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# **The 2010 *Deepwater Horizon* Oil Spill: Natural Resource Damage Assessment Under the Oil Pollution Act**

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July 24, 2013

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R41972

## Summary

The 2010 *Deepwater Horizon* oil spill leaked an estimated 4.1 million barrels of oil into the Gulf of Mexico, damaging the waters, shores, and marshes, and the fish and wildlife that live there. The Oil Pollution Act (OPA) allows state, federal, tribal, and federal governments to recover damages to natural resources in the public trust from the parties responsible for the oil spill. Under the public trust doctrine, natural resources are managed by the states for the benefit of all citizens, except where a statute vests such management in the federal government.

In particular, OPA authorizes Trustees (representatives of federal, state, and local government entities with jurisdiction over the natural resources in question) to assess the damages to natural resources resulting from a spill, and to develop a plan for the restoration, rehabilitation, replacement or acquisition of the equivalent, of the natural resources. The types of damages that are recoverable include the cost of replacing or restoring the lost resource, the lost value of those resources if or until they are recovered, and any costs incurred in assessing the harm. OPA caps liability for offshore drilling units at \$75 million for economic damages, but does not limit liability for the costs of containing and removing the oil.

The process established by OPA for assessing the damages to natural resources is known as Natural Resources Damage Assessment (NRDA). In the three steps of the NRDA process, the Trustees are required to solicit the participation of the responsible parties and design a restoration plan. This plan is then paid for or implemented by the responsible parties. If the responsible parties refuse to pay or reach an agreement with the Trustees, the Trustees can sue the responsible party for those damages under OPA. In the alternative, the Trustees may seek compensation from the Oil Spill Liability Trust Fund, but there is a cap of \$500 million from the Fund for natural resources damages. The federal government may then seek restitution from the responsible parties for the sums taken from that Fund.

The Trustees are not required to adhere to the NRDA process set forth in the OPA regulations. However, they are accorded a rebuttable presumption in court for any determination or assessment of damages conducted pursuant to the regulations. Of course, the Trustees and the responsible parties are permitted to enter into settlement agreements at any point throughout the NRDA process.

The NRDA process in the Gulf is in the Restoration Planning Phase. The caps on the Oil Spill Liability Trust Fund and on OPA liability have captured Congress's attention, as has Gulf restoration. In 2012, President Obama signed the RESTORE Act, which establishes from Clean Water Act penalties the Gulf Coast Restoration Trust Fund, which is available for restoration activities in the Gulf Coast region.

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## Introduction

The estimated 4.1 million barrels of oil released during the 2010 *Deepwater Horizon* oil spill is considered to be the largest accidental marine oil spill in the history of the petroleum industry and will have an impact on the natural resources of the Gulf region for the foreseeable future. Under the Oil Pollution Act of 1990 (OPA), federal, state, tribal, and foreign governments may seek compensation for the costs of restoring damaged natural resources from the parties responsible through the Natural Resource Damage Assessment (NRDA) process. Under the NRDA process, damages are assessed to restore the natural resources to their prior condition and to compensate the public for their lost use of these resources.

This report examines the NRDA process under the OPA in the context of the *Deepwater Horizon* spill. In particular, this report describes the statutory requirements of OPA, the NRDA process under the implementing regulations, and developments in the Gulf of Mexico.

## Statutory Framework of OPA

OPA (sometimes known as OPA 90) applies to discharges of oil into the navigable waters of the United States, adjoining shorelines, and the exclusive economic zone of the United States.<sup>1</sup> It was enacted partially in response to the *Exxon Valdez* spill in 1989, where liability was imposed primarily through the Clean Water Act (CWA). OPA amended the CWA<sup>2</sup> and several other statutes imposing oil spill liability to create a unified oil spill liability regime, to expand the coverage of such statutes, increase liability, to strengthen federal response authority, and to establish a fund to ensure that claims are paid up to a stated amount. Several federal district courts have held that OPA preempts other general maritime remedies.<sup>3</sup>

## Liability

Pursuant to OPA, the parties responsible for causing the oil spill are responsible for damages to natural resources.<sup>4</sup> In the case of offshore drilling, a *responsible party* is the lessee or permittee of the area in which the facility is located.<sup>5</sup> When the Coast Guard receives information of an incident, it is required to designate the responsible parties.<sup>6</sup>

Liability under OPA is strict, and joint and several.<sup>7</sup> *Joint and several liability* means that where there are multiple responsible parties, each is potentially liable for the whole amount of the

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<sup>1</sup> The United States' exclusive economic zone extends to 200 nautical miles offshore; the *Deepwater Horizon* spill occurred 50 miles offshore. See 33 U.S.C. §2701(6); Presidential Proclamation No. 5030, 48 Fed. Reg. 10605, (March 14, 1983).

<sup>2</sup> See 33 U.S.C. §1321.

<sup>3</sup> See *In re: Settoon Towing*, No. 07-1263, 2009 WL 4730971 (E.D. La. December 4, 2009); *Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741 (E.D. La. 2009).

<sup>4</sup> 33 U.S.C. §2702.

<sup>5</sup> *Responsible party* is further defined at 33 U.S.C. §2701(32)(C).

<sup>6</sup> The authority of the President to designate the responsible party under 33 U.S.C. Section 2714(a) was delegated to the Coast Guard via executive order in 1991. Exec. Order No. 12777 (56 Fed. Reg. 54757 (October 22, 1991)).

<sup>7</sup> See *Rice v. Harken Exploration, Inc.*, 250 F.3d 264, 266 (5<sup>th</sup> Cir. 1991). OPA section 1001(17) (33 U.S.C. §2701(17)) (continued...)

damages, regardless of its share of blame. Responsible parties, however, can bring separate actions for subrogation to resolve reimbursement issues among themselves.<sup>8</sup> *Strict liability* means liability is assigned regardless of fault or blame. There does not have to be a mistake, negligence, or a willful action for a party to be responsible.

It is important to note that while OPA provides a federal remedy for natural resource damages, it does not preclude liability under other laws. For instance, the federal government may impose criminal liability for harming protected species.<sup>9</sup> Moreover, OPA specifically allows states to impose additional liability for oil spills and/or requirements for removal activities.<sup>10</sup>

## Determination of Damages

Under OPA, each *responsible party* for an oil spill is liable for removal costs and six specified categories of damages.<sup>11</sup> One of these categories is natural resource damages,<sup>12</sup> which replaced the CWA natural resource damages provisions for oil spills.<sup>13</sup> OPA defines natural resource damages as “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.”<sup>14</sup> *Removal* is defined as “containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare.”<sup>15</sup> Thus, harm to natural resources is categorized as a *damage* under OPA; *removal* is separate.<sup>16</sup>

In the case of natural resource damages, OPA provides that responsible parties are liable to the United States government, states, Indian tribes, or foreign governments for damages to natural resources under each of their respective jurisdictions.<sup>17</sup> OPA provides three factors for measuring natural resource damages.<sup>18</sup> The first allows for “the cost of restoring, rehabilitating, replacing, or

(...continued)

declares that OPA’s liability standard is the same as that in section 311 of the Clean Water Act, the provision of that act addressing oil spills. CWA section 311, in turn, has been interpreted by courts to impose strict, joint and several, liability. *See also* In re: Settoon Towing, No. 07-1263, 2009 WL 4730971, at \*2 (E.D. La. December 4, 2009). S.Rept. 101-94, 1990 U.S.C.C.A.N. 722, 726 (1990) (“[this bill] explicitly extends strict, joint, and several liability for compensation of third party damages”).

<sup>8</sup> 33 U.S.C. §2702(d)(1)(B).

<sup>9</sup> For an analysis of criminal laws related to wildlife harm, see CRS Report R41308, *The 2010 Oil Spill: Criminal Liability Under Wildlife Laws*, by Kristina Alexander.

<sup>10</sup> 33 U.S.C. §2718(a).

<sup>11</sup> 33 U.S.C. §2702(b). The six specified categories of damages are for natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services.

<sup>12</sup> 33 U.S.C. §2702(b)(2)(A). The statute indicates that the United States, states, and Indian tribes can recover all of their removal costs, while private parties can recover removal costs only “for acts taken by the person which are consistent with the National Contingency Plan.”

<sup>13</sup> *See* OPA §2002(a), 33 U.S.C. §1321 note.

<sup>14</sup> 33 U.S.C. §2702(b)(2)(A).

<sup>15</sup> 33 U.S.C. §2701(30) (including, but not limiting damage to “fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”).

<sup>16</sup> 33 U.S.C. §2702(b).

<sup>17</sup> 33 U.S.C. §2706(a).

<sup>18</sup> 33 U.S.C. §2706(d).

acquiring the equivalent of, the damaged natural resources.”<sup>19</sup> The second considers “the diminution in value of those natural resources pending restoration.”<sup>20</sup> And the third allows for recovery of the reasonable costs incurred in “assessing those damages.”<sup>21</sup>

Damages are capped under OPA unless one of the enumerated statutory exceptions applies. For offshore facilities, a responsible party’s liability for economic damages is limited to \$75 million, but there is no cap on removal costs.<sup>22</sup> Exceptions that would nullify the cap include gross negligence, willful misconduct, or violating an applicable federal regulation.<sup>23</sup>

## Trustees

The governmental entities with jurisdiction over resources—federal, state, tribal, and foreign—are the Trustees throughout the NRDA process. Under OPA, the function of the Trustees is to assess natural resource damages, as well as to “develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.”<sup>24</sup> Accordingly, they are charged with acting “on behalf of the public.”<sup>25</sup>

The Trustees must give a written invitation to the responsible parties to participate in the NRDA process, and if the responsible parties accept, they must do so in writing.<sup>26</sup> Significantly, OPA requires presenting NRDA claims to the responsible parties before any suit can be filed or other action taken to allow for pre-trial settlement.<sup>27</sup> Under Section 1006(e)(2) of OPA, if the Trustees satisfy the NOAA’s NRDA regulations in estimating damages, their assessment is treated as having a rebuttable presumption of accuracy in any judicial or administrative proceeding.<sup>28</sup> This means that a responsible party would have the burden of proving that the assessment is wrong, rather than the Trustees having to show that the assessment is right.

Typically, Trustees form a Trustee Council, to develop a restoration plan that addresses the damages to all of the Trustees’ resources.<sup>29</sup> These Trustees must reach consensus on the extent of damages and restoration when issuing a unified plan. When the goal is to have one plan to

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<sup>19</sup> 33 U.S.C. §2706(d)(1)(A).

<sup>20</sup> 33 U.S.C. §2706(d)(1)(B).

<sup>21</sup> 33 U.S.C. §2706(d)(1)(C).

<sup>22</sup> 33 U.S.C. §2704(a)(3).

<sup>23</sup> 33 U.S.C. §2704(c)(1).

<sup>24</sup> 33 U.S.C. §2796 (c). The statute permits the U.S. government to assess damages under a state or tribe’s trusteeship, upon request and subject to the federal officials’ discretion.

<sup>25</sup> 15 C.F.R. §990.11.

<sup>26</sup> 15 C.F.R. §990.14(c)(1).

<sup>27</sup> 33 U.S.C. §§2713(a), (c). This requirement has been held to be jurisdictional and mandates dismissal when not complied with by a claimant. *See* *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 240 (11<sup>th</sup> Cir. 1995); *Russo v. M/T Dubai Star*, No. C 09-05158 SI, 2010 WL 1753187 (N.D. Cal. April 29, 2010); *Marathon Pipe Line Co. v. LaRoche Indus. Inc.*, 944 F. Supp. 476, 477 (E.D. La. 1996); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 311 (E.D. Va. 1993); *Abundiz v. Explorer Pipeline Co.*, 2003 WL 23096018, at \*5 (N.D. Tex. November 25, 2003); *Prairie Band of Potawatomi Indians v. Glacier Petroleum, Inc.*, No. Civ. A. 00-2165-CM, 2001 WL 584451 (D. Kan. May 2, 2001) (dismissing the complaint for failing to complete the requisite stages under OPA).

<sup>28</sup> 33 U.S.C. §2706(e)(2).

<sup>29</sup> *See* NOAA, Trustee Council: Working Cooperatively, <http://www.gulfspillrestoration.noaa.gov/about-us/co-trustees/> (last visited August 3, 2011).

address all of the impacts, which is how NRDA generally operates, the Trustees must work cooperatively to determine the magnitude and extent of injury to natural resources and create a plan to restore those injured resources to baseline (pre-spill) levels. When more than one state's natural resources are involved, each state gets one vote on these issues, even if a state has multiple state agencies represented among the Trustees. Each federal department also gets one vote, despite the number of subagencies involved.

