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RESTORING THE RESTORE ACT'S CONSERVATIVE PRINCIPLES

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INTRODUCTION

The 2010 Gulf Coast oil spill was the largest offshore oil spill in American history. For 87 days, the Macondo prospect gushed oil into the Gulf of Mexico before engineers were able to successfully seal the well. The effects of the spill on the Gulf region's economy and environment were significant and continue to be felt today.

In 2012, two years after the spill, Congress passed and the president signed the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (RESTORE Act)¹, which sets aside 80 percent of the civil and administrative fines paid pursuant to the 2010 Deepwater Horizon oil spill, as the spill is commonly called. The primary purpose of the RESTORE Act is to channel these fines to mitigation of the impact of the oil spill and increased resilience across the Gulf Coast to future disasters.

1. Public Law 112-141, Subtitle F, 112th Congress, July 6, 2012. <http://www.gpo.gov/fdsys/pkg/PLAW-112publ141/pdf/PLAW-112publ141.pdf>



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While the RESTORE Act is in many ways imperfect, it does reflect a number of important conservative principles. These include privileging local decision-making over federal regulation, maintaining a direct nexus between the actors liable for the disaster and the people and firms adversely impacted, and a commitment to reducing future taxpayer exposure to risk.

Regardless of the specific strengths or weaknesses of the RESTORE Act, the key to ensuring that it ultimately represents a victory for limited, responsible government is careful oversight during implementation. For this reason, it is imperative that the states and intergovernmental bodies with responsibility for implementing the act maintain a laser focus on the act's original intent and that it not be misused to pursue unrelated goals or policy agendas.

While America's attention has largely moved away from the Gulf Coast, the effects of the Deepwater Horizon spill are far from over; in October 2013, a 4,100 pound tar mat—a chunk of spilled oil and sand—was found in Louisiana.² The Gulf Coast will feel the effects of the Deepwater Horizon spill for some time yet, but appropriate use of RESTORE Act funds can mitigate these effects and build environmental resiliency in ways that benefit the economy and taxpayers.

2. Katherine Sayre, "Tar mat discovered at Fourchon Beach after Tropical Storm Karen," *The Times-Picayune*, Oct. 16, 2013. http://www.nola.com/environment/index.ssf/2013/10/tar_mat_discovered_at_fourchon.html

BACKGROUND ON THE RESTORE ACT

I. Goals and legislative history

On April 20, 2010, the Deepwater Horizon oil rig, which was drilling in the Macondo Prospect 50 miles off the Louisiana coast, exploded. The blast killed 11 rig workers and soon began spilling millions of barrels of oil into the Gulf of Mexico. It took almost three months for BP, the company leasing and operating the well, to contain the leak temporarily and another two months to permanently close the well. While the amount of oil spilled is currently the subject of litigation, it is clear that the spill was the largest offshore spill in American history and that all five Gulf Coast states--Texas, Louisiana, Mississippi, Alabama, and Florida--were affected, albeit to varying degrees.

In July 2011, a bipartisan group of nine senators representing all five Gulf Coast states introduced the RESTORE Act (S. 1400) in the Senate; in October, Rep. Steve Scalise, R-La., introduced a companion bill in the House (H.R. 3096) with 41 cosponsors. The intent of these bills was primarily to allocate the civil fines and penalties paid under the Clean Water Act to the areas on the Gulf Coast impacted by the spill. Absent the RESTORE Act, these fines would have been paid to the Oil Spill Liability Trust Fund, a federally administered program funded both by civil fines from oil spills as well as a per-barrel excise tax on oil produced in or imported into the United States.³

In March 2012, the Senate passed the RESTORE Act as part of a larger transportation bill, which passed 74-22. The next month, the House passed a similar transportation bill including the RESTORE Act, by a 293-127 vote. In June, the reconciled transportation bill (known as MAP-21) including the RESTORE Act passed the House by a 373-52 vote and the Senate by a 74-19 vote; it was signed into law on July 6, 2012.

2. Key provisions

The most salient feature of the RESTORE Act is the creation of the Gulf Coast Restoration Trust Fund, which is divided into five different accounts. The first three are commonly called pots (or buckets) one, two, and three, a nomenclature we adopt here.

