance from the *Deepwater Horizon* rig, and average population of coastal counties.

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[34] See AMERICA'S GULF COAST: A LONG TERM RECOVERY PLAN AFTER THE DEEPWATER HORIZON OIL SPILL, 8 (Sept. 2010).

[35] RESTORE was included as Title F of the surface transportation and federal-aid highways funding act (MAP-21), Pub. L. No. 112-141 (passed June 29, 2012). Senators Landrieu, Shelby, and Nelson (and Boxer from California) and Representatives Scalise, Palazzo, Bonner, and Richmond were recognized as leads in the effort to pass the legislation. See, e.g., Oxfam America, Congress passes law to restore Gulf Coast communities, ecosystems and economy, http://www.oxfamamerica.org/press/pressreleases/congress-passes-law-to-restore-gulf-coast-communities-ecosystems-and-economy.

[36] The Act defines a "coastal political subdivision" as "any local political jurisdiction that is immediately below the State level of government, including a county, parish, or borough, with a coastline that is contiguous with any portion of the United States Gulf of Mexico." 33 U.S.C. § 1321(a)(29).

- **Gulf Coast Ecosystem Restoration Science Program** – 2.5% of the Fund (plus 25% of the interest earned) will support a NOAA-led Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology program dedicated to the Gulf's ecosystem, fish stocks, fish habitat, and recreational, commercial, and charter fishing industry.
- **Centers of Excellence** – 2.5% of the Fund (plus 25% of the interest earned) will sustain a competitive grant program to establish "Centers of Excellence" to conduct Gulf Coast research.

The only funds that have been obligated to the RTF to date are those associated with the Transocean civil settlement. As discussed above, in February 2013 the Department of Justice finalized an agreement with Transocean that settled that company's civil CWA liability for $1 billion. Since these settlement funds are subject to the RESTORE Act, 80% (or $800 million, with interest) will be deposited into the RTF. The remainder, 20% (or $200 million, with interest), will be transferred to the OSLTF.

Table 2. Schedule of transfers of Transocean settlement monies

Timing	Total Amount	Amount of total directed to RTF	Amount of total directed to OSLTF
By Apr. 22, 2013	$400 million (with interest)	$320 million (with interest)	$80 million (with interest)
By Feb. 19, 2014	$400 million (with interest)	$320 million (with interest)	$80 million (with interest)
By Feb.19, 2015	$200 million (with interest)	$160 million (with interest)	$40 million (with interest)

The extent of BP's civil CWA liability has not been established, and is the subject of ongoing litigation. Two key factors in determining liability are the total amount of oil released in the Gulf of Mexico during the disaster (the government estimates are significantly higher than BP's) and the company's standard of conduct (whether it exercised due diligence, or instead engaged in negligence, gross negligence, or willful misconduct). The judge's decisions on these factors will affect the final amount of the fines, with a statutory maximum of $17.6 billion.

Process

The Department of the Treasury is responsible for RTF oversight and accountability, and published draft regulations for administering the RTF on September 6, 2013.[37] Each of the five processes funded by the RTF is governed by separate rules; some cross-cutting accountability and coordination mechanisms apply to more than one of them.

Direct Component. These funds go directly to the five Gulf states and/or affected local political subdivisions (with the recipient depending on the state) in equal shares. Each recipient must develop a multi-year implementation plan and certify that the projects and programs in it are designed to restore and protect Gulf Coast resources, carry out one or more of the listed eligible activities, were selected based on meaningful and broad-based public input, are based on the best available science, and were selected in a manner consistent with state procurement rules for comparable projects. Eligible activities range from natural resource restoration and protection to workforce development and job creation.[38] Each recipient is developing its implementation plan, subject to guidance provided by the Treasury regulations.

Gulf Coast Ecosystem Restoration Council. The 11-person Council is composed of the five Gulf state Governors and the heads of six federal agencies.[39] The Council is intended to support activities that achieve restoration and protection of Gulf Coast natural resources and economies. The Council must maintain a science-based Comprehensive Plan for restoring and protecting natural resources. It approved the first iteration of this plan – the Initial Comprehensive Plan – on August 28, 2013.[40] That plan did not include the mandatory ten-year

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[37] The regulations were open for public comment through November 5, 2013. 78 Fed.Reg. 54801 (Sept. 6, 2013), available at https://www.federalregister.gov/articles/2013/09/06/2013-21595/gulf-coast-restoration-trust-fund.

[38] The full list of eligible activities is: Restoration and protection of the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region; Mitigation of damage to fish, wildlife, and natural resources; Implementation of a federally approved marine, coastal, or comprehensive conservation management plan, including fisheries monitoring; Workforce development and job creation; Improvements to or on State parks located in coastal areas affected by the Deepwater Horizon oil spill; Infrastructure projects benefitting the economy or ecological resources, including port infrastructure; Coastal flood protection and related infrastructure; Planning assistance; Administrative costs of complying with this subsection (limited to 3%); and Activities to promote tourism and seafood in the Gulf Coast region, including Promotion of tourism in the Gulf Coast Region, including recreational fishing, and Promotion of the consumption of seafood harvested from the Gulf Coast Region. 33 U.S.C. § 1321(t)(1)(B); The RESTORE the Gulf Coast States Act of 2012, Pub. L. No. 112-141, § 1603 (June 29, 2012).

[39] The federal agencies represented are the Departments of Commerce (which was selected by the state representatives to chair the Council), the Interior, Army, Agriculture, and Homeland Security, and the Environmental Protection Agency. A current list of the designees selected by the Governors and the agency leads is available at RestoreTheGulf.gov, Council Members, http://www.restorethegulf.gov/council/about-gulf-council.

[40] The Initial Comprehensive Plan (Aug. 2013) and accompanying Final Programmatic Environmental Assessment (Aug. 2013) are available at http://www.restorethegulf.gov/release/2013/08/21/gulf-coast-ecosystem-restoration-council-posts-materials-august-28-2013-council-m.

funding plan (which must be updated every five years) or three-year list of activities to be funded (which must be updated annually). The Council explained that, among other things, it is waiting for the final oversight regulations from the Department of the Treasury before it releases the draft funding plans. At the same time, the Council must review and approve state expenditure plans for the Spill Impact Component (see below), which may be used for both ecological and economic restoration.

Spill Impact Component. These funds go to the five Gulf states and/or affected local political subdivisions based on a weighted average related to the amount of shoreline oiled, distance from the *Deepwater Horizon* rig, and average population of coastal counties (with each state receiving a minimum of 5% of the total amounts made available each fiscal year). Each recipient must develop an expenditure plan that lists the projects, programs, and activities to be funded. This plan must be consistent with the goals and objectives of the Council's Comprehensive Plan and be approved by the Council. The approval requirement is satisfied by a state member's certification that all requirements are met plus an affirmative vote from the federal Chair of the Council.[41] The funds may support the same range of activities designated for the Direct Component (see above). Each recipient is developing its implementation plan, subject to guidance provided by the Council and/or Treasury regulations.