Litigation may be avoided altogether if the responsible parties consent to the Trustees' restoration plan. Once money is recovered by a Trustee under OPA, including to cover the costs of assessing the damages, it is deposited in a special trust account in order "to reimburse or pay costs by the trustee ... with respect to the damaged natural resource."<sup>30</sup> By establishing a collaborative process for resolving liability issues, NRDA is thus designed to avoid litigation. According to discussion on the House floor about OPA, "[OPA] is intended to allow for quick and complete payment of reasonable claims without resort to cumbersome litigation."<sup>31</sup>

OPA also includes a citizen suit provision for natural resource damages. It states that "any person" is permitted to sue a federal official "where there is alleged to be a failure of that official to perform a duty ... that is not discretionary with that official."<sup>32</sup>

## Oil Spill Liability Trust Fund

OPA provides for an Oil Spill Liability Trust Fund (OS Trust Fund), which is financed chiefly by a per-barrel tax on crude oil produced in or imported to the United States.<sup>33</sup> Administered by the National Pollution Funds Center, an independent Coast Guard unit that serves as its fiduciary,<sup>34</sup> the OS Trust Fund can be used to remedy natural resource damages if the responsible parties refuse to accept the Final Restoration Plan and the Trustees choose not to sue.<sup>35</sup> The OS Trust Fund can likewise be used in the interim period before the responsible parties are identified, as well as in circumstances where the responsible parties cannot be identified.

OS Trust Fund monies are available for a range of remedial and compensatory uses, including the payment of removal costs and costs incurred by Trustees during the NRDA process.<sup>36</sup> For example, the Trustees may use the Fund for assessing natural resource damages and for developing and implementing restoration plans.<sup>37</sup> Money for the Trustees' immediate assessment of the natural resource damage may come from the OS Trust Fund until the responsible parties are identified and provide reimbursement to the Fund.<sup>38</sup>

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<sup>30</sup> 33 U.S.C. §2706(f).

<sup>31</sup> 135 Cong. Rec. 26943 (November 2, 1989).

<sup>32</sup> 33 U.S.C. §2706(g).

<sup>33</sup> 26 U.S.C. §4611.

<sup>34</sup> See 33 C.F.R. Part 136.

<sup>35</sup> 33 U.S.C. §2712. The standards and procedural requirements for claims filed against the OS Trust Fund are set forth in the Coast Guard's OPA regulations. See 33 C.F.R. §§136.1-136.241.

<sup>36</sup> For more information on the OPA claims process, see CRS Report R41262, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, coordinated by Curry L. Hagerty and Jonathan L. Ramseur.

<sup>37</sup> 33 U.S.C. §2712(2).

<sup>38</sup> See 33 U.S.C. §2752(b).

The OS Trust Fund has compensation limits for damaged natural resources. It can be used to pay damages up to its per-incident cap of \$1 billion.<sup>39</sup> However, only \$500 million of that amount can go toward natural resource damage assessments and claims in connection with any single incident.<sup>40</sup> The remaining money from the OS Trust Fund can be used for the payment of removal costs and the other costs, expenses, claims, and economic damages included in OPA.<sup>41</sup> The money available from the OS Trust Fund exceeds an offshore facility's liability limit of \$75 million for economic damages under OPA.<sup>42</sup>

With some exceptions, a claim for removal costs or damages must first be presented to a responsible party or its guarantor before it may be presented to the National Pollution Funds Center for payment from the Fund.<sup>43</sup> The OS Trust Fund could also be used if the responsible parties are not known, insolvent, or refuse to give money for assessment before they are found responsible by a court.<sup>44</sup>

## The NRDA Process Under the OPA Regulations

The National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce oversees the NRDA process under OPA.<sup>45</sup> Currently, NOAA is involved in 13 other NRDA oil spill cases in the Gulf in addition to the BP spill.<sup>46</sup> Although Trustees are not obligated to follow NOAA's NRDA regulations, Trustees have an incentive to comply with the regulations because of the rebuttable presumption accorded such determinations.<sup>47</sup>

Under the OPA regulations, the Trustees may take emergency restoration action before completing the NRDA process, provided that (1) the action is needed to avoid irreversible loss of natural resources; (2) the action will not be undertaken by the lead response agency; (3) the action is feasible and likely to succeed; (4) delay would result in increased damages; and (5) the costs of the action are not unreasonable.<sup>48</sup> The regulations also provide that settlement for natural resource damages may occur at any time, if the terms of the settlement are adequate to satisfy the goal of OPA and are "fair, reasonable, and in the public interest."<sup>49</sup>

Under the OPA regulations, the Trustees are required to invite the responsible parties to participate in the NRDA process "as soon as practicable" but not later than the delivery of a Notice of Intent to Conduct Restoration Planning.<sup>50</sup> The regulations further state that the Trustees

<sup>39</sup> 26 U.S.C. §9509(c)(2)(A)(i).

<sup>40</sup> 26 U.S.C. §9509(c)(2)(A)(ii).

<sup>41</sup> 26 U.S.C. §9509(c)(1)(A).

<sup>42</sup> 33 U.S.C. §2704(a)(3).

<sup>43</sup> 33 U.S.C. §2713(b); 33 C.F.R. §136.103(c).

<sup>44</sup> 33 U.S.C. §2712 (a).

<sup>45</sup> See 15 C.F.R. part 990.

<sup>46</sup> NOAA, Southeast Region home page for Damage Assessment, Remediation, and Restoration Program, <http://www.darrp.noaa.gov/southeast/index.html>.

<sup>47</sup> See Valerie Ann Lee and P.J. Bridgen, *The Natural Resource Damage Assessment Deskbook: A Legal and Technical Analysis*, at 105 (2002).

<sup>48</sup> 15 C.F.R. §990.26(a).

<sup>49</sup> 15 C.F.R. §990.25.

<sup>50</sup> 15 C.F.R. §990.14(c).

and responsible parties should consider entering into binding agreements to facilitate their interactions and resolve any disputes.<sup>51</sup> Once the responsible parties accept an invitation to participate, the Trustees determine the scope of their participation in accordance with the regulations.<sup>52</sup> Furthermore, the regulations allow Trustees to take other actions to expedite the restoration of injured natural resources, including pre-incident planning and the development of regional restoration plans.<sup>53</sup>

The Trustees' work occurs in three steps: a Preassessment Phase, the Restoration Planning Phase, and the Restoration Implementation Phase.<sup>54</sup> These phases are discussed in detail below.