Pot One (the “direct component”), consisting of 35 percent of the Trust Fund, is divided equally between Texas, Louisiana, Mississippi, Alabama, and Florida for use in a variety of “eligible activities,” including ecosystem restoration, conservation programs, flood protection, workforce development,

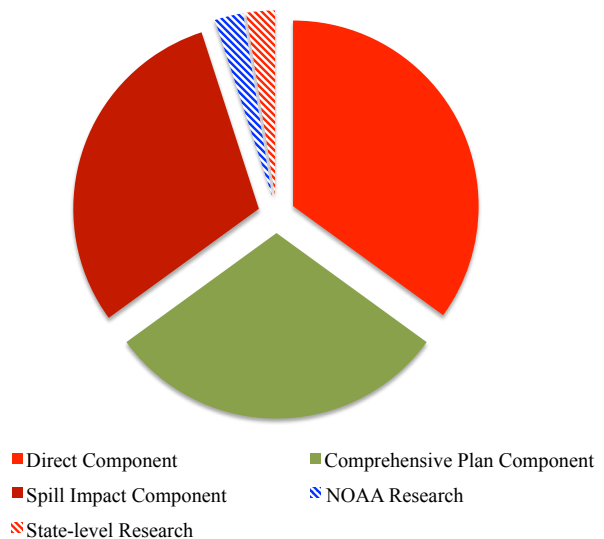
and tourism promotion. In Louisiana and Florida, funds are divided between state and local governments. States, counties, and parishes can generally utilize these funds as they see fit, so long as they can be justified under the (extremely broad) “eligible activities” requirement.

Pot Two (the “comprehensive plan component”), consisting of 30 percent of the Trust Fund, will be spent at the discretion of the Gulf Coast Ecosystem Restoration Council, a body established by the RESTORE Act and consisting of the governors of the five impacted states and six federal cabinet members. The council is charged with developing and executing a comprehensive plan for Gulf Coast redevelopment.

Pot Three (the “spill impact component”) divides a further 30 percent of the Trust Fund between the five impacted states based on a formula that takes into account the amount of coastline affected by the Deepwater Horizon spill, proximity to the well, and coastal population. States are to use these funds for “projects, programs, and activities that will improve the ecosystems or economy of the Gulf Coast region,” an admittedly broad definition. Programs funded through this pot are subject to approval by the Gulf Coast Ecosystem Restoration Council.

The final five percent of the Trust Fund is divided equally between a) the National Oceanic and Atmospheric Administration, to establish Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology program; and b) to establish “Centers of Excellence” for research in a variety of environmental and engineering fields related to the Gulf Coast.

CHART ONE: DISTRIBUTION OF RESTORE ACT FUNDS



Red shading indicates funds administered by state and local governments.

Blue shading indicates funds administered by the federal government.

Green shading indicates funds administered by the Gulf Coast Ecosystem Restoration Council, which is comprised of both state and federal officials.

3. National Pollution Funds Center, “The Oil Spill Liability Trust Fund (OSLTF),” U.S. Coast Guard, Oct. 22, 2013. http://www.uscg.mil/NPFC/About_NPFC/osltf.asp

The amount of funds ultimately available through the RESTORE Act is still unknown. A first tranche of funding – consisting of a \$1 billion civil fine paid by Transocean (the company that owned the Deepwater Horizon) and a \$70 million fine from MOEX (a partner of BP in the Macondo project) – has been appropriated.⁴ But the largest source of funding will likely come from BP. That case is currently being litigated and could result in a fine as high as \$18 billion.

Finally, it is important to note that RESTORE Act funding is just one mechanism of funding Gulf Coast restoration. In addition to the civil penalties paid under the Clean Water Act that the RESTORE Act deals with, BP and Transocean have paid \$4.4 billion in criminal penalties,⁵ and additional funds totaling more than \$1 billion will come through the Natural Resource Damage Assessment (NRDA) process, which assesses and begins remedying the damage from oil spills.