Gulf Coast Ecosystem Restoration Science Program. NOAA must develop and implement a program to "carry out research, observation, and monitoring to support, to the maximum extent practicable, the long-term sustainability of the ecosystem, fish stocks, fish habitat, and the recreational, commercial, and charter fishing industry in the Gulf of Mexico." At various stages, NOAA must consult with the Director of the Fish and Wildlife Service, the Gulf of Mexico Fisheries Management Council, and the Gulf States Marine Fisheries Commission, and coordinate with existing federal and state science and technology programs in the Gulf States and the Centers of Excellence. Pursuant to a Science Plan Framework released in December 2013, the Program envisions a roughly 20-year operational timeline. The program identifies four focus areas to improve holistic understanding of the Gulf of Mexico: ecosystem structure, functioning and connectivity; holistic approaches to observing and monitoring; integrated analysis and synthesis of existing and new data; and periodic "state of health" assessments.[42]

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[41] 33 USC § 1321(t)(2)(C)(vi)(III) ("For approval of State plans pursuant to paragraph (3)(B)(iv), the certification by a State member of the Council that the plan satisfies all requirements of clauses (i) and (ii) of paragraph (3)(B), when joined by an affirmative vote of the Federal Chairperson of the Council, shall be considered to satisfy the requirements for affirmative votes under subclause (I).").

[42] Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology Program, RESTORE Act Science Program, Science Plan Framework (Dec. 12, 2013), at 5, 11, available at http://restoreactscienceprogram.noaa.gov/wp-content/uploads/2013/12/RESTOREScienceProgramFramework_Final_2013_12.pdf.

Centers of Excellence. These funds will be divided equally among the five Gulf states for competitive grants to establish Centers of Excellence, which will engage in research on the Gulf Coast. The grants may be awarded to nongovernmental entities and consortia in the Gulf Coast region, including public and private higher education institutions. Each Center of Excellence must focus on science, technology, and monitoring in the Gulf Coast within one or more of the following disciplines: coastal/deltaic sustainability, restoration, and protection; coastal fisheries and wildlife ecosystem research and monitoring; offshore energy development, including research and technology to improve sustainable and safe development; and comprehensive observation, monitoring, and mapping. Some states have already begun identifying Centers of Excellence—for example, in March 2013, Mississippi Governor Phil Bryant named the University of Southern Mississippi-led Center for Gulf Studies a Research Center of Excellence for the state.[43] The Treasury Department's oversight and accountability regulations, which are nearing final status, may provide detail about the required processes for establishing the competitive grants process.

F. The Natural Resource Damage Assessment

Overview

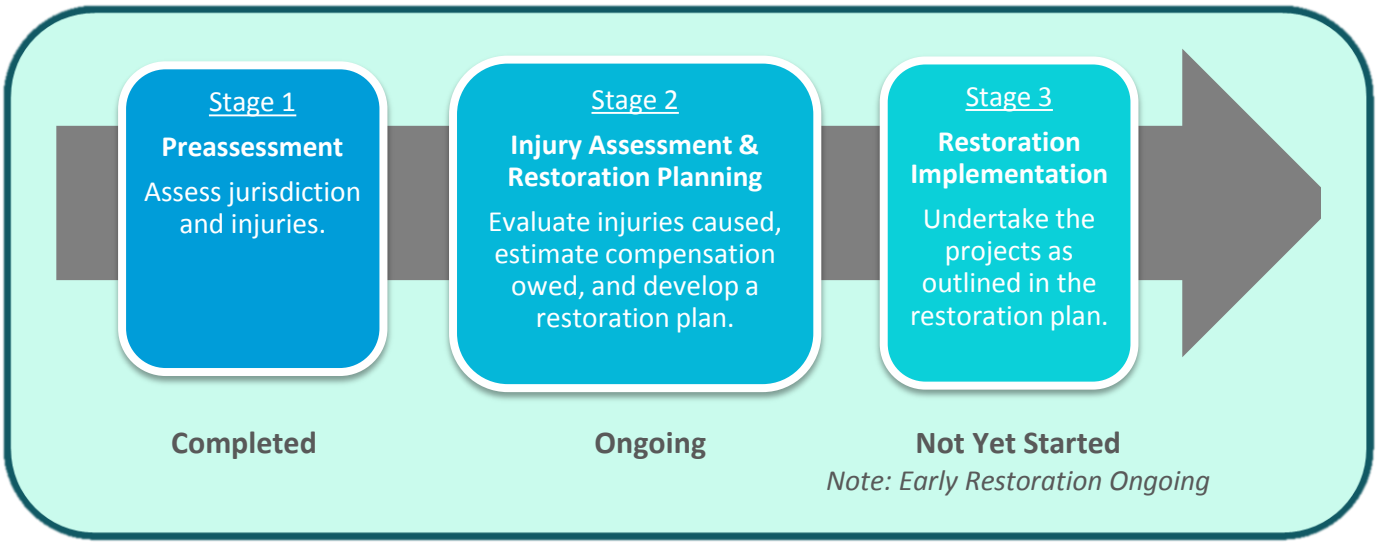
As set out in the Oil Pollution Act and related regulations, a natural resource damage assessment (NRDA) is the process where federal, state, and tribal governments act as trustees to determine the injuries that an oil spill has caused to natural resources and the services they provide, and to plan and implement an approach for restoration. The goal is to return natural resources to the condition they would have been in had the oil spill not occurred.[44] This includes compensation for losses between the time of the oil spill and when recovery is complete. In general, parties responsible for a spill are liable for "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage."[45]

The NRDA process is divided into three stages: (1) Preassessment; (2) Injury Assessment and Restoration Planning; and (3) Restoration Implementation (see Figure 6). The trustees for the *Deepwater Horizon* spill, which include federal and state agencies from across the Gulf (see

[43] See Gov. Phil Bryant, "Gov. Bryant Names Center for Gulf Studies as RESTORE Research Center of Excellence, Mar. 7 2013, http://www.governorbryant.com/gov-bryant-names-center-for-gulf-studies-as-restore-research-center-of-excellence/.
[44] See 15 CFR ¶ 990.10.
[45] 33 USC § 2702(a)(2)(A).

Table 3), are currently in the process of assessing the extent of injuries to natural resources and services and developing a restoration plan.

Figure 6. Stages of the NRDA Process



This process may rely on cooperation from the responsible parties. As previously discussed, trustees may rely on the Oil Spill Liability Trust Fund to pay for oil spill response and assessment activities to the extent a responsible party is unwilling to cooperate (or cannot pay or be found). The costs of the *Deepwater Horizon* disaster, however, far exceed the statutory limits set for the OSLTF, which may pay a maximum of $1 billion for a single incident (with a cap of $500 million on NRDAs and claims).[46] The trustees have therefore sought funds from BP and other responsible parties to fund the response and NRDA.

In April 2011, the Gulf trustees announced that BP had agreed to enter into a voluntary $1 billion agreement to fund certain restoration projects early, before the NRDA is complete. The trustees agreed to split the $1 billion so that NOAA and the Department of the Interior (DOI) will each receive $100 million for "projects to restore federal trust resources," and the trustees for each state will receive $100 million "for projects to restore state trust resources." The remaining $300 million is to be used for restoration projects that the state trustees suggest, and that NOAA and DOI select.[47] Several early restoration projects have already begun to be implemented.

[46] 26 USC § 9509(c)(2)(A).

[47] Deepwater Horizon Natural Resource Damage Assessment ("NRDA"): Agreement Among Trustees for Allocation of Funds Under Framework Agreement with BP dated April 20, 2011 for Early Restoration, dated Apr. 20, 2011. NOAA and DOI are the only two federal trustees party to the early restoration agreement.