## Preassessment Phase

In the Preassessment Phase,<sup>55</sup> the Trustees initially establish whether there is jurisdiction under OPA and whether it is appropriate to try to restore the damaged resources. Under 15 C.F.R. Section 990.42, the Trustees must determine that there are injuries, that those injuries have not been remedied, and that there are feasible restoration actions available to fix the injuries. If any of those evaluations result in a negative finding, the NRDA process ends.<sup>56</sup> Determining whether injuries exist involves data gathering, and the Trustees use multiple sources, including the public, to obtain the information they need.<sup>57</sup>

Once injuries have been found, the Trustees complete the second step of the Preassessment Phase—preparation of a Notice of Intent to Conduct Restoration Planning Activities. This Notice is published in the *Federal Register* and also is delivered directly to the responsible parties.<sup>58</sup>

Finally, the Trustees open a publicly available administrative record, which includes the documents considered by the Trustees throughout the process. This record stays open until the Final Restoration Plan is delivered to the responsible parties.

## Restoration Planning Phase

The second phase in the NRDA process, known as the Restoration Planning Phase, focuses on designing the restoration plan.<sup>59</sup> This phase is composed of two primary steps: (1) injury assessment and (2) developing restoration alternatives.

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<sup>51</sup> 15 C.F.R. §990.14(c)(3).

<sup>52</sup> The participating responsible parties may request that trustees use alternate assessment procedures and may reject any proposed assessment procedures. See 15 C.F.R. §990.14(6).

<sup>53</sup> 15 C.F.R. §990.15.

<sup>54</sup> 15 C.F.R. §990.12.

<sup>55</sup> 15 C.F.R. Subpart D.

<sup>56</sup> See 15 C.F.R. §§990.41, 990.42.

<sup>57</sup> 15 C.F.R. §990.42.

<sup>58</sup> 15 C.F.R. §990.44.

<sup>59</sup> 15 C.F.R. Subpart E.

## Injury Assessment

First, the Trustees determine if the injuries to natural resources resulted from the incident. An injury is defined by the regulations as “an observable or measurable adverse change in a natural resource or impairment of a natural resource service.”<sup>60</sup> The Trustees will also evaluate harm resulting from the response actions,<sup>61</sup> such as the *in situ* burning, the use of dispersants, or vehicle damage to shores and marshes. These injuries are also compensable under OPA.<sup>62</sup>

The Trustees must likewise quantify the injuries and identify possible restoration projects. In particular, they must quantify the degree, and spatial and temporal injuries relative to the baseline.<sup>63</sup> The baseline is the level the Trustees agree the resources were at prior to the injury and to which they will be restored under NRDA.<sup>64</sup> The regulations allow the Trustees to use historical data, reference data, control data, and/or data on incremental changes to establish the baseline.<sup>65</sup> Thus, the activities that occur in the Restoration Planning Phase may include field studies, data evaluation, modeling, injury assessment, and quantification of damage, either in terms of money needed to restore the resource or in terms of habitat or resource units. To quantify injury, the Trustees are required to estimate the time for natural recovery *without* restoration, but including any response actions.<sup>66</sup>

## Developing Restoration Alternatives

Information from the injury assessment is used to develop a restoration plan that includes specific projects for remediation. Restoration can include restoring, replacing, rehabilitating, or acquiring the equivalent of the natural resource harmed or destroyed by the incident.<sup>67</sup> Once the information on the injuries justifies restoration, the Trustees must “consider a reasonable range of restoration alternatives before electing their preferred alternative.”<sup>68</sup> Only alternatives considered technically feasible can be included in a restoration plan.

The regulations indicate that each restoration alternative is composed of primary and/or compensatory restoration components that will address one or more of the specific injuries resulting from an oil spill incident.<sup>69</sup> For each alternative, the trustees must consider primary restoration actions, which is action taken to return injured natural resources and services to the baseline. This must include a natural recovery alternative, in which no intervention would be taken to restore injured natural resources and services to baseline.

At the same time, the Trustees must consider compensatory restoration actions for the interim loss of natural resources or services pending recovery. For compensatory restoration, the Trustees are

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<sup>60</sup> 15 C.F.R. §990.30.

<sup>61</sup> 15 C.F.R. §990.51(e).

<sup>62</sup> 33 U.S.C. §2702(b).

<sup>63</sup> 15 C.F.R. §990.52.

<sup>64</sup> See 15 C.F.R. §990.30.

<sup>65</sup> 15 C.F.R. §990.30.

<sup>66</sup> 15 C.F.R. §990.52(c).

<sup>67</sup> 15 C.F.R. §990.30.

<sup>68</sup> 15 C.F.R. §990.53.

<sup>69</sup> 15 C.F.R. §990.53(a)(2).

first directed to consider actions that would provide services of the *same* type and quality as the injured resources. If these cannot provide a reasonable range of alternatives, the Trustees should then identify actions that “provide natural resources and services of *comparable* type and quality as those provided by the injured natural resources.”<sup>70</sup> According to the House Conference Report, the priority in planning restoration is “to restore, rehabilitate and replace damaged resources. The alternative of acquiring equivalent resources should be chosen only when the other alternatives are not possible, or when the cost of those alternatives would, in the judgment of the trustee, be grossly disproportionate to the value of the resources involved.”<sup>71</sup>

Once the range of alternatives is chosen, the Trustees evaluate the alternatives and choose one as the basis of the restoration plan.<sup>72</sup> At a minimum, the proposed alternatives must be evaluated based on (1) the cost to carry out the alternative; (2) the extent to which each alternative is expected to meet the trustees’ goals; (3) the likelihood of success for each alternative; (4) the extent to which each alternative will prevent future injury and avoid collateral injury; (5) the extent to which each alternative benefits more than one natural resource; and (6) the effect of each alternative on public health and safety.<sup>73</sup> The Trustees are required to select a “preferred” restoration alternative, and if the Trustees conclude that two or more are equally preferable, they must select the most cost-efficient alternative.

The regulations set forth what the Draft Restoration Plan should include, such as a summary of the injury assessment procedures, a description of the injuries, the range of restoration alternatives considered, and the objectives of restoration.<sup>74</sup> The regulations also require that the Trustees “establish restoration objectives that are specific to the injuries,” which “should clearly specify the desired outcome, and the performance criteria by which successful restoration will be judged.”<sup>75</sup>

OPA requires the Trustees to provide opportunities for public involvement during the development of restoration plans.<sup>76</sup> A Draft Damage Assessment and Restoration Plan is submitted to the public for formal comment.<sup>77</sup> Those comments are addressed within the Final Restoration Plan.

