

Detailed Analysis of the RESTORE Act regarding the “Recommendation for Adoption of a “Social Infrastructure Project Portfolio System” Selection Framework and “Community Engagement and Project Input” Process”

I. Background and Executive Summary of the RESTORE Act Legislation Relevant provisions to the Recommendations

The 112th Congress passed the RESTORE Act on June 29, 2012 as part of the surface transportation and federal-aid highways act, the “Moving Ahead for Progress in the 21st Century Act,” or “MAP-21” (Pub. L. No. 112-141; H.R.4348). President Obama signed the Act into law on July 6, 2012.

The RESTORE Act creates a Gulf Coast Restoration Trust Fund. The Fund will receive 80% of the civil and administrative penalties paid to the United States under the Clean Water Act (CWA) by the parties responsible for the *Deepwater Horizon* oil spill. The Trust Fund will support a variety of projects aimed at helping the Gulf recover from injuries experienced as a result of decades of oil and gas development in the Gulf, including the effects of *Deepwater Horizon*. In general, RESTORE is intended to complement other efforts to restore the Gulf, and is not intended to set a precedent for future uses of CWA penalties or to interfere with the ongoing Natural Resource Damage Assessment (NRDA) process .

Restoration Trust Fund (RTF)

RESTORE will create a Gulf Coast Restoration Trust Fund (RTF) under the guardianship of the Treasury Secretary. The Treasury Secretary will shortly develop and provide auditing requirements and other procedures to evaluate whether funded projects are compliant with the Act. Such procedures are subject to public notice and comment. It would be safe to assume that the forthcoming Treasury “requirements” and policies will retain strong oversight provisions by the Federal Government.

Equal-Share State Allocations

Out of the RTF, 35% of funds will go directly to the five Gulf states—Florida, Mississippi, Alabama, Louisiana, and Texas—in equal shares (7% each)—regardless of the impacts of the *Deepwater Horizon* incident on the state. The funds may be used for ecological and economic restoration of the Gulf. RESTORE dictates that states may only expend funds for a specific list of purposes, including protection and restoration of natural resources, infrastructure, workforce development, job creation, tourism promotion, promoting consumption of Gulf seafood, planning assistance and flood protection infrastructure.

RESTORE further dictates how the equal-share state funds will be allocated among counties in Florida. In Florida, disproportionately affected Florida counties will share 75% of Florida’s equal-share funding, while non-disproportionately impacted counties will receive 25% .

II. Key considerations of the RESTORE Act that are relevant to the funding of proposed “Social Infrastructure Project Portfolio System” Selection Framework” and the “Community Engagement and Project Input” Process.

- 1) As a condition of funding, each state or locality receiving funds must develop a “Best available science”—based multi-year implementation plan describing how selected projects meet RESTORE’s stated funding purposes.
- 2) “Best available science” is defined as science that maximizes the quality, objectivity, and integrity of information; uses peer- reviewed and

public data; and clearly communicates risks and uncertainties.

- 3) The validity of “Social Infrastructure Projects” in “public” economic development project planning and implementation and the Analytical Hierarchy Process utilized in the proposed “Community Engagement and Project Input” Process are based upon science that maximizes the quality, objectivity, and integrity of information; uses peer- reviewed and public data; and clearly communicates risks and uncertainties.
- 4) Public participation requirements to solicit recommendations for projects are vague: states may use any “appropriate” procedure for public input that already exists in the state, including conferring with a preexisting government task force. Many have questioned whether Escambia County’s current RESTORE Act implementation process is an “appropriate” procedure for public input, especially given the current selection and evaluation “methodologies” presented by the Greater Pensacola Chamber of Commerce that are clearly detrimental to the evaluation and selection criteria of potential “Social Infrastructure Projects” and “Community Engagement and Project Input” regarding such projects.
- 5) Local governments receiving funds *may* give preference to Gulf individuals/companies in awarding project grants, but it is not required that they do so, and the definition of local individuals/companies is broad. Local *preference* is clearly provided for in the current proposed recommendation to the Committee.
- 6) There is no provision in RESTORE allowing citizens to sue for judicial review of a state’s use of funds or the Treasury’s failure to enforce RESTORE’s audit provisions.
- 7) However, since, the RESTORE Act is silent on these matters it may be safe to assume that courts would uphold “causes of action,” under the current federal and state statutes, for maladministration, malfeasance and/or misuse of public funds that could be brought against the RESTORE “allocation process” by individual taxpayers and/or citizens groups against local municipalities.