Table 3. Trustees for the *Deepwater Horizon* Oil Spill

	Lead Trustee Agency	Additional Trustee Agencies
US Dept. of the Interior	US Fish and Wildlife Service	National Park Service; Bureau of Land Management
US Dept. of Commerce	National Oceanic and Atmospheric Administration	
US Dept. of Defense*		
US Environmental Protection Agency**		
US Dept. of Agriculture**		
State of Louisiana	Coastal Protection and Restoration Authority	Oil Spill Coordinator's Office; Dept. of Environmental Quality; Dept. of Wildlife and Fisheries; Dept. of Natural Resources
State of Mississippi	Dept. of Environmental Quality	
State of Alabama	Dept. of Conservation and Natural Resources	Geological Survey of Alabama
State of Florida	Dept. of Environmental Protection	Fish and Wildlife Conservation Commission
State of Texas	Parks and Wildlife Dept.	General Land Office; Commission on Environmental Quality

* *The Department of Defense is a trustee under the Oil Pollution Act, but is not a signatory to the early restoration framework agreement and is not currently a member of the Trustee Council*

** *Designated as trustees on September 10, 2012 by Executive Order 13,626*

Process

The process for selecting projects differs somewhat from the usual NRDA process. The first step in the process is identifying potential projects that are appropriate candidates for early restoration. This includes, among other things, reviewing projects suggested by the public.[48] To be considered, potential projects must, among other things, satisfy the criteria set out in the early restoration agreement, which require projects to:

- Restore or replace "natural resources or services injured as a result of the [spill] or response… or compensat[e] for interim losses";
- Address one or more "injuries to natural resources or services associated with the [spill]";
- Try to restore natural resources or services "of the same type, quality, and of comparable ecological and/or human use value" injured by the oil spill;
- Be consistent "with the anticipated long-term restoration needs and anticipated final restoration plan"; and
- Be "feasible and cost effective."[49]

[48] *Deepwater Horizon* Oil Spill; Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement, 8.

[49] Framework for Early Restoration, para.6.

Once potential projects have been identified, the majority of the trustees must agree on the projects, and all trustees must agree on the "NRD offsets" (i.e., the amount of credit BP will receive against its ultimate NRD liability). At this point negotiations with BP begin, as BP must agree on the funding and the designation of NRD offsets before a project can move forward.[50] Proposed projects are then released to the public for review and comment in the form of a draft early restoration plan and accompanying environmental analysis. After public comments are considered, the trustees finalize the plan and projects are implemented after all permitting requirements are satisfied.[51] If the public comment process causes the trustees to make a change to a proposed project, further negotiations and agreement with BP may be necessary for the project to receive early restoration funding.

As of this writing, the trustees have finalized two rounds of early restoration projects totaling an estimated $71 million for 10 projects. In December 2013, the trustees proposed a third round of projects with 44 proposed projects in a draft early restoration plan accompanied by a draft programmatic early restoration plan and programmatic early restoration environmental impact statement.[52] If finalized, the third round of projects will cost an estimated $627 million, leaving approximately $300 million for additional early restoration projects.

It should be noted that early restoration projects are moving forward concurrently with the rest of the assessment process. As noted above, the trustees are in the process of assessing injuries to natural resources and developing a restoration plan. They are also drafting a programmatic environmental impact statement for the entire restoration (i.e., one that is not just focused on early restoration projects). It is anticipated that the assessment will take several more years to complete.[53] In the meantime, the parties may either reach a settlement or litigate the damages.

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[50] *See* Agreement Among Trustees for Allocation of Funds Under Framework Agreement with BP dated April 20, 2011 for Early Restoration; Dep't of the Interior et al., Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration PEIS, 3 (Dec. 2013), available at http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/phase-iii/.

[51] See the trustees' overview in their Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration PEIS, 6-8.

[52] See Dep't of the Interior et al., Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration PEIS (Dec. 2013), available at http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/phase-iii/. The deadline for commenting on these documents was February 19, 2014.

[53] See Status Update for the *Deepwater Horizon* Oil Spill, 89, Apr. 2012, available at http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL_NRDA_StatusUpdate_April2012.pdf ("Given its geographic size, three-dimensional nature and ecological complexity, the assessment likely will continue for years").

G. Summary

A complex network of restoration processes exists to help the Gulf of Mexico region recover from the impacts of the *Deepwater Horizon* oil spill, as well as decades of degradation. The main purposes and coverage of the key processes described above are summarized in Table 4.

Table 4. Summary information about the six key Gulf restoration and recovery processes

	Lead	Purpose	Geographic Coverage	Money Committed	Timing
OSLTF	National Pollution Funds Center, U.S. Coast Guard	Fund federal agencies to administer OPA, respond to future oil spills, and support R&D	United States	$1.495 billion (additional funds expected)	Currently scheduled to receive funds from 2012–2018
NAWCF	U.S. Fish and Wildlife Service, Department of the Interior	Benefit migratory birds and other wildlife and habitat impacted by the spill	United States, Canada, and Mexico	$100 million (additional funds possible)	Funding grants in FY 2014–2019
NFWF	National Fish and Wildlife Foundation	Restore and protect natural resources in the Gulf	Focus on natural resources in the Gulf of Mexico	$2.544 billion (additional funds possible)	Currently scheduled to receive funds from 2013–2018
NAS	National Academy of Sciences	Fund 30-year scientific program that focuses on human health and environmental protection	Benefit the Gulf of Mexico and/or the outer continental shelf	$500 million (additional funds possible)	Currently scheduled to receive funds from 2013–2018
RTF	Varies with the process, but includes the 5 Gulf States, including some coastal political subdivisions, and 7 federal agencies[54]	Varies with the process, but generally restoration and protection of the natural resources, ecosystems, and economies of the Gulf Coast[55]	Varies with the process, but generally the Gulf Coast region (the Gulf State coastal zones plus 25 miles inland and all federal waters in the Gulf)[56]	$800 million (additional funds expected)	Currently scheduled to receive funds from 2013–2015
NRDA	Federal and state trustees	Restore natural resources impacted by the spill to the condition they would have been in had the spill not occurred	Focus on natural resources impacted by the oil spill	$1 billion in early restoration (additional funds expected)	Unclear (in progress)

[54] For example, the Restoration Council is composed of representatives from the five Gulf states and six federal agencies; the allocations that are split amongst the states go to leads from the states and/or coastal political subdivisions; and the Restoration Trust Fund as a whole is administered by the U.S. Department of Treasury.

[55] For example, the purpose of the RESTORE Act Science Program is to carry out research, observation, and monitoring to support long-term sustainability of Gulf of Mexico ecosystems and fisheries, while the purpose of the Centers of Excellence is to carry out Gulf Coast science, technology, and monitoring.

[56] The majority of the RTF must be expended on activities focused on the Gulf Coast region, as defined in the Act. However, the Gulf Coast Ecosystem Restoration Science Program focuses on the Gulf of Mexico in its entirety.

II. Discussion: How the Pieces Fit Together

The previous section provided background information on the various restoration and recovery processes that are being funded and implemented in response to the *Deepwater Horizon* oil spill. The next section explores cross-cutting questions about how the processes interrelate – how they may overlap, when there may be gaps between them, and what mechanisms exist for coordinating them.

A. Overlap Between the Various Restoration and Recovery Processes

The myriad restoration and recovery processes collectively form a mosaic that is intended to fund an appropriate response to the *Deepwater Horizon* disaster. Several factors will determine the effectiveness of the mosaic. One is that the potentially largest pieces of the restoration and recovery efforts, the Gulf Coast Restoration Trust Fund (RTF) and the natural resource damages, have yet to be decided. Indeed, two key uncertainties are the amount and timing of the RESTORE Act funds to the RTF, and the final resolution of the natural resource damages. Another factor is the scope of the various processes: some of them are compensatory, and thus the monies can only be used to remedy damage caused by the spill; others are punitive, and those monies can be used for a broader array of purposes. We address both of these factors in this section.

Scale and Timing of the Funding Processes

The Restoration Trust Fund will ultimately receive 80% of any civil and administrative Clean Water Act penalties levied in connection with the *Deepwater Horizon* oil spill that are paid after enactment of the legislation (i.e., July 6, 2012). To date, the only monies that have been designated to the RTF are those from the Transocean civil settlement, $800 million of which will go to the RTF.[57] The final amounts will be determined either through the pending trial or any future settlement. The total funds that will be deposited into the RTF will therefore remain unknown until the CWA penalties are resolved, but could include up to an additional $14.1 billion.[58]

[57] The MOEX settlement was entered prior to passage of the RESTORE Act, and therefore none of the CWA civil penalties paid by MOEX went to the RTF.

[58] These amounts are equal to 80% of the estimated maximum CWA civil penalties based on the estimated amount of oil spilled. The original government estimate was 4.1 million barrels (accounting for the capture of 800,000 barrels before it entered the marine environment). The statutory maximum penalty per barrel released is $1,100, unless the violator acted with gross negligence or willful misconduct, in which case the maximum is

The NRDA process is on a similarly hazy timeline. As noted above, the trustees are currently assessing injuries to natural resources caused by the oil spill, and are developing a restoration plan. The trustees anticipate that the NRDA process will take several more years to complete. One of the challenges with this timeline is the increased risk that, regardless of trustee effort, injuries may become dispersed and harder to detect – especially in a region that consistently suffers severe degradation, such as of the loss of underlying coastal wetlands from multiple causes.[59] Conversely, if the assessment is concluded too early, it may not adequately account for damages that may manifest later. To date, BP has agreed to fund up to $1 billion to start certain restoration projects early, which the trustees have called a "down payment" on BP's ultimate liability for natural resource damages.[60] The total damages, however, are likely to be much higher.

While the scale and timing of the Restoration Trust Fund and NRDA are still largely unknown, several funding streams (totaling more than $5.4 billion) are already in place. These funds will flow to a wide variety of projects across the continent over several decades.

Scope of the Funding Processes

Since there are several different funding streams, it is important to keep in mind that they have varying purposes and geographic scopes (see Table 5). For example, the funds going to the OSLTF will be used for future oil spills across the country. As noted, the monies in the OSLTF are used to, among other things, fund the costs of oil spill response and, to the extent a responsible party cannot pay or cannot be found, compensate for injuries caused by an oil spill. Accordingly, the settlement monies going to the OSLTF will not focus on the Gulf Coast – or on restoring injuries caused by the current spill – but will be used throughout the United States for future spills.

Similarly, the NAS funds will not be focused on restoring injuries caused by the current spill. The funds going to NAS are to be used for a 30-year scientific program that "focuse[s] on human health and environmental protection[,] including issues related to offshore oil drilling" and the

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$4,400. This results in a maximum range of $4.5 to $17.6 billion. In determining the final CWA civil penalty, the court will also take into account several discretionary factors delineated in the CWA.

[59] Fish and Wildlife Service and National Oceanic and Atmospheric Administration, "Status and Trends of Wetlands In the Coastal Watersheds of the Conterminous United States 2004 to 2009." http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-In-the-Coastal-Watersheds-of-the-Conterminous-US-2004-to-2009.pdf. Wetland loss is one of several chronic issues impacting the Gulf.

[60] See, e.g., Deepwater Horizon Oil Spill Phase I Early Restoration Plan and Environmental Assessment, ES-3 ("[The early restoration agreement] is a down payment against the ultimate claim for damages from the Spill").

production and transportation of hydrocarbons.[61] Although the program is still being developed, it is clear that, like the OSLTF, one of the key elements of the program is that it is forward-looking.[62] Also like the OSLTF, it appears that the funds can be used across a wide geographic scope, so long as the activities "enhance[e] the safety of offshore oil drilling and hydrocarbon production and transportation in the Gulf of Mexico and on the United States' outer continental shelf."[63]

In contrast to the monies going to the OSLTF and NAS, many of the restoration and recovery processes are focused – at least in part – on restoring or benefiting natural resources impacted by the current spill. Money obtained through the NRDA process will be used to restore natural resources injured by the spill; by statute, the funds may only be used to "reimburse or pay costs incurred by the trustee [in completion of their duties] with respect to the damaged natural resource."[64] The RESTORE Act also constrains where monies can be spent: they must generally be spent on projects in the Gulf Coast region, which is defined as the Gulf State coastal zones plus 25 miles inland as well as all federal waters in the Gulf of Mexico.[65]

Not all of the settlement funds must be spent in the Gulf. The funds going to NAWCF, for instance, may be used to benefit species affected by the spill anywhere along their migration routes. Indeed, funds for fiscal year 2014 are to be split amongst the United States, Canada, and Mexico (70% will be allocated to the United States). Similarly, while funds going to NFWF and the NRDA process are to focus on natural resources harmed by the spill, the funds could presumably be spent on projects outside the region if they benefit the types of resources that were impacted by the spill (e.g., migratory birds, sea turtles).

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[61] Agreement between BP Exploration and Production, Inc. and the National Academy of Sciences, Exhibit B-1 to the Guilty Plea Agreement of BP Exploration and Production, Inc., paras. 3-4.

[62] See NAS, Gulf Research Program, "What are key elements of the program?", available at http://nationalacademies.org/gulf (last accessed Feb.7, 2014).

[63] Agreement between BP Exploration and Production, Inc. and the National Academy of Sciences, Exhibit B-1 to the Guilty Plea Agreement of BP Exploration and Production, Inc., para. 4. Note that the National Academy of Sciences has also indicated that funds can be used for "[w]ork that transfers knowledge to and from other places in the United States or other nations…" See NAS, Gulf Research Program, available at http://nationalacademies.org/gulf/index.html (last accessed Mar. 6, 2014).

[64] OPA § 1006(f), 33 USC § 2706(f).

[65] For more on the geographic scope, *see supra* note 56 and surrounding text.

Table 5. Comparison of purpose and geographic scope of Gulf restoration and recovery processes

	Purpose	Geographic Coverage
OSLTF	Fund federal agencies to administer OPA, respond to future oil spills, and support R&D	United States
NAWCF	Benefit migratory birds and other wildlife and habitat impacted by the spill	United States, Canada, and Mexico
NFWF	Restore and protect natural resources in the Gulf	Focus on natural resources in the Gulf of Mexico
NAS	Fund 30-year scientific program that focuses on human health and environmental protection	Benefit the Gulf of Mexico and/or the outer continental shelf
RTF	Varies with the process, but generally restoration and protection of the natural resources, ecosystems, and economies of the Gulf Coast[66]	Varies with the process, but generally the Gulf Coast region, defined as the Gulf State coastal zones plus 25 miles inland plus all federal waters in the Gulf of Mexico[67]
NRDA	Restore natural resources impacted by the spill to the condition they would have been in had the spill not occurred	Focus on natural resources impacted by the oil spill

The relationship between NFWF and NRDA

Considering the similarity in purpose and geographic scope of the NFWF and NRDA processes, there is the potential for overlap between them. The goal of NRDA is to remedy injuries to natural resources caused by the oil spill.[68] Similarly, NFWF must use the settlement funds it receives "to remedy harm to resources where there has been injury to, or destruction of, loss of, or loss of use of those resources" from the spill. At first reading, the focus of the NFWF funding therefore seems to be the same as for the NRDA process – remedying injuries to resources affected by the oil spill.

The language in the criminal plea agreements that directs funds to NFWF could, however, be interpreted more broadly. For instance, the language could be interpreted to include projects

[66] For more on the purposes of the processes, *see supra* note 55 and surrounding text.
[67] For more on the geographic scope, *see supra* note 56 and surrounding text.
[68] In general, parties responsible for a spill are liable for "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage." 33 USC § 2702(a)(2)(A).

that leave affected resources in a better condition than they were in prior to the spill. Further, while NFWF projects must be focused on resources impacted by the spill, this could be interpreted to mean not just those resources actually impacted by the spill, but the type or category of resources impacted (e.g., not just the marshes oiled by the spill, but marshes more generally). This seems consistent with NFWF's approach, as they have indicated that "[t]he money will fund projects benefitting the natural resources of the Gulf Coast of a type that were impacted by the spill."[69]

It is important to keep in mind, however, that the NRDA trustees are not limited to restoring natural resources impacted by the spill. Under OPA, the trustees may choose to restore or rehabilitate injured resources, or they may choose to replace or acquire the equivalent of the injured natural resources.[70] In addition, in determining which restoration actions should be taken to compensate for the lost use of natural resources pending their restoration, the OPA regulations direct the trustees to "consider compensatory restoration actions that provide services of the same type and quality, and of comparable value as those injured."[71] To the extent that is not possible, the trustees will consider restoration actions that "provide natural resources and services of a comparable type and quality as those provided by the injured natural resources."[72] The NRDA trustees therefore have discretion to fund a relatively broad set of projects, as long as there is the requisite connection between the spill and the restoration actions. This is consistent with the types of projects that may be funded with the NFWF funds.

In light of this potential overlap, there is clear need for coordination between the NFWF and NRDA processes. Coordination can help avoid duplicative projects being funded. It can also help identify complementary projects that, together, will achieve greater benefits than they would in isolation.

The criminal plea agreements contain language intended to decrease potential overlap between the two processes. For example, they state that the monies going to NFWF, among others, "shall have no effect on…any civil claims by any party." In addition, BP and Transocean cannot use these monies to argue that civil claims should be "reduce[d] in any way."[73] Since civil claims include the trustees' natural resource damage claims, this language makes clear

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[69] This was in response to the FAQ "How will the money be used?" on NFWF's website. See NFWF, Gulf Environmental Benefit Fund: Frequently Asked Questions, "How will the money be used?," available at http://www.nfwf.org/gulf/Pages/Gulf-FAQ.aspx (emphasis added) (last accessed Apr. 29, 2014).
[70] 33 USC § 2706(d)(1).
[71] 15 CFR ¶ 990.53(c)(2).
[72] 15 CFR ¶ 990.53(c)(2).
[73] BP Guilty Plea Agreement, ¶ 4(c); Transocean Cooperation Guilty Plea Agreement, ¶ 4(c).

that, as a legal matter, the NFWF projects will not affect the amount of natural resource damages that BP and Transocean may ultimately be required to pay.

As a practical matter, however, it may become difficult to determine the extent to which the NFWF projects – either directly or indirectly – benefit natural resources injured by the spill. To the extent that NFWF or other monies are used to restore resources before the NRDA is complete, there is the potential for overlap with activities that would have been funded by the natural resource damages process.

The criminal plea agreements also include consultation requirements that should decrease overlap. These requirements are discussed in more detail below.

The potential for overlap between the science programs

In addition to overlap between NFWF and NRDA, the various science programs created or funded by the different restoration processes may also overlap. Under RESTORE, scientific research and monitoring primarily fall under two different restoration processes: the NOAA-led Restoration Science, Observation, Monitoring and Technology Program (Gulf Coast Ecosystem Restoration Science Program) and the state Centers of Excellence.

The Gulf Coast Ecosystem Restoration Science Program has a broad purpose: to support the long-term sustainability of ecosystems and fisheries in the Gulf through research, observation, and monitoring. To fulfill this purpose, the RESTORE Act sets out a list of activities that are eligible for funding under the program. This list includes, among other things, marine and estuarine research, marine and estuarine ecosystem monitoring and ocean observation, and data collection. The program therefore funds a wide range of research and monitoring activities.

These activities could potentially overlap with those of the state Centers of Excellence. As noted above, the Centers are required to focus on science, technology, and monitoring in at least one of the following disciplines:

- Coastal and deltaic sustainability, restoration, and protection;
- Coastal fisheries and wildlife ecosystem research and monitoring;
- Offshore energy development;
- Sustainable and resilient growth, economic and commercial development; and/or
- Comprehensive observation, monitoring and mapping.

Depending on which discipline(s) a Center of Excellence focuses on, there is the potential for overlap with the Gulf Coast Ecosystem Restoration Science Program. For example, a focus on "coastal fisheries and wildlife ecosystem research and monitoring" could fall within the broad purpose of the NOAA-led program (i.e., to support the long-term sustainability of ecosystems and fisheries in the Gulf). The same could be said for "comprehensive observation, monitoring and mapping." In contrast, a focus on offshore energy development or on commercial development may not overlap at all with the NOAA-led program.

Likewise, the NAS program created by the criminal plea agreements could overlap with both of the RESTORE Act science programs. NAS will receive $500 million over the next five years to fund a 30-year program focused on "human health and environmental protection[,] including issues relating to offshore oil drilling" and the production and transportation of hydrocarbons in the Gulf and the outer continental shelf. The goal is to improve "the safety of offshore oil drilling and hydrocarbon production and transportation" in these areas.[74] The program will fund studies in research and development, education and training, and environmental monitoring, all of which must relate to the program's focus. While NAS is still determining what research it will undertake, its broad focus and the types of studies it will be funding could potentially overlap with the RESTORE Act programs. For example, its focus on "environmental protection" (even in the context of improving the safety of offshore drilling operations) could overlap with the purpose of the Gulf Coast Ecosystem Restoration Science Program and some of the disciplines of the states' Centers of Excellence (e.g., coastal and deltaic sustainability, restoration, and protection). In addition, some of the activities that the NAS program will undertake, including research and monitoring, are the same types of activities that will be undertaken by the NOAA-led program and the Centers of Excellence.

There could also be significant overlap with the BP-funded Gulf of Mexico Research Initiative (GoMRI). In May 2010, BP announced that it would provide $500 million in funding over 10 years for "an independent research program."[75] Later that year, BP entered into an agreement with the Gulf of Mexico Alliance to administer and manage the program. The purpose of the program is similar to that of the NAS program: "to study the effect, and the potential associated impact, of hydrocarbon releases on the environment and public health, as well as to develop improved spill mitigation, oil detection, characterization and remediation technologies."[76] The program currently has five areas of focus, including the interaction of degraded oil-dispersant

[74] Agreement between BP Exploration and Production, Inc. and the National Academy of Sciences, Exhibit B-1 to the Guilty Plea Agreement of BP Exploration and Production, Inc., paras. 3-4.
[75] Gulf of Mexico Research Initiative Master Research Agreement between BP Exploration & Production Inc. and Gulf of Mexico Alliance (as amended and restated July 11, 2012) (hereinafter "Master Agreement").
[76] Master Agreement, Recitals.

systems with coastal and ocean ecosystems, the environmental effects of oil-dispersant systems, and the impacts of oil spills on human health.[77] These areas of focus could potentially overlap with the NAS program, the Gulf Coast Ecosystem Restoration Science Program, and the Centers of Excellence.