NEPA requires that major federal actions that significantly affect the human environment must be reviewed to assess the impacts of the action.<sup>78</sup> The extent of the environmental review depends on the extent of the impacts on the environment. Final Restoration Plans that have significant impacts on the human environment will require an environmental impact statement, which will evaluate the impacts, provide alternatives to the chosen activity, consider possible mitigation, and involve the public in the process. Lesser impacts may mean that an environmental assessment is appropriate.

<sup>70</sup> 15 C.F.R. §990.53(c)(2) (emphasis added).

<sup>71</sup> H.Rept. 101-653, 1990 U.S.C.C.A.N. 779, 786-787 (1990) (Conf. Rep.).

<sup>72</sup> 15 C.F.R. §990.55. The OPA regulations likewise contemplate that Trustees may consider using a Regional Restoration Plan or an existing restoration project if these alternatives are preferred. See 15 C.F.R. §990.56.

<sup>73</sup> 15 C.F.R. §990.54(a).

<sup>74</sup> 15 C.F.R. §990.55.

<sup>75</sup> 15 C.F.R. §990.55(b)(2).

<sup>76</sup> See 15 C.F.R. §990.14(d).

<sup>77</sup> 15 C.F.R. §990.55.

<sup>78</sup> See 15 C.F.R. §990.23.

## Restoration Implementation Phase

Once the Trustees have agreed on a Final Restoration Plan, they begin phase three, Restoration Implementation.<sup>79</sup> Within a “reasonable time” after completed restoration planning, the Trustees must close the administrative record and present a written demand in writing to the responsible parties.<sup>80</sup> The demand must invite the responsible parties to implement the Final Restoration Plan subject to Trustee oversight and reimburse the Trustees for their assessment and oversight costs.<sup>81</sup> In the alternative, the demand may invite the responsible parties to advance a specified sum to the Trustees, representing all of their direct and indirect costs of assessment and restoration.<sup>82</sup> The regulations require that the demand identify the incident, identify the trustees, describe the injuries, provide an index to the administrative record, and provide the Final Restoration Plan.<sup>83</sup>

The responsible parties then have 90 days to respond.<sup>84</sup> They may respond “by paying or providing binding assurance that they will reimburse trustees’ assessment costs and implement the plan or pay assessment costs and the trustees’ estimate of the costs of implementation.”<sup>85</sup> If the responsible parties do not agree to the demand within 90 days, the trustees may either file a judicial action for damages or present the uncompensated claim for damages to the Oil Spill Liability Trust Fund.<sup>86</sup> Pursuant to the regulations, judicial actions and claims must be filed within three years after the Final Restoration Plan is made publicly available. At least one court has held that the responsible parties could demand a jury for such a trial.<sup>87</sup>

The regulations further provide that sums recovered by the Trustees in satisfaction of a natural resource damage claim must be placed in a revolving trust account.<sup>88</sup> Moreover, sums recovered for past assessment costs and emergency restoration costs may be used to reimburse the Trustees. All other sums must be used to implement the Final Restoration Plan.

Lastly, the regulations state several measures the Trustees can take to facilitate the implementation of restoration. These include establishing a Trustee committee, developing more detailed workplans, monitoring and overseeing restoration, and evaluating the success of the restoration, as well as the need for corrective action.<sup>89</sup>

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<sup>79</sup> 15 C.F.R. Subpart F.

<sup>80</sup> 15 C.F.R. §990.61.

<sup>81</sup> 15 C.F.R. §990.62(b).

<sup>82</sup> *Id.*

<sup>83</sup> 15 C.F.R. §990.62(e).

<sup>84</sup> 15 C.F.R. §990.62(d).

<sup>85</sup> *Id.*

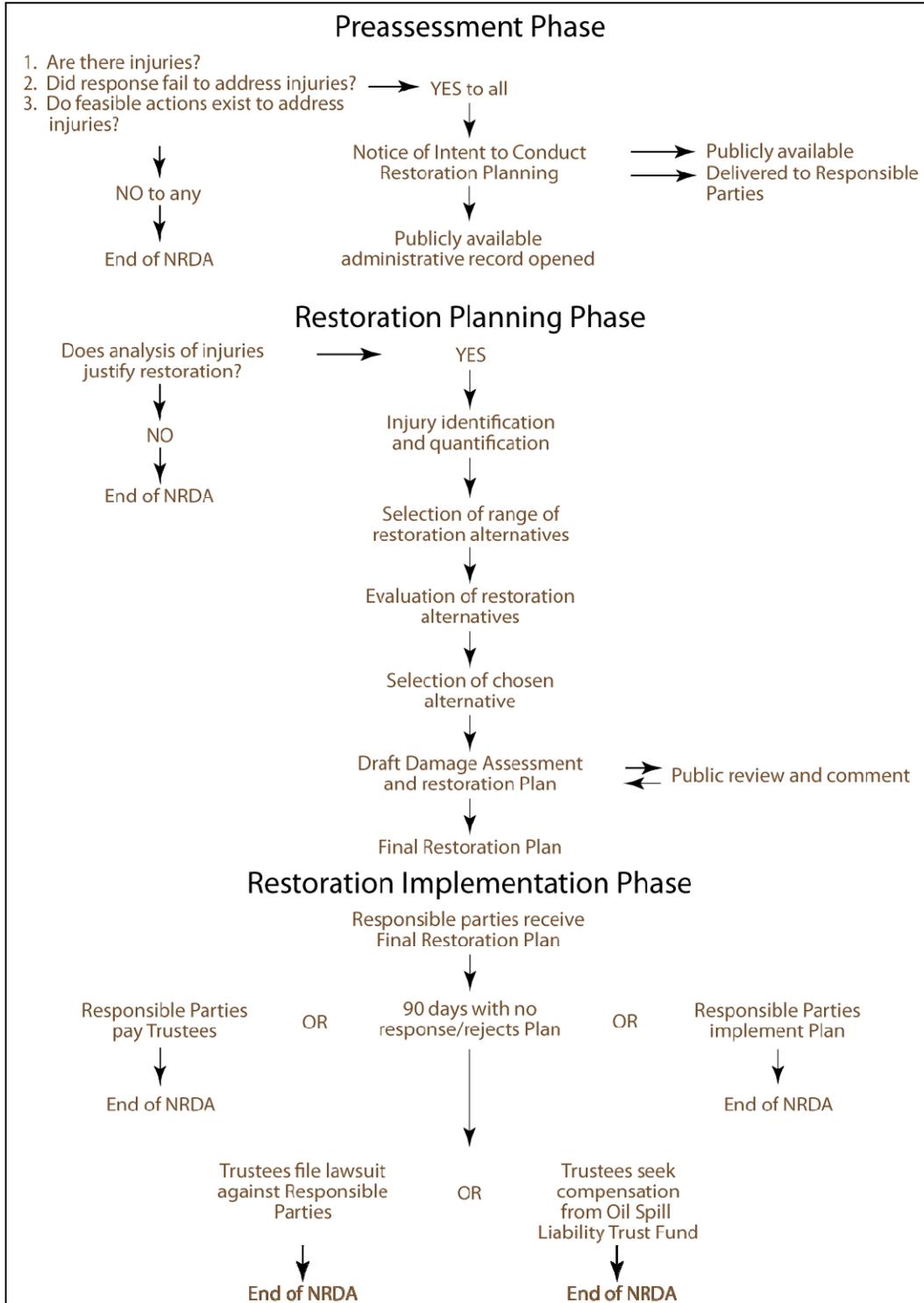
<sup>86</sup> 15 C.F.R. §990.64.

<sup>87</sup> *United States v. Viking Resources, Inc.*, 607 F. Supp. 2d 808 (S.D. Tex. 2009).

<sup>88</sup> 15 C.F.R. §990.65(a).

<sup>89</sup> 15 C.F.R. §990.66.

**Figure I. Flow Chart of NRDA Process**  
According to NOAA Regulations



**Source:** Congressional Research Service based on 15 C.F.R. Part 990.

**Note:** Preassessment Phase—15 C.F.R. §§990.40-990.45; Restoration Planning Phase—15 C.F.R. §§990.50-990.56; Restoration Implementation Phase—15 C.F.R. §§990.60-990.66.

# NRDA and the 2010 *Deepwater Horizon* Oil Spill

## The Trustees and the Responsible Parties in the Gulf NRDA Process

For the 2010 *Deepwater Horizon* oil spill, the responsible parties identified are BP Exploration and Production, Inc.,<sup>90</sup> Transocean Holdings Inc., Triton Asset Leasing GmbH, Transocean Offshore Deepwater Drilling Inc., Transocean Deepwater Inc., Anadarko Petroleum, Anadarko E&P Company LP, and MOEX Offshore 2007 LLC.<sup>91</sup> As of April 2012, BP was the only responsible party participating in the cooperative NRDA process.<sup>92</sup>

The federal government Trustees include the following:

- U.S. Department of the Interior, as represented by the National Park Service, U.S. Fish and Wildlife Service, and the Bureau of Land Management;
- NOAA, on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture;
- U.S. Department of Defense (DOD);<sup>93</sup>
- EPA;
- various agencies of the state of Louisiana, including the Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- state of Mississippi Department of Environmental Quality;
- state of Alabama Department of Conservation and Natural Resources, and Geological Survey of Alabama;
- state of Florida Department of Environmental Protection, and Fish and Wildlife Conservation Commission; and
- various agencies of the state of Texas, including the Texas Parks and Wildlife Department.

The Federal Lead Administrative Trustee is the Department of the Interior. The state Trustees are the governors and various agencies of the states affected by the spill: Alabama, Florida, Louisiana, Mississippi, and Texas.<sup>94</sup> Federally recognized Indian tribes may be Trustees for

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<sup>90</sup> In this instance, the Coast Guard notified BP it was a responsible party for the spill on April 28, 2010. See e-mail communication with the author on August 26, 2010, from LTCR Thomas A. Shuler, U.S. Coast Guard Deputy Senate Liaison.

<sup>91</sup> See 75 Fed. Reg. 60800 (October 1, 2010).

<sup>92</sup> See NOAA, Natural Resource Damage Assessment Status Update, [http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL\\_NRDA\\_StatusUpdate\\_April2012.pdf](http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL_NRDA_StatusUpdate_April2012.pdf) (April 18, 2012).

<sup>93</sup> Note that DOD is a trustee under OPA by virtue of the proximity of its facilities.

<sup>94</sup> See NOAA, Co-Trustees, Gulf Spill Restoration, <http://www.gulfspillrestoration.noaa.gov/about-us/co-trustees/> (last continued...)

affected tribal lands; at least one state recognized Indian tribe has sued BP for alleged fishing losses and damages to ancestral lands.<sup>95</sup> No foreign governments appear to have been affected, but Canada might have a claim if the habits of migratory birds are disrupted; damage to Mexican resources is also a possibility, but the search for potential harms in Mexican territory remains inconclusive.

Past NRDA processes have occurred on a much smaller scale with fewer Trustees. Accordingly, the size of the 2010 spill and the diverse range of federal and state Trustees may make consensus more difficult. Because the range of natural resources do not conform to political boundaries, it is also possible that different Trustees may argue the same resources belong to them. OPA doesn't appear to prohibit separate NRDA processes resulting from one spill, and the implementing regulations allow Trustees to operate independently from one another.

OPA does not explicitly state whether the Trustees are required to work together to develop a single plan, or whether multiple plans are permitted. It states only that the act will not provide double compensation for the same loss.<sup>96</sup> At the same time, Section 2706(c) of OPA assigns each type of Trustee (federal, state, tribal, and foreign) the responsibility of developing its plan for the restoration of the resources it oversees, rather than requiring all the Trustees to develop just one plan for all damaged resources.

In the legislative history of OPA, Congress identified these issues and recognized that separate plans may result, while indicating that cooperation was the preferred method. After acknowledging that in some cases more than one Trustee may share control over a natural resource, the House Conference Report on OPA states that “trustees should exercise joint management or control over the shared resources. The trustees should coordinate their assessments and the development of restoration plans, but [OPA] does not preclude different trustees from conducting parallel assessments and developing individual plans.”<sup>97</sup>

However, the NOAA regulations state that “[i]f an incident affects the interests of multiple trustees, the trustees should act jointly” to ensure that full restoration is achieved without double recovery of damages.<sup>98</sup> The regulations also provide that the Trustees may act independently where the resources can reasonably be divided.<sup>99</sup> If separate NRDA processes conducted pursuant to these regulations were challenged, a court would likely defer to NOAA's interpretation of OPA to allow multiple damage assessments in some circumstances.<sup>100</sup>

For the Gulf oil spill NRDA process, the Trustees have formed a Trustee Council. It appears that a joint restoration plan may enhance the Trustees' negotiating position with responsible parties.

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(...continued)

visited May 20, 2011).

<sup>95</sup> See Laurel Brubaker Calkins and Allen Johnson Jr., *BP Sued by Pointe Au Chien Tribe Over Spill Damage, Fishing Losses*, Bloomberg, (April 18, 2011), available at <http://www.bloomberg.com/news/2011-04-18/american-indian-tribe-sues-bp-for-spill-damages-fishing-losses.html>. State tribes, however, may not serve as Trustees under OPA.

<sup>96</sup> 33 U.S.C. §2706(d)(3).

<sup>97</sup> H.Rept. 101-653, 1990 U.S.C.C.A.N. 779, 787 (1990).

<sup>98</sup> 15 C.F.R. §990.14(a)(1).

<sup>99</sup> 15 C.F.R. §990.14(a)(2).

<sup>100</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

However, as the NRDA process evolves, individual interests may diverge because of different restoration priorities and related individual interests.

## Restoration Planning for the 2010 *Deepwater Horizon* Oil Spill

The natural resources under the jurisdiction of the federal and state Trustees have been and continue to be threatened as a result of discharged oil from the *Deepwater Horizon* spill and the subsequent removal efforts.<sup>101</sup> While the full extent of the potential injuries is presently unknown, exposure to oil discharges has resulted in adverse effects on aquatic organisms, birds, wildlife, vegetation, and natural habitats. In particular, over 950 miles of shoreline habitats, including salt marshes, sandy beaches, and mangrove areas have been jeopardized.<sup>102</sup> A variety of visibly oiled wildlife, including birds, sea turtles, and marine mammals has been captured or collected dead.<sup>103</sup> Meanwhile, the human use associated with natural resources in the Gulf region has declined, including fishing, swimming, beach-going, and viewing birds and wildlife.<sup>104</sup>

The NRDA process in the Gulf is currently in the Restoration Planning Phase.<sup>105</sup> On October 1, 2010, the Trustees announced its Intent to Conduct Restoration Planning regarding the discharge of oil from the *Deepwater Horizon* into the Gulf of Mexico.<sup>106</sup> As discussed above, pursuant to OPA, federal and state Trustees are authorized to (1) assess natural resource injuries resulting from the discharge of oil, and (2) develop and implement a plan for the restoration of the injured resources. The Notice of Intent also includes the Trustees' determination of jurisdiction to pursue restoration under OPA, as well as their determination that the injuries to natural resources in the Gulf resulted from the incident.<sup>107</sup> The Notice of Intent further lists the types of response actions already employed for this spill and indicates that feasible restoration actions exist to address the natural resource injuries and losses.<sup>108</sup>

Later, on February 17, 2011, NOAA announced its plans to develop a Programmatic Environmental Impact Statement (PEIS) in cooperation with its state co-trustees, as part of the ongoing NRDA process.<sup>109</sup> The PEIS will assess the environmental, social, and economic attributes of the affected environment and the potential consequences of alternative actions to restore, rehabilitate, replace, or acquire the equivalent of natural resources potentially injured by the oil spill.

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<sup>101</sup> 75 Fed. Reg. 60800 (October 1, 2010) (hereinafter Notice of Intent).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> <http://www.gulfspillrestoration.noaa.gov/>.

<sup>106</sup> 75 Fed. Reg. 60800 (October 1, 2010). Soon after, on October 8, 2010, President Obama issued an executive order establishing the Gulf Coast Ecosystem Restoration Task Force, consisting of senior officials from federal agencies and five state representatives. The parallel function of this Task Force was, among other things, to support the NRDA process by referring potential ecosystem restoration actions to the Trustee Council for consideration and facilitating coordination among the various governmental departments and agencies. Although the Task Force released its restoration strategy in December 2011, the President terminated the Task Force by executive order in September 2012 following the enactment of the RESTORE Act. The executive order can be seen at <http://www.whitehouse.gov/the-press-office/2012/09/10/executive-order-gulf-coast-ecosystem-restoration>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

The initial step in the PEIS process included public scoping meetings in each of the affected Gulf Coast states and the District of Columbia. The purpose of the scoping process was “to identify the concerns of the affected public and federal agencies, states, and Indian tribes, involve the public early in the decision making process, facilitate an efficient PEIS preparation process, define the issues and alternatives that will be examined in details, and save time by ensuring that draft documents adequately address relevant issues.”<sup>110</sup> The comments provided during scoping helped to define the parameters of a draft PEIS, on which the public will be allowed to comment.<sup>111</sup> The scoping meetings also gave the public the opportunity to learn more about damage assessment and the environmental impacts of the spill.

## NRDA Funding for the 2010 Oil Spill

Early in the NRDA process, BP provided \$45 million to state and federal trustees for NRDA preassessment and assessment activities.<sup>112</sup> At that time, BP acknowledged that the Trustees retain the right to obtain additional payments for assessment costs that may exceed the initial payments.<sup>113</sup> DOI Trustees have received an additional \$12.4 million in reimbursement from BP for actual costs.<sup>114</sup> DOI also has an Interagency Agreement with the U.S. Coast Guard for OS Trust Fund money totaling \$47.8 million to support initial baseline data collection, and has used \$5.9 million of DOI NRDA funding for assessment activities.<sup>115</sup> DOI has presented a claim of \$67.5 million to the responsible parties for estimated costs to implement selected assessment procedures.<sup>116</sup> Trustees are required to submit claims to the responsible parties before funds can be advanced by the OS Trust Fund.

On April 21, 2011, the Trustees for the *Deepwater Horizon* oil spill announced that BP agreed to provide \$1 billion toward early restoration projects in the Gulf of Mexico to address injuries to natural resources caused by the spill.<sup>117</sup> Under the agreement, DOI, NOAA, and the five Gulf states affected by the spill each will receive \$100 million to implement projects.<sup>118</sup> The remaining \$300 million will be allocated by NOAA and DOI for projects proposed by state trustees.<sup>119</sup> All projects must then conform to the requirements of the agreement and be approved by BP and the Trustee Council.<sup>120</sup> NOAA has stated that the money:

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<sup>110</sup> *Id.*

<sup>111</sup> NOAA, Federal Natural Resource Trustees Announce Next Step in BP Deepwater Horizon Spill Gulf Restoration Process, [http://www.noaa.gov/stories/2011/20110219\\_gulfspillrestoration.html](http://www.noaa.gov/stories/2011/20110219_gulfspillrestoration.html) (February 19, 2011).

<sup>112</sup> Arnold & Porter LLP, Deepwater Horizon - Oil Pollution Act: Funding for Natural Resource Damage Preassessment and Assessment Activities, [http://www.doi.gov/deepwaterhorizon/adminrecord/upload/BP-Advance-Funding-Letter-5\\_28\\_10.pdf](http://www.doi.gov/deepwaterhorizon/adminrecord/upload/BP-Advance-Funding-Letter-5_28_10.pdf) (May 28, 2010).

<sup>113</sup> *Id.*

<sup>114</sup> U.S. Congress, Senate Committee on Environment and Public Works, Subcommittee on Water and Wildlife, *Progress on Assessing Natural Resource Damages and Early Restoration After the BP/Deepwater Horizon Oil Spill Disaster*, Testimony of Cynthia Dohner, Regional Director, Southeast Region, U.S. Department of Interior, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., June 28, 2011.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill, available at <http://www.restorethegulf.gov/sites/default/files/documents/pdf/framework-for-early-restoration-04212011.pdf>.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

represents a first step toward fulfilling BP's obligation to fund the complete restoration of injured public resources, including the loss of use of those resources by the people living, working and visiting the area. The Trustees will use the money to fund projects such as the rebuilding of coastal marshes, replenishment of damaged beaches, conservation of sensitive areas for ocean habitat for injured wildlife, and restoration of barrier islands and wetlands that provide natural protection from storms.<sup>121</sup>

The Trustees have since selected and planned 10 early restoration projects costing nearly \$71 million.<sup>122</sup>

BP's agreement, however, does not limit the authority of the Trustees to perform assessments, engage in other early restoration planning, or select and implement additional restoration projects.<sup>123</sup> BP additionally established a \$20 billion escrow fund known as the Gulf Coast Claims Facility, targeted toward individual and business losses from the oil spill. The Gulf Coast Claims Facility has since ceased operations, with a court-supervised claims settlement program having begun on June 4, 2012.<sup>124</sup>

## The RESTORE Act

During the 112<sup>th</sup> Congress, President Obama signed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21).<sup>125</sup> Included in MAP-21 is the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).<sup>126</sup> It would appear that the requirements under the new law would overlap with NRDA. Significantly, the RESTORE Act establishes in the Treasury the Gulf Coast Restoration Trust Fund, which is available to restore the Gulf Coast region.<sup>127</sup> It requires the Secretary of the Treasury to deposit into this fund 80% of all administrative and civil penalties paid by responsible parties in connection with the *Deepwater Horizon* oil spill under the Clean Water Act. Amounts in the fund are available for expenditure without further appropriation for eligible activities and are to remain available until expended.<sup>128</sup>

The RESTORE Act specifies that 35% of the fund must be available to the states of Alabama, Florida, Louisiana, Mississippi, and Texas "in equal shares for expenditure for ecological and economic restoration of the Gulf Coast region."<sup>129</sup> In particular, these funds may be used for a variety of enumerated activities, including restoration and protection of natural resources,

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<sup>121</sup> NOAA, NRDA Trustees Announce \$1 Billion Agreement to Fund Early Gulf Coast Restoration Projects, [http://www.noaanews.noaa.gov/stories2011/20110421\\_nrdarestitution.html](http://www.noaanews.noaa.gov/stories2011/20110421_nrdarestitution.html) (April 21, 2011).

<sup>122</sup> See NOAA, Final Phase I Early Restoration Plan, <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/Final-ERP-EA-041812.pdf> (April 18, 2012); NOAA, Phase II Early Restoration Plan and Environmental Review, <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/Phase-II-ERP-ER-12-21-12.pdf> (December 21, 2012).

<sup>123</sup> See Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill, available at <http://www.restorethegulf.gov/sites/default/files/documents/pdf/framework-for-early-restoration-04212011.pdf>.

<sup>124</sup> See <http://gulfoastclaimsfacility.com/>.

<sup>125</sup> See P.L. 112-141.

<sup>126</sup> See *id.*, Title I, Subtitle F, 12 Stat. 405, 588-607 (2012).

<sup>127</sup> 33 U.S.C. §1321 note.

<sup>128</sup> See *id.*

<sup>129</sup> *Id.*

mitigation of damages, implementation of certain federally approved plans, workforce development and job creation, infrastructure projects, coastal flood protection, and, in certain circumstances, activities to promote tourism and seafood.<sup>130</sup>

Meanwhile, with 30% of funds from the Gulf Coast Restoration Trust Fund, the RESTORE Act additionally established the Gulf Coast Ecosystem Restoration Council, consisting of members appointed by the President from federal agencies.<sup>131</sup> The Council is required, among other things, to develop a comprehensive plan and identify certain projects with respect to the restoration of the ecosystem and natural resources of the Gulf Coast Region, as well as collect and consider related scientific research.<sup>132</sup>

Also of importance, the RESTORE Act requires an additional 30% of the Gulf Coast Restoration Trust Fund to be disbursed to the five Gulf Coast states using a formula that weighs the mileage of oiled shoreline, the distance from the affected shoreline to the *Deepwater Horizon* drilling unit, and the population of coastal counties.<sup>133</sup> Lastly, the RESTORE Act requires 5% of funds to be distributed for a marine research program and for making certain research grants.<sup>134</sup>

## Conclusion

The NRDA process has been successful in the past, but it has never been tested on such a large scale as the 2010 *Deepwater Horizon* oil spill. In this case, more oil was spilled; a greater geographic area is involved; and more Trustees are involved than in past spills. The Trustees may have difficulty agreeing on the assessment of damages, baseline conditions, the value of the damaged resources, and the proper method of restoring them. If a unified restoration plan is sought, the Trustees must make unanimous decisions on these issues, and then BP has the option not to accept the Final Restoration Plan. If BP rejects the Trustees' Plan, the Trustees may sue BP under NRDA to resolve these issues, extending the final conclusion, which could delay restoration of the natural resources.

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<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* On January 29, 2013, the Gulf Coast Ecosystem Restoration Council released *The Path Forward to Restoring the Gulf Coast: A Proposed Comprehensive Plan*. See <http://www.restorethegulf.gov/sites/default/files/The%20Path%20Forward%20to%20Restoring%20the%20Gulf%20Coast%20-%20Gulf%20Restoration%20Council%20FINAL.pdf>.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

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## **Acknowledgments**

This report was initially authored by Kristina Alexander, Legislative Attorney. Harold Upton, Analyst in Natural Resources Policy, also contributed to this report.