III. DETAILED ANALYSIS OF THE RESTORE ACT and its Relevance and Allowance for Social Infrastructure Projects

	Act § Provisions	Topic	Description	Notes
1.	§1606(b)	Effect	RESTORE does not supersede or affect recovery under the Oil Pollution Act or other federal law, or apply to any other oil spill incident.	RESTORE is explicit about not setting precedent, and not affecting recovery under the Oil Pollution Act, including NRDA.
2.	§1608	Oversight	The Office of the Inspector General and Treasury Department have authority to audit and investigate any projects, programs, and activities funded under RESTORE.	It is unclear how much capacity the Inspector General and Treasury will have to monitor expenditures and audits .
3.	§1603—CWA § 311(a)(33)	Project region	“ <u>Gulf Coast region</u> ”—coastal zones that border the Gulf of Mexico in five states, including federal lands; any adjacent land, water, and watersheds within 25 miles of coastal zones; and all federal waters in the Gulf.	RESTORE includes a fairly inclusive definition of the Gulf region, incorporating watersheds within 25 miles. Note the coastal zones in each state may have varying depth and area.
4.	§1603—CWA § 311(a)(27)	Best available science	“ <u>Best available science</u> ”—science that maximizes the quality, objectivity, and integrity of information; uses peer-reviewed and public data; and clearly communicates risks and uncertainties.	This definition applies throughout the Act

5.	§1603—CWA § 311(t)(1)(B)(i)-(ii)	Limited uses	<p>State funds may only be used to carry out one or more of the following in the Gulf Coast region:</p> <ul style="list-style-type: none"> • Restoration and protection of natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands. • Mitigation of damage to fish, wildlife, and natural resources. • Implementation of a federally approved marine/coastal management plan, including fisheries monitoring. • Workforce development and job creation. • Improvements to state parks affected by the oil spill. • Infrastructure projects benefitting the economy or ecological resources, including ports. • Flood protection and infrastructure. • Planning assistance. • Promotion of tourism, including recreational fishing. • Promotion of Gulf seafood consumption. • Administrative costs (up to 3%). 	<p>“Workforce development and job creation” is very open-ended, as is “Infrastructure” projects benefitting the economy.”</p> <p>Several provisions could potentially be interpreted for evaluation and selection of “social infrastructure projects” and road projects have other sources available.</p> <p>Several provisions could potentially overlap with the ongoing NRDA and the State funds which could be a source of funding for some commonly discussed projects that are not “social infrastructure projects.”</p>
6.	§1603—CWA § 311(t)(1)(C)(i)	Florida funds	<p>75% of Florida funds go to the eight Florida counties disproportionately affected by the incident; 25% of funds go to the non-disproportionately impacted counties. Of the funds to non-disproportionately impacted counties,</p> <ul style="list-style-type: none"> • 34% shall be based on the average population; • 33% based on the average per capita sales tax collections; and • 33% based on the inverse proportion of the average distance from the <i>Deepwater Horizon</i> oil rig to the nearest and farthest points of the shoreline. 	<p>It is necessary for RESTORE to specify county-by-county allocation in Florida because the coastal zone of Florida includes the entire state.</p> <p>The expenditure of RESTORE funds in Florida may be further restricted by Florida state law (see FLA. STAT. § 377.43, “Disbursement of funds received for damages caused by the Deepwater Horizon oil spill”).</p>