3. Why conservatives should care

Because the RESTORE Act was passed by large bipartisan majorities in both the House and the Senate, it naturally reflects priorities from across the political spectrum. However, it does include several key elements that conservatives should embrace:

- **Localism:** Rather than trying to dictate a recovery from Washington, the RESTORE Act devolves spending decisions primarily to state and local governments (65 percent of the trust fund) and an intergovernmental body, the Gulf Coast Ecosystem Restoration Council (30 percent of the fund). Under existing law, absent the RESTORE Act, the fines and fees paid by BP and Transocean would have gone to the Oil Spill Liability Trust Fund, which is controlled by the federal government.
- **Controlling the growth of government:** Nothing in the RESTORE Act permanently increases the size or scope of the government on any level. While the CBO did estimate the RESTORE Act would increase direct federal outlays by about \$1.2 billion, this estimate does not take into account offsets likely to come from the final settlements and fines. The act does not create any permanent new federal bureaucracies or increase the power of any federal agencies.

- **A pro-growth, pro-environment emphasis:** The RESTORE Act – if implemented appropriately – will have both economic and environmental benefits. Healthy, clean coasts are critical to the economies of the Gulf Coast states. In Louisiana alone, the commercial saltwater fishing industry is worth \$3.1 billion and supports 34,000 jobs, to take just one example of the economic impact of a clean coastal environment.⁶ Tourism in Alabama, Mississippi, and Louisiana results in more than \$23 billion in annual spending and supports 382,000 jobs.⁷ If implemented appropriately, the RESTORE Act can benefit the coastal environment not merely for its own sake, but also for the benefit of hunters, fishers, and commerce.

However, it is critical to stress that while the statutory language of the act reflects principles that are important to conservatives, it is far from clear that these priorities will be reflected in implementation. The statutory language is in many cases extremely vague and subject to being placed in service of goals that fall far outside a free-market, limited-government framework. It is for this reason that it is so critical that conservatives engage with the implementation phase of the RESTORE Act.

THE CONSERVATIVE APPROACH TO IMPLEMENTATION

But what principles should guide a free-market approach to implementing the RESTORE Act? Put differently, how should conservatives evaluate the myriad projects, programs, and activities that have been or will be mooted for funding? We believe that six principles, if faithfully adhered to, will result in an implementation process that is faithful to the intent of the act and provides sound economic value.

1. Projects should aim to provide public goods or at least remedy market failures. While the RESTORE Act aims to target funds to the communities affected by the Deepwater Horizon spill, it is not the appropriate mechanism to directly compensate individuals and firms who suffered losses; this is not the intent of the legislation, and such compensation is being handled by other mechanisms.

Rather, RESTORE Act funds should be used to provide public goods: products and services like infrastructure that are used by most or all people and for which use by one person

4. U.S. Department of Justice Office of Public Affairs, "Transocean Agrees to Plead Guilty to Environmental Crime and Enter Civil Settlement to Resolve U.S. Clean Water Act Penalty Claims from Deepwater Horizon Incident," Jan. 3, 2013. <http://www.justice.gov/opa/pr/2013/January/13-ag-004.html>

5. Margaret Cronin Fisk, "Transocean \$1 Billion Gulf Oil-Spill Settlement Approved," Bloomberg, Feb. 19, 2013. <http://bloomberg.com/news/2013-02-19/transocean-1-billion-gulf-oil-spill-settlement-approved.html>

6. Louisiana Department of Wildlife and Fisheries, "Louisiana's Commercial and Recreational Coastal Fisheries," July 30, 2013. <http://www.lacpra.org/assets/docs/JohnLouisianaCommercialRecreationalCoastalFisheriesjuly30.ppt>

7. Kate Gordon, et al. "Beyond Recovery: Moving the Gulf Coast Toward a Sustainable Future," Center for American Progress, February 2011. http://www.american-progress.org/issues/2011/02/pdf/beyond_recovery.pdf

SIDEBAR ONE: BENEFITS OF HEALTHY WETLANDS

While a key economic justification for wetlands restoration is that they absorb energy from destructive coastal waves, absorb storm surge, and reduce the intensity of hurricanes and tropical storms, wetlands restoration can be justified on several other grounds. A 2011 study from the Duke University Center on Globalization, Governance, and Competitiveness suggests five benefits of healthy wetlands:

- Seafood species habitat. Fish, shrimp, oysters and crabs all rely on wetlands to breed.
- Recreation. Hunters, fishermen, recreational photographers, and boaters all utilize wetlands for recreation.
- Flood protection. By mitigating the damage potential of storms and waves, wetlands provide \$23 billion of storm protection annually.
- Water filtering. By filtering pollutants and sediment, wetlands lower the cost of water treatment.
- Carbon sequestration. Gulf Coast wetlands destruction means the United States loses 3.2 million tons of carbon dioxide sequestration annually.

10. Charles H. Peterson, et al, "A Once and Future Gulf of Mexico Ecosystem Restoration Recommendations of an Expert Working Group," Pew Environment Group, 2011. <http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/Petersonetal-GOM-report.pdf>

doesn't preclude use by others. (Note that Pot Three of the RESTORE Act funds puts a cap on the amount of funding that can be spent on infrastructure, though "infrastructure" is undefined in the act.) At a minimum, projects funded with RESTORE Act dollars should correct the failure of markets these limited cases to provide products and services at socially optimal levels.

In the context of the Gulf Coast, wetlands restoration is an excellent example of a public good that the RESTORE Act can and should fund. Land loss along the Louisiana coast, caused by a variety of natural and man-made phenomena (including 200 square miles lost due to Hurricanes Katrina and Rita),⁸ brings populated areas closer to the sea, raising the cost of future storms to both the private and public sectors. Louisiana alone has almost 500,000 National Flood Insurance Program (NFIP) policies in effect with a total exposure of \$112 billion.⁹ The Gulf Coast racks up an average of \$14 billion annually in losses due to storms.¹⁰ Protestations to the contrary notwithstanding, NFIP premiums on most of the properties that face the greatest risks are far below actuarially sound levels, leaving taxpayers on the hook to pay future claims.

This is not to say, of course, that any project claiming to provide public goods or remedy a market failure is worth funding; far from it. All projects should be subject to rigorous cost-benefit analysis using dollar-denominated, market prices whenever possible. But projects in which the benefits disproportionately accrue to a small number of households or firms should be avoided.

8. Environmental Defense Fund, National Wildlife Federation and National Audubon Society, "Common Ground: A Shared Vision for Restoring the Mississippi River Delta," July 28, 2010. http://tx.audubon.org/sites/default/files/documents/common_ground_-_a_shared_vision_for_restoring_the_mississippi_river_delta.pdf

9. Carolyn Kousky and Erwann Michel-Kerjan, "Hurricane Sandy, Storm Surge, and the National Flood Insurance Program: A Primer on New York and New Jersey," Resources for the Future, November 2012. <http://www.rff.org/RFF/Documents/RFF-IB-12-08.pdf>

2. Projects should have a direct and tangible connection to the areas impacted by the spill. Political horse-trading notwithstanding, the impulse behind the RESTORE Act was to direct funds to pay for economic and environmental projects in areas affected by the Deepwater Horizon oil spill. These funds should not be treated as a general revenue windfall to either the federal or state treasuries. Any RESTORE Act spending that does not have a positive impact on the communities that suffered ecological damage and economic losses proximately caused by the oil spill should be eschewed.

3. Projects undertaken under the rubric of "sustainability" should demonstrate specifically how they affect the incentives of households and firms or reduce future economic costs. The term "sustainability" has, in too many instances, become a buzzword with little actual meaning. This is unfortunate. The RESTORE Act provides an opportunity to meaningfully improve the economic sustainability of the Gulf Coast by investing in projects that reduce the expected costs of future storms.

For a project to qualify as increasing economic sustainability, it should either reduce future economic costs or improve the incentives facing households and firms in making future decisions. For instance, programs that provide monetary incentives for property owners to better secure structures against tropical storms would increase the economic sustainability of the region, as would projects to increase coastal barrier protection.

Simply put, this should not be viewed as "free money" for state and local governments. There is an obvious temptation to apply the funds to a laundry list of desired projects that have little, if any, connection to the Deepwater Horizon spill or to meaningful economic resiliency of the region. Job training programs, workforce development, and "capacity building" may (or may not) be worthwhile programs, but unless supporters of these ideas can illustrate a significant nexus to improving market incentives or reducing future economic costs, they are questionable uses of RESTORE Act funds. Simply putting the word "sustainable" in front of a long-sought public program is insufficient.

4. Projects that mitigate or ameliorate damage from previous poorly-executed government programs should be prioritized. The Gulf Coast has borne the brunt of generations of lackluster federal infrastructure and water management programs, from management of the Mississippi River to the now-closed Mississippi River Gulf Outlet (MRGO), an Army Corps of Engineers-built channel that almost certainly served to increase the amount of damage that Hurricane Katrina did to Louisiana. Rather than merely launch new projects, the RESTORE Act provides an excellent opportunity to undo damage done by previous federal interventions.

SIDEBAR TWO: INAPPROPRIATE DEVELOPMENT

While not funded by RESTORE Act money, some projects done in the name of “economic development” in the wake of the Deepwater Horizon spill are inappropriate uses of public funds under the principles we outline in this paper. Examples of this include:

- Mississippi has committed \$15 million in state funds toward the construction of a baseball stadium in Biloxi, funded by the initial oil spill settlement.¹²
- Alabama is spending \$58 million of its \$85.5 million Natural Resource Damage Assessment (NRDA) funds to build a “lodge and meeting facility” at Gulf State Park.¹³

11. Warren Kulo, “Bryant announces \$15 million state contribution to Biloxi stadium project,” GulfLive.com, May 30, 2013. http://blog.gulflive.com/mississippi-press-news/2013/05/gov_bryant_to_appear_in_biloxi.html

12. Alabama Tourism Department, Newsletter, May 15, 2013. <http://tourism.alabama.gov/2013/05/alabama-tourism-department-newsletter-may-15-2013/>

5. Projects should be justifiable on sound economic grounds, bearing in mind the opportunity cost of spending. Every dollar spent on one project is a dollar that cannot be spent on another; wasteful and inefficient projects not only are poor uses of dollars, they prevent better projects from being funded. For this reason, it is critical that projects are evaluated through the lens of dollar-denominated benefit-cost analysis, and projects that provide relatively fewer benefits are scuppered in favor of projects that get more “bang for the buck.”

The measure here should be the value created for citizens and taxpayers, not the number of jobs created. Valuable infrastructure, public goods, and environmental projects will no doubt provide economic opportunities over time. By contrast, the number of jobs created by short-term spending projects is a poor measure of value creation and says nothing about whether a project meaning-

fully contributes to Gulf Coast sustainability.

6. The decision making and implementation process should be completely transparent. In order for the public, both in the Gulf Coast and around the country, to have faith in the RESTORE Act’s implementation process, decisions about project funding, and all expenditures made utilizing RESTORE Act money, should be completely transparent. Ideally, this would mean real-time or almost real-time disclosure of all grants, contracts, and sub-contracts using RESTORE Act funding. This information should be provided both in human- and machine-readable formats. Mississippi’s restore.ms website is at least a good first step in making information about RESTORE Act projects available.

Most importantly, the various entities with authority to spend RESTORE Act funds should make their deliberations and decision-making processes as transparent as possible to public scrutiny. This should include, at a minimum, publicizing benefit-cost analyses and planning documents that informed funding decisions and contracts awarded using RESTORE Act funds.

CONCLUSION

More than three years after the Deepwater Horizon spill and one year after the passage of the RESTORE Act, the process of implementing the act and spending billions of dollars in fines that ultimately will flow through the program is just getting underway. While early indications suggest the funds will be used responsibly, a great deal of uncertainty about the process remains.

Conservatives and good government activists who want to ensure that the funds are used responsibly should pay close attention to the actions by officials. Louisiana faces real vulnerabilities and cannot afford to see funds misused on projects that do not advance the act’s goals. This opportunity to accomplish something good out of the BP disaster should not be squandered.

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