Aside from these scientific programs, there are also numerous scientific studies of the oil spill that have been completed or are ongoing. These include studies being carried out pursuant to the NRDA process. Shortly after oil began to flow into the Gulf of Mexico, the trustees started collecting data related to the spill in order to, among other things, assess the impacts of the spill on natural resources. The trustees have formed several technical working groups to assess these impacts, including groups studying birds, fish, deepwater communities, and human uses of impacted natural resources. While these studies are more narrowly focused on the impacts of the spill, the data collected from this work could inform, as well as complement, the work carried out under the scientific programs discussed above. It is important to note, however, that some of that data is not currently available to the public because the trustees are in the midst of building their case against BP and other responsible parties with regard to natural resource damages.[78]

In light of the various science programs that have the potential to overlap, it is important that they be coordinated. Some overlap among the programs may be beneficial: comprehensive programs require extensive resources and may benefit from independent teams of researchers working on similar issues. Thorough coordination may, however, maximize the utility of the outputs from the various science programs and centers. While there is currently no overarching legal coordination mechanism in place, there are a few tools intended to increase coordination among the various science programs. These are described in more detail below.

Linkages among the processes

While there is the potential for overlap among the various restoration processes and scientific programs, there is also the potential for some valuable linkages. One example is the RESTORE Act's cost-share provisions. Under the RESTORE Act, the Direct Component and Spill Impact

[77] See Gulf of Mexico Research Initiative, GoMRI History, available at: http://gulfresearchinitiative.org/about-gomri/gri-history (last accessed Nov. 11, 2013).

[78] In November 2013, BP announced that it was "launching an effort to make a vast quantity of environmental data collected from the Gulf of Mexico" available to the public. It released its first set of data at that time, and indicated that "more data releases are planned in 2014." BP, Press Release, "BP Makes Gulf of Mexico Environmental Data Publicly Available," dated Nov. 18, 2013 (available at http://www.bp.com/en/global/corporate/press/press-releases/bp-makes-gom-environmental-data-available.html). The trustees have also made some data available to the public (see, e.g., http://gomex.erma.noaa.gov/erma.html).

Component may be used to satisfy the non-federal cost-share requirements for matching grants under other, existing federal programs.[79] Thus, projects and programs that are partially funded by other monies but still require a non-federal cost-share component (e.g., NAWCF projects) could satisfy this match requirement and attain full funding with fines and penalties paid as a result of the spill.

At the same time, valuable linkages may be created among the various restoration processes and scientific programs. Billions of dollars are expected to go to natural resource restoration. There is already $1 billion available to start restoration projects before the NRDA is finished, and NFWF will receive over $2.5 billion to restore natural resources injured by the spill. To the extent these processes can be coordinated with projects funded under the RESTORE Act and NAWCF, there is the potential for some powerful synergies. The same can be said for the numerous scientific programs and studies undertaken with settlement and other monies related to the spill.

B. Mechanisms for Coordinating the Processes

In light of the overlap in focus among many of the restoration and recovery processes, it is important that these processes be coordinated. Coordination is important not only in ensuring that the processes are not duplicative, but also in ensuring that they complement each other – making it more likely that projects and programs funded by these processes will achieve greater benefits than they could on their own. This section explores some of the ways that coordination may be achieved among the processes.

Comparing the leadership

One of the ways that coordination may be achieved among the various restoration and recovery processes is through the overlapping appointment of representatives to the various positions, boards, and advisory committees tasked with administering them (see Table 6).

The six processes described here vary in their level of governmental and nongovernmental leadership:

- The OSLTF is overseen by the U.S. Coast Guard National Pollution Funds Center.

[79] 33 USC 1321(t)(1)(N), (3)(F).

- NAWCF grant requests are received by FWS, then reviewed and ranked by the NAWCC, which consists of the FWS Director, Secretary of the Board of NFWF, representatives of state fish and wildlife agencies, and nonprofit wetlands conservation organizations. Project recommendations are then submitted to the Migratory Bird Conservation Commission, which is composed of members of Congress, the Secretaries of the Interior and Agriculture, and the EPA Administrator.

- NFWF is a nongovernmental, nonprofit organization. However, its Board of Directors consists of 30 governmental and nongovernmental members, including the leaders of FWS and NOAA, who must be approved by the Interior Secretary.

- The NAS is a nongovernmental research organization. Its board and any optional committees it creates must also be nongovernmental. Once a year, NAS must seek advisory recommendations from certain federal and state agencies and resource managers regarding administration of the Gulf Research Program.

- The RTF, created by the RESTORE Act, is administered by the Treasury Department, and monies will be disbursed by and to representatives of the five Gulf states, the Departments of the Interior, Commerce (including NOAA),[80] Agriculture, and Homeland Security, the EPA Administrator, and the Secretary of the Army. In Louisiana and Florida, some of the funds will go directly to local governments, and in Florida some of the funds will also go to a consortium of public and private research institutions and agencies.

- The NRDA Trustee Council is composed of representatives from the five Gulf states, the Departments of the Interior, Commerce, and Agriculture, and the EPA.[81]

[80] The Department of Commerce has been selected, by the state members, as the federal chair of the Gulf Coast Ecosystem Restoration Council.
[81] The Department of Defense is also a natural resource trustee, due to its Gulf Coast facilities whose resources may be impacted by the oil spill, but it is not a signatory to the early restoration agreement and is not currently a member of the Trustee Council.

Table 6. Comparison of entities involved in leading the Gulf restoration and recovery processes

	OSLTF	NAWCF	NFWF	NAS	RTF	NRDA
FEDERAL						
Department of the Interior		FWS	FWS		X	FWS, NPS, BLM
Department of Commerce			NOAA		X	NOAA
Department of Defense					Army	*
Department of Homeland Security	Coast Guard				(Coast Guard)	
Department of Agriculture					X	X
Environmental Protection Agency					X	X
Department of the Treasury					X	
Federal resource managers			X			
North American Wetlands Conservation Council		X				
Migratory Birds Conservation Commission		X				
STATE						
Alabama					X	X
Florida					X	X
Florida—local governments					X	
Louisiana					X	X
Louisiana—local governments					X	
Mississippi					X	X
Texas					X	X
State resource managers			X			
Public research entities					X	
Nongovernmental						
NGO staff			X	X		
Private research institutions					X	

(X) – Secretarial designee
** – Not currently on the Trustee Council*

Shared leadership offers perhaps the most potent tool for coordinating RESTORE Act implementation and NRDA. On the federal side, the only variations between representatives are (1) the specification that the Secretary of the Army be involved in the RESTORE Act Restoration Council, whereas the Department of Defense more broadly is included in the NRDA process; and (2) that the Treasury Department is not a NRDA trustee. On the state side, the major variation is that under some of the RESTORE Act processes funds are distributed directly to local governments within Florida and Louisiana, not a state lead.

The need for coordination among the federal entities involved in these two processes is recognized and reflected in President Obama's Executive Order 13,626. The Order, which added USDA and EPA as members of the NRDA Trustee Council, states that

> Federal members of the [RESTORE] Gulf Restoration Council and [NRDA] Trustee Council, as well as all Federal entities involved in Gulf Coast restoration, shall work closely with one another to advance their common goals, reduce duplication, and maximize consistency among their efforts. All Federal members are directed to consult with each other and with all non-federal members in carrying out their duties on the Gulf Restoration Council.[82]

Coordination mechanisms built into the processes

The benefit of the numerous restoration processes is the breadth of resources, both financial and technical, that are being pulled into Gulf recovery efforts. One of the challenges, however, is the lack of specific legally-binding coordination requirements in the midst of similar, if not sometimes overlapping, purposes and objectives.[83]

There are nonetheless several tools for communication among responsible authorities. For example, the criminal plea agreements provide that NFWF must consult with state and federal resource managers "[i]n conducting or funding…projects." This is not only "to identify the highest priority projects," but also "to maximize the environmental benefits of such projects." At present, NFWF is consulting with certain state and federal natural resource agencies (see Table 1 for the list of resource agencies that NFWF is consulting). NFWF has indicated that "[t]he input of these consultative agencies will be the primary means through which [projects funded under NFWF] will be coordinated with" projects under the NRDA and the RESTORE Act

[82] Ex. Order 13,626 §3(c).

[83] It is important to note that, while there are no overarching legal coordination mechanisms in place, the main scientific bodies have been coordinating. The bodies have established an ad hoc coordinating forum, which has bimonthly conference calls where participants can share information about their activities and build relationships that may enable coordination as the programs move forward.

processes. While NFWF is required to consult with government resource managers, it is important to keep in mind that NFWF retains ultimate authority over project funding. Thus it remains to be seen whether the consultation requirement will spur coordination between the NFWF-funded projects and the other restoration and recovery processes.

The provisions related to the Gulf Coast Ecosystem Restoration Science Program also contain several tools for coordination. First, NOAA must consult with the FWS Director during establishment of the program and with the FWS Director, the Gulf of Mexico Fishery Management Council, and the Gulf States Marine Fisheries Commission during its implementation. Second, funding will be prioritized for projects that, among other things, "build on, or are coordinated with, related research activities."[84] Third, NOAA (in consultation with FWS) must seek to avoid duplicating other research and monitoring efforts. Finally, NOAA (again, in consultation with FWS) is required to establish a plan to coordinate activities with those in existing federal and state science and technology programs in the Gulf, including Centers of Excellence created pursuant to the RESTORE Act. Taken together, these requirements draw a picture in which NOAA must actively consult and coordinate with the myriad ongoing natural resources and fisheries research, monitoring, observation, and technology programs that exist in the Gulf to ensure a reduction in inefficient overlap and an increase in synergistic benefits. Although only a relatively small percentage of RESTORE funds are designated for the Science Program, the Program could play a broader coordinating role for research activities within (and, possibly, outside of) the RESTORE framework.

Similarly, the NAS program is supposed to make use of the expertise of "the nation's scientific, engineering, and health-care communities."[85] NAS is also required to seek advisory recommendations regarding program administration on an annual basis from the Interagency Coordinating Committee on Oil Pollution Research, which includes the Bureaus of Safety and Environmental Enforcement (BSEE) and Ocean Energy Management (BOEM), and from the environmental protection departments and other coastal natural resource managers in the five Gulf states.

Finally, a potential coordination tool that has yet to be implemented is the National Environmental Policy Act (NEPA). NEPA requires federal agencies to analyze the potential environmental impacts and cumulative impacts of "major federal actions," ensuring decision-makers have the information necessary to meaningfully consider the potential environmental and socioeconomic impacts of proposed projects (including private, state, and local projects

[84] RESTORE Act, § 1604(d).
[85] BP Criminal Plea Agreement, Exh. B-1.

that require federal approval or receive federal funding). Many of the Gulf restoration processes are at least jointly implemented by federal agencies or receive federal monies, and thus are likely to trigger environmental assessment requirements. The analyses that will be completed for the various projects, activities, and programs proposed or funded by these processes may provide a tool for increasing coordination among them.

C. Potential Gaps

While the various restoration and recovery processes collectively have a broad scope, there are no requirements that funds be spent on all eligible activities or resources. This makes it likely that areas where it is difficult to ascertain or restore injuries, or that lack adequate support will likely receive a relatively small share of the funding. Offshore waters – the deep waters, generally under federal jurisdiction, that are far from shore and the public eye – deserve special consideration.

Of the federal agencies with authority over deepwater areas, NOAA, DOI, and EPA are the most likely to direct their focus at offshore waters (although all three have multiple competing priorities). This could materialize through some of the RESTORE-funded processes, particularly through the portions that have a region- or ecosystem-wide focus, such as the Restoration Council or the Gulf Coast Ecosystem Restoration Science Program. The best opportunity for addressing deepwater areas may, however, be through the NRDA process. Given that all three agencies are represented on the trustee council and the increasing evidence that the deepwater environment suffered injuries from the spill, the NRDA process could in some ways address the federal waters that were at the epicenter of the spill.[86]

The other processes are unlikely to provide significant funding for the deepwater. The OSLTF funds the agencies that enforce the OPA and respond to oil spills, but – if the *Deepwater Horizon* response is any indication – oil spill responses may continue to focus on the ocean surface and polluted shorelines, not deepwater offshore areas. And NAWCA grants do not, by definition, apply to deepwater areas. One possible exception is the NAS program – resources from this program may focus on the deepwater since such research will likely accelerate alongside the growing hydrocarbon production efforts taking place in increasingly deep waters.

[86] For deep-sea impacts of the spill, see Montagna PA, Baguley JG, Cooksey C, Hartwell I, Hyde LJ, et al., *Deep-Sea Benthic Footprint of the Deepwater Horizon Blowout*, PLoS ONE 8(8) (2013), available at http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0070540.

Another key area that may not receive significant focus is upland areas – areas that are integrally connected to Gulf of Mexico watersheds and ecosystems, but lie beyond the boundaries of the Gulf Coast region as defined in one or more processes.

One factor is whether upland areas are within the scope of the funding streams. This has primarily arisen within the context of the RESTORE Act. Funds disbursed under RESTORE are generally restricted to expenditure in the Gulf Coast region, which is defined as the lands, waters, and watersheds within the coastal zones of the five Gulf states, plus the area within twenty-five miles, and all federal waters in the Gulf of Mexico.[87] Due to the inclusion of "watersheds" in the definition, it may be possible to fund projects in areas beyond the Gulf Coast region that are in watersheds that drain into the region itself.[88] The other restoration and recovery processes do not have such strictly defined geographical boundaries, but rather are generally bounded by types of resources or injuries.[89] For instance, restoring uplands may be addressed in the NRDA process to the extent they relate to natural resources injured by the spill.

D. Potential Long-Term Effects

As the various restoration and recovery processes begin to receive funding, another important consideration will be the potential effect of the restoration funds on the long-term conservation and restoration capacity of Gulf of Mexico programs and institutions. The primary question is whether they will truly supplement existing restoration and protection efforts, or whether they will ultimately supplant other sources of funding. This may be a direct effect (such as replacing federally-appropriated funds) or an indirect result (such as the gradual replacement of an existing program). Looking at past funding levels for the various institutions and processes, the influx on the front end may be significant.

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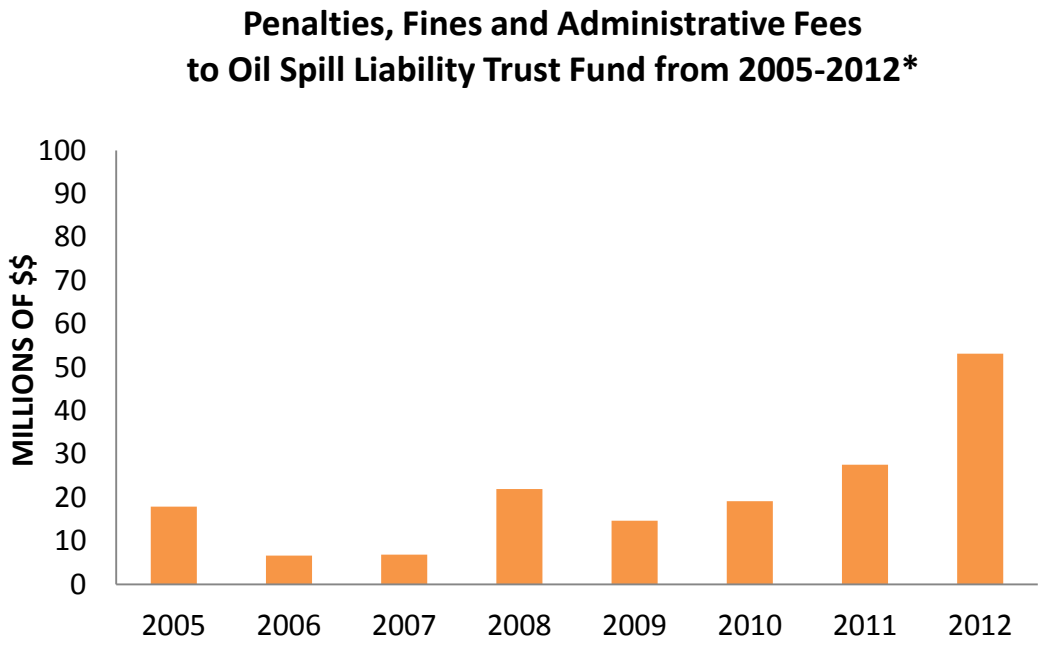
[87] For more on the geographic scope, *see supra* note 56 and surrounding text.

[88] A "preliminary list of authorized but not yet commenced projects and programs" was produced as *Appendix A: Background Information* to the Council's Initial Comprehensive Plan, which was finalized and approved in August 2013. Members of the Council put forward projects "which would further the purposes and goals of [the RESTORE Act]." Only one member of the Council, the USDA, put forward any projects that were outside of the Gulf Coast region.

[89] NAWCA grants may be used beyond the Gulf Coast region (from Mexico to Canada), but will be restricted to projects that benefit specific species of migratory birds impacted by the spill. NFWF funds are not explicitly restricted to the Gulf Coast region, but they are intended to remedy and reduce the risk of future harm to the Gulf's natural resources; thus these projects will likely be located almost exclusively within the Gulf Coast region. The OSLTF is not limited to the Gulf region. NRDA projects can take place outside of the Gulf region if they are intended to remedy injuries to natural resources caused by the spill.

This is certainly true for the OSLTF. Although the OSLTF will receive only 20% of the CWA civil and administrative fines coming out of the *Deepwater Horizon* disaster (with the rest going to the RTF), the amounts the OSLTF will receive from the disaster are expected to dwarf any previous contributions to the fund (see Figure 7). For example, from 2005 to 2011, the OSLTF received a total of $114 million in fines, penalties, and fees.[90] In contrast, the OSLTF is already set to receive $1.495 billion over a five-year period through plea agreements and settlements reached with some of the parties responsible for the *Deepwater Horizon* disaster, even prior to determination and allocation of the CWA amounts for BP, which could also be in the billions.

Figure 7. A snapshot of recent contributions to the OSLTF



**Note that $45 million of 2012's fines came from MOEX's Gulf civil settlement.*

NFWF will similarly be receiving an unprecedented influx of funding. NFWF receives support from a variety of sources, including both federal and non-federal funds. As noted previously, prior to the settlements associated with *Deepwater Horizon*, NFWF had received $2.1 billion over the course of its almost 30-year history. In recent years, NFWF's annual funding was $102.8 million (2012), $110.5 million (2011), and $112.8 million (2010).[91] The percentage of

[90] US Department of the Treasury, Office of the Inspector General, Bureau of Public Debt Trust Fund Management Branch Annual Audit Reports, available at http://www.treasury.gov/about/organizational-structure/ig/Pages/audit_reports_index.aspx.

[91] *See* NFWF's annual reports from 2012, 2011, and 2010, available at www.nfwf.org.

federal versus non-federal support ranged from 44% to 63% over the three-year period. In comparison with these historical levels, the influx of $2.544 billion over a five-year period is an enormous increase in program scale – averaging the funds over that period would translate to roughly a five-fold increase in annual revenues.

Not all of the processes will be similarly affected. For example, NAS has a relatively large annual budget and is receiving a smaller quantity of funds from the settlement processes. In 2012, NAS received $250 million from the federal government.[92] Combining the funds from the BP and Transocean criminal plea agreements to date, NAS is slated to receive $500 million to support a 30-year science program, equating to roughly $16.6 million per year. Thus the deposits will not represent a significant increase in overall institutional annual funding. To note, NAS is not to use settlement funds to replace existing federal activities.[93]

One of the potentially most significant questions is what effect the influx of funds from the RTF and NRDA will have on long-term restoration and conservation efforts. These processes are only funded by *Deepwater Horizon* recovery, thus the funds will not supplant other sources of revenue. The fact remains, however, that a remarkable amount of funding will be focused on achieving regional restoration in a way rarely before seen – and in a way that likely overlaps with the efforts of existing federal, state, and local programs.

In sum, for the recipients of restoration funds, it remains to be seen whether historical revenue streams remain constant or are gradually, suddenly, temporarily, or permanently altered. It also remains to be seen how the network of disaster recovery processes interact and coordinate with existing regional conservation and restoration programs, and whether they alter the direction, scope, and extent of these programs and institutions over the long term.

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[92] *See* NAS' annual report from 2012, available at www.nas.org.

[93] Comment by Chris Elfring during the Gulf Research Program Virtual Listening Meeting that was hosted on Dec. 5, 2013. The recording is posted on NAS, Gulf Research Program Events, www.nationalacademies.org/gulf/events/index.html.

III. Conclusion

Major oil spills and major changes to U.S. environmental laws and policies have often gone hand in hand. The 1969 Santa Barbara oil spill ushered in an era of stricter oversight of offshore oil and gas leasing and development. The 1989 *Exxon Valdez* tanker spill was the catalyst for the enactment of the Oil Pollution Act of 1990. So far, the *Deepwater Horizon* tragedy has not produced the sorts of changes to the legal landscape that earlier spills did. Instead of new laws, the *Deepwater Horizon* spill has created an experiment that is unprecedented in the history of oil and gas development and environmental law. That experiment involves the reallocation of fines and penalty dollars to the resources, states, and communities affected by the spill. The fact that the nation chose to do this at a time of tight budgets and extremely challenging politics is a testament to both the scale of the spill and a collective desire to see those dollars deliver real value.

In large part this paper tracks that experiment. There is still much that is unsettled or even unknowable at this time with regard to how many dollars will go to whom for what. In many ways, the heaviest burden will fall on those states and communities that are eligible to receive funds. The temptation to fund easy, popular, quick projects will be great and understandable. The pressure to opt for economic development projects over those offering more environmental benefits will be great, especially since under most of these processes economic development is an allowable use of some funds. Similarly, those involved will be relying upon new decisionmaking processes and public engagement opportunities without the normal regulatory structure. None of that should be surprising since this is the first time anyone has walked this path. That is what makes this an experiment.

But the experimental nature of this should be a reason for care, caution, and accountability rather than a license for unhindered flexibility. If this recovery effort goes awry, if the nation does not feel the funds were spent wisely and accountably, then it could easily be the last time spill-related funds are made directly available to affected states and communities. Much good can be done with these monies, and a positive example can be set for the future. For the most part that will depend on federal, state, and local officials and community leaders keeping faith with the reasons Congress and the Administration chose to make these funds available. It will depend on remembering that federal funds are still subject to federal oversight, and it will depend on delivering real value with these dollars across the Gulf. That is the experiment. If it is successful, it will build trust and the possibility of making the best parts of the experiment permanent. If that happens, the legacy of this spill and its aftermath may be more significant and positive than anyone could have imagined.

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