7.	§1603—CWA § 311(t)(1)(E)	Funding conditions	<p>All states/localities receiving funds must meet audit and other requirements of the Secretary of Treasury; develop a multi-year implementation plan; and certify that:</p> <ul style="list-style-type: none"> • Each project is “designed to restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, coastal wetlands, or economy of the Gulf Coast;” • Each project carries out one or more of the allowable uses in; • Projects were selected based on “meaningful” and “broad-based” public input, including from individuals, businesses, and NGOs; • Each natural resource restoration or protection project is based on the best available science; and • Project selections were consistent with the procurement rules for a comparable project in that state, including any competitive bidding and audit requirements. 	<p>Public participation requirements are vague and open-ended and could include the proposed “Community Engagement and Project Input” process recommended.</p> <p>There is “best available science” research available for social infrastructure projects.</p> <p>ALL RESTORE projects must be based on the “best available science,” a term which is specifically defined in the statute.</p> <p>Social infrastructure projects carry out one or more of the of the allowable uses.</p> <p>Procurement rules and allowable uses enable Escambia to be reimbursed for the “community engagement” process.</p>
8.	§1603—CWA § 311(t)(1)(G)-(H)	Compliance	If locality does not spend funds in accord with the funding conditions (e.g., audit requirements), it will be cut off until it restores misused amounts to the RTF and/or funding conditions are met.	It is unclear how well the Treasury will be able to monitor fund allocations and bring enforcement actions against states. Note that the Treasury’s monitoring procedures must be developed subject to public notice and comment .
9.	§1603—CWA § 311(t)(1)(I)	Public Input	State may use any “appropriate” procedure for public input in that state, including consulting with task forces.	<p>RESTORE has a very open-ended public input clause. Note that consultation with a consultant facilitator satisfies this clause.</p> <p>The recommended process clearly is in accordance with the RESTORE Act provisions and may be considered the “best available science” regarding a public input process.</p>
10.	§1603—CWA § 311(t)(1)(K)	Local hire preference	There may be preferences for individuals/companies “that reside in, are headquartered in, or are principally engaged in business in the State.”	Note there is no local preference <i>requirement</i> and should be reviewed. The definition of “local” businesses is extremely broad.
11.	§1603—CWA § 311(t)(1)(N)	Non-federal matching funds	Funds can be used to satisfy the non-federal share of any project cost that meets the allowable funding uses.	Social Infrastructure Projects may leverage funding and receive other federal grants.

IV. Profile on the Author of this Detailed Analysis, Diversity Program Advisors, Inc.

Diversity Program Advisors is a Pensacola-based firm offering a comprehensive range of professional services specializing in the development, management and implementation diversity inclusion of programs, projects and issues affecting our public/private sector clients. Working with an impressive and capable array of associates, nationally and regionally, Diversity Program Advisors offers clients, expert advice and assistance in the development, management and implementation of diversity inclusion initiatives, projects and programs ... *“we build bridges for success”*.

Diversity Program Advisors was established in 2008 by George Hawthorne, who brings an extensive and varied professional background combined with significant and long-standing experience in working with diversity inclusion in public/private projects, programs and initiatives. The company’s philosophy is based on the principle that diversity inclusion and community benefits agreements are prerequisites to a viable economic development, community development and client profitability.

We are positioned to help clients effectively and efficiently bridge the divide between the needs of a diverse community and public/private sector entities. Our mission is to serve our clients by assisting in the development of effective partnerships among community stakeholders, government and the business community. We bring to any project exemplary professionals with a wide variety of talent and relevant experience.

We offer strategic planning and implementation advice with respect to a broad range of diversity inclusion activities including issue resolution, government and business negotiations, governance, education, social, housing, economic development, and partnership development. As well, we offer services designed to improve the internal operations of community stakeholders thus positioning them to deal more effectively with their local government, with economic development projects and with the business community.

Prepared By:

