

National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling

LONG-TERM REGIONAL RESTORATION IN THE GULF: FUNDING SOURCES AND GOVERNANCE STRUCTURES

Staff Working Paper No. 15

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I. INTRODUCTION

This staff working paper analyzes alternative funding mechanisms and governance structures for a multi-jurisdictional entity that would oversee implementation of long-term restoration activities in the Gulf of Mexico. The paper: (1) reviews the current status of Gulf-wide restoration efforts; (2) considers proposals for new initiatives and increased funding; and (3) analyzes options and offers several possible recommendations for Commissioner consideration.

Lack of sustained and predictable funding, project coordination, and long-term planning have resulted in incomplete and often ineffective efforts to restore the Gulf. A unified Gulf-wide restoration effort that is governed by a single entity (referred to in this paper as a “council”) with decision-making authority and accountability would provide numerous benefits. It would minimize duplication of effort and waste in spending. It would provide a mechanism to resolve conflicts, so projects can go forward in a coordinated manner that directs funding to the places and resources most in need of restoration. And, ideally, it would be empowered to ensure that restoration efforts are science-based, but not unnecessarily delayed by a lack of scientific certainty, and that the stakeholders most affected by restoration efforts are given a meaningful voice in the process.

A. Funding

No entity with authority to make restoration decisions will be effective without a sustained source of funding dedicated to restoration. This fact has been demonstrated repeatedly in other region-wide restoration efforts. Currently, no such Gulf-wide funding source exists. While a range of sources currently provide funding to individual states for restoration, or for specific agency projects, none is directed to Gulf-wide restoration, and none is sustainable.

The federal and state litigation against BP and other parties offers opportunities to direct restoration funding to the Gulf: first, significant Natural Resource Damages payments will be recovered; second, any Clean Water Act penalties recovered by the federal government could be directed, by Congress, to the Gulf to fund restoration projects not funded through Natural Resource Damage payments; and third, a global settlement of civil and criminal litigation may include features (such as Supplemental Environmental Projects, criminal restitution, and criminal

“community service” payments) designed to fund Gulf-wide restoration. Other funding sources – revenues from Outer Continental Shelf drilling, an increased per barrel tax on oil production, and appropriated funds directed at Gulf-wide restoration – have been considered by Congress and others. All of these potential funding sources (perhaps with the exception of Natural Resource Damages recoveries) face hurdles, political and otherwise, but are worthy of the Commission’s consideration. They are more fully described in Part II.

B. Governance Structure

Separate from, but related to, funding sources is an array of options for the governance structure of a long-term restoration council. A Gulf Coast Ecosystem Restoration Task Force recommended by the Mabus Report¹ and established by Executive Order, is now in place. As contemplated by the Executive Order, the Task Force represents an important first step towards coordinating restoration projects undertaken by the various jurisdictions in the Gulf, coordinating applicable science, and engaging stakeholders. However, as many in Congress and the Administration have suggested, the Task Force lacks some of the features necessary to achieve long-term Gulf restoration. Legislation that would build upon the Task Force’s mandates, through creation of a long-term council, passed the House in the 111th Congress, was considered by the Senate in the 111th Congress, and (along with legislation introduced in the 112th Congress) informs the current debate on long-term restoration goals for the Gulf. Region-wide restoration initiatives elsewhere in the United States add some useful lessons learned to the debate. In examining options for the governance structure of a long-term council, the Commission should consider a range of relevant factors, including the council’s required adherence to restoration goals; the extent of its decision-making authority and its decision-making structure; the manner in which funds are allocated; the role of science; and opportunities for public involvement. An analysis of these factors is laid out in Part III.

C. Recommendations

Part IV contains specific recommendations for funding and governance structures applicable to three scenarios: (1) expenditure of Natural Resource Damages funds; (2) expenditure of global settlement funds; and (3) expenditure of a larger pool of sustained funding by a long-term restoration council. All of these recommendations are informed, to a degree, by lessons learned from four existing region-wide efforts: the Exxon Valdez Trustee Council; the Chesapeake Bay Program; the Everglades Task Force; and the California Bay-Delta program.

II. LONG-TERM FUNDING FOR GULF RESTORATION

Experience in the Gulf and elsewhere has demonstrated that full restoration cannot be accomplished without sufficient and sustained funding.² Interested stakeholders share this

¹ Ray Mabus, *America’s Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill* (September 2010), 10, <http://www.restorethegulf.gov/sites/default/files/documents/pdf/gulf-recovery-sep-2010.pdf>.

² It is difficult to define “full restoration,” given that the historic acreage and configuration of Gulf wetlands and barrier islands are generally viewed as impossible to reconstitute. As described in Chapter 7 of the Commission’s final report, restoration means enhancing the quality of the Gulf Coast ecosystem to the point where there is a strong degree of resilience against natural and manmade assaults.

essential premise, wholly apart from their inevitable disagreements about how available monies can best be allocated. In other region-wide restoration efforts – even those that receive significantly more annual funding than the Gulf – lack of sufficient resources is often cited as a key impediment to reaching long-term restoration goals.³

Estimates of the cost of Gulf restoration vary widely. According to testimony before the Commission, full restoration of the Gulf will require a total of \$15–20 billion, or a minimum of \$500 million per year, over 30 years.⁴ Existing funding sources do not amount to anywhere near these figures; the exception is that, beginning within a few years after 2017, Gulf of Mexico Energy Security Act of 2006 (GOMESA)⁵ revenues will provide a substantial source of funding to individual Gulf states, though their use for coordinated, strategic restoration purposes may be limited. The lawsuit brought by the Department of Justice against BP and other companies⁶ could result in significant funding for Gulf-wide restoration if Congress passes the requisite legislation. Other proposals suggested by Congress and non-governmental organizations include increased annual appropriations for Gulf restoration, an increased per barrel tax on oil production, and accelerated availability of outer continental shelf revenues under GOMESA. These funding sources are discussed below.

A. Existing and Proposed Funding Sources

1. Primary Existing Sources of Gulf Restoration Funding

Water Resources Development Act of 2007⁷: Title VII of the Act authorizes approximately \$1.9 billion in projects to address ecosystem restoration, hurricane damage, and storm protection in coastal Louisiana. However, the legislation merely authorizes the Army Corps of Engineers to perform restoration projects; the necessary funding requires a separate appropriation from Congress. To date, no construction projects in the Louisiana Coastal Area have been funded.⁸

³ See, e.g., Anne Swanson (Chesapeake Bay Commission), interview with Commission staff, October 18, 2010 ; Lynn Scarlett (former Deputy Secretary, U.S. Department of the Interior, who coordinated the Department’s Everglades Task Force participation in the last Administration,) interview with Commission staff, October 19, 2010. See also Government Accountability Office, *Chesapeake Bay Program: Improved Strategies Are Needed to Better Assess, Report, and Manage Restoration Progress* (October 2005), 6 (lack of assurance of long-term funding impedes ability to target resources); Little Hoover Commission, *Still Imperiled, Still Important: The Little Hoover Commission’s Review of the CALFED Bay-Delta Program* (November 17, 2005), 39-41 (lack of plan for sustained funding hampers ability to gain public support for implementation of restoration objectives).

⁴ Testimony of James Tripp (Environmental Defense Fund), Hearing before the National Commission, September 28, 2010, 205; Testimony of Brian McPeck (The Nature Conservancy), Hearing before the National Commission, September 28, 2010, 285.

⁵ Gulf of Mexico Energy Security Act, Pub. L. No. 109-432, Div. C, 120 Stat. 2922, 3000.

⁶ Complaint of the United States of America, *United States v. BP Exploration & Production Inc.*, No. 10-cv-4536 (E.D. La., Dec. 15, 2010).

⁷ Water Resources Development Act of 2007, Pub. L. No. 110-114, 121 Stat. 1041.

⁸ See Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, *Roadmap for Restoring Ecosystem Resiliency and Sustainability* (March 2010), 8, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/gulfcoast/roadmap>. The President’s FY2011 budget requested \$19 million for such projects. As of this writing, that budget has not been approved by Congress.

Coastal Wetlands Planning, Protection and Restoration Act of 1990 (Breux Act)⁹: The Breux Act identifies, prepares, and funds coastal wetlands restoration projects in Louisiana. The Act, which is currently authorized through 2019, provides for “long-term conservation of such wetlands and dependent fish and wildlife populations in order of priority, based on the cost-effectiveness of such projects in creating, restoring, protecting, or enhancing coastal wetlands”¹⁰ The Breux Act directs approximately \$30 million to \$80 million per year to coastal restoration, depending on revenues from taxes on fishing equipment, import duties, and small engine motorboat fuel.¹¹

GOMESA: The Act allocates revenues from certain outer continental shelf leasing areas to the Gulf oil and gas producing states of Alabama, Louisiana, Mississippi, and Texas. Until 2017, GOMESA revenue sharing is limited to revenues from specific geographical areas; after that date, revenues will be available from all eligible areas. In fiscal year 2010, qualified GOMESA revenues totaled about \$2.3 million.¹² The Bureau of Ocean Energy Management, Regulation and Enforcement estimates that, by the early 2020s, shared revenues could total \$3.1 billion through 2022 and could reach \$59.6 billion through 2067.¹³ State share of revenues is capped at \$500 million per year from 2016-2055.¹⁴ States and political subdivisions may use the funds for the following purposes: coastal protection, conservation, or restoration; mitigation of damage to fish, wildlife, and natural resources; implementation of federally-approved conservation management plans; onshore infrastructure projects that mitigate the impact of outer continental shelf activities; and planning assistance and administrative costs of complying with GOMESA.

Coastal Impact Assistance Program¹⁵: The Program directs the Secretary of the Interior to disburse \$250 million to outer continental shelf producing states (including the five Gulf states) for each of fiscal years 2007-2010. Funds may be used for essentially the same purposes as GOMESA funds.

Outer Continental Shelf Lands Act (OCSLA) Section 8(g)¹⁶: Under the Act, generally 27% of oil leasing rentals, royalties, and other revenues paid to the United States for leases within 3 nautical miles of a state are to be paid to that state. In fiscal year 2008, revenues directed to Gulf states under Section 8(g) totaled approximately \$75 million.¹⁷

⁹ Pub. L. No. 101-646, Title III, 104 Stat. 4761, 4778-88; 16 U.S.C. §§ 3951-3954.

¹⁰ 16 U.S.C. § 3952(a)(1).

¹¹ 26 U.S.C. § 9503(c); 26 U.S.C. § 9504(b)(2); Mabus, *America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, 46; see U.S. Army Corps of Engineers, “Coastal Wetlands Planning, Protection & Restoration Act,” http://www.mvn.usace.army.mil/pd/cwppra_mission.htm.

¹² Bureau of Ocean Energy Management, Regulation and Enforcement, “Gulf of Mexico Energy Security Act of 2006 Fiscal Year 2010 Allocations,” <http://www.boemre.gov/offshore/PDFs/GOMESAFY2010Final.pdf>.

¹³ Minerals Management Service, “Oil and Gas Revenues: Fund the Future,” *MMS Ocean Science: The Science and Technology Journal of the Minerals Management Service* (April/May/June 2008), 12-13.

¹⁴ Gulf of Mexico Energy Security Act, Pub. L. No. 109-432, 120 Stat. 3006 (Dec. 20, 2006).

¹⁵ 43 U.S.C. § 1356a.

¹⁶ 43 U.S.C. § 1337(g).

¹⁷ Bureau of Ocean Energy Management, Regulation and Enforcement, “MMS Fast Facts” (April 2009), 2, <http://www.boemre.gov/ooc/PDFs/MMSFastFactsApr09.pdf>.

While these existing sources provide significant funding, they are not sufficient to achieve Gulf-wide restoration because: (1) they are not of the necessary scale to accomplish Gulf-wide restoration; (2) funding amounts vary by year, may be subject to congressional appropriation, and are not predictable; and (3) not all of the funding provided is required to be used for restoration. In addition, individual authorized projects are often designed and implemented without regard to larger regional ecosystem restoration goals. Even after GOMESA revenues reach their full potential, those revenues will be directed to the individual states, which may or may not use them to fund restoration consistent with Gulf-wide goals.

2. Potential Funding from Litigation

BP and other named parties may be subject to significant civil and criminal penalties, in addition to Natural Resources Damages claims, for violations of the Oil Pollution Act, Clean Water Act, and a number of federal wildlife statutes.¹⁸ Given the cost of lengthy litigation and the high penalties that may be imposed, BP and the other parties have a strong incentive to settle all federal and state claims in one global settlement. The federal, state, and tribal parties likewise would benefit from a global settlement that would avoid litigation expenses as well as delays in the actual implementation of restoration projects.¹⁹

As described further below, a global settlement under the Oil Pollution Act and Clean Water Act, and other statutes would result in substantial penalties and damage awards payable to the federal government, though it is unclear what portion of these funds would be directed to the Gulf.

a. Natural Resource Damages Recovery

Federal and state trustees designated under the Oil Pollution Act have formed a Trustee Council to begin the Natural Resource Damage Assessment process for the *Deepwater Horizon* spill. Through either litigation or a settlement, BP and other responsible parties will pay damages, which may be used for “restoration, rehabilitation, replacement or acquisition of the equivalent” of natural resources injured by the spill.²⁰ The total amount of damages is not currently known.

Under the Oil Pollution Act, recovered Natural Resource Damages funds must be used for restoration of resources injured as a result of the spill. It is not yet clear how the damage award will be allocated. It is likely that the Trustee Council in its current form, or some reconfiguration of the Trustee Council, will make such decisions. Observers and participants have identified a number of challenges including: (1) whether federal trustees will maintain a united front in pursuing Natural Resource Damages claims; (2) how five Gulf states and several

¹⁸ See Oil Pollution Act, 33 U.S.C. §§ 2701-2762; Clean Water Act, 33 U.S.C. §§ 1251-1387. Note that this paper focuses on federal Clean Water Act claims and federal, state, and tribal Natural Resource Damage claims. Other possible legal actions include state claims for economic loss and claims under federal wildlife statutes. They are not addressed here.

¹⁹ Testimony of Richard Stewart (New York University Law School), Hearing before the National Commission, September 28, 2010, 197 (full litigation of Natural Resource Damages claims alone could take 20 years or more).

²⁰ 33 U.S.C. § 2706(c), (f).

federal agencies will be able to reach agreement on project selection; (3) whether funding or project selection will be targeted to geographical areas (such as Louisiana) that suffered the most damage or by some other criterion; (4) how Natural Resource Damages projects will be integrated with other restoration efforts in the Gulf; and (5) the difficulties of establishing a “baseline,” and the determination of whether restoration should be targeted to a pre-spill or “enhanced” baseline.²¹ For more information on this topic, please refer to the Commission staff working paper titled: Natural Resource Damage Assessment: Evolution, Current Practice, and Preliminary Findings Related to the Deepwater Horizon Oil Spill (No. 17).

b. Civil and Criminal Penalties

In addition to a Natural Resource Damages action, the federal government has the authority to bring civil and criminal enforcement actions under a variety of federal statutes, primarily the Clean Water Act.²² On December 15, 2010, the United States filed a civil complaint in the Eastern District of Louisiana naming BP and other companies as defendants. The complaint seeks civil penalties for alleged violations of the Clean Water Act and “a declaration that the [d]efendants are responsible and strictly liable for unlimited removal costs and damages under the Oil Pollution Act of 1990.”²³ For more information on authorities for civil and criminal penalties, please refer to the Commission staff working paper titled: Unlawful Discharges of Oil: Legal Authorities for Civil and Criminal Enforcement and Damage Recovery (No. 14) (Legal Authorities staff working paper). As that paper describes, civil and criminal penalties could total in the billions of dollars, depending on a variety of factors. Ordinarily, those penalties would be deposited in to the Oil Spill Liability Trust Fund²⁴; however, as noted below, the Administration and some in Congress have proposed that a portion of the funds be directed to restoration of the Gulf.

Additionally, as discussed in the Legal Authorities staff working paper, a criminal action could result in a court order to one or more parties to make restitution or community service payments, which could be directed to Gulf restoration. A civil action settlement could include a Supplemental Environmental Project (SEP), which is a tool used by the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) in settlements in environmental enforcement actions. SEPs are a potential mechanism for directing funding resulting from the litigation against BP and others to the Gulf region. Louisiana Governor Jindal issued a press release on August 16, 2010, encouraging EPA and BP to work with the state to develop a SEP program to use potential settlement funds for coastal restoration projects.²⁵

²¹ Testimony of Richard Stewart, 195, 198-200, 219-20, 238-39; Testimony of Garrett Graves (Louisiana Office of Coastal Activities), Hearing before the National Commission, September 28, 2010, 323-25.

²² Statutes other than the CWA, including the Migratory Bird Treaty Act, the Marine Mammal Protection Act, and the Endangered Species Act, are described in the Legal Authorities paper.

²³ Complaint of the United States of America, *United States v. BP Exploration & Production Inc.*, No. 10-cv-4536 (E.D. La., Dec. 15, 2010).

²⁴ 26 U.S.C. § 9509(b)(8); 33 U.S.C. § 1321(s).

²⁵ Press Release, Louisiana Office of the Governor, *Governor Jindal on Coastal Restoration: Time to Act is Now* (August 16, 2010), <http://emergency.louisiana.gov/Releases/81610Release.htm>; see also Testimony of Richard Stewart Testimony, 221-22; Testimony of James Tripp, 205; Testimony of Garrett Graves, 312.

The primary advantage of a SEP program in this case would be to ensure that monies recovered from BP and other responsible parties are directed to Gulf restoration. The likelihood of inclusion of a SEP in a settlement with BP, or the size of any agreed-upon SEPs, may be limited by the so-called “nexus” requirement. EPA requires a nexus between the violations being enforced and a proposed SEP. EPA recognizes a nexus only if a proposed SEP meets one of the following criteria:

the project is designed to reduce the likelihood that similar violations will occur in the future; or the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.²⁶

In its SEP Policy, EPA notes that a nexus may be established more easily if the project impacts the site where the violation occurred or a site in the same ecosystem or geographic area. “Immediate geographic area” is generally within a “50 mile radius of the site.”²⁷ Restoration projects included in a settlement with BP and others could fit within the second criterion established by EPA (reduces the adverse impact to public health or the environment to which the violation at issue contributes), but they would likely need to be directly related to the effects of the *Deepwater Horizon* spill itself.²⁸

In sum, funds recovered from litigation or settlement may be directed to Gulf restoration in the following ways:

- Natural Resource Damage awards must be spent to restore the Gulf;
- Civil and/or criminal penalties could be directed to the Gulf, but only through Congressional action, because under the Clean Water Act such funds are directed to the Oil Spill Liability Trust Fund;
- If the United States reaches a settlement with BP and other parties, the settlement could include one or more Supplemental Environmental Projects aimed at Gulf restoration;
- The court in a criminal action could order restitution or a community service payments, which could be used for Gulf restoration; and
- A small amount of funds may be directed to Gulf restoration pursuant to federal wildlife statutes.²⁹

²⁶ EPA, Nexus Requirement in the Supplemental Environmental Projects Policy (2002), 1, <http://www.epa.gov/compliance/resources/policies/civil/seps/sepnexus-mem.pdf>.

²⁷ EPA, Final Supplemental Environmental Projects Policy (1998), 5, <http://www.epa.gov/oecaerth/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>.

²⁸ Examples of past SEPs resulting from Clean Water Act oil spill violations include the purchase and permanent protection of resources in the affected area. See Written Statement of Richard Stewart (New York University Law School), Hearing before the National Commission, September 28, 2010, 4.

²⁹ See Legal Authorities paper.

3. Legislative Proposals

Legislative proposals in the 111th Congress attempted to fund Gulf restoration in several ways:

- Direction of at least 80% of civil and criminal Clean Water Act penalties resulting from the *Deepwater Horizon* spill to Gulf restoration (Landrieu bill);³⁰
- Creation of a new retroactive penalty – in addition to existing section 311 penalties – under the Clean Water Act of \$200 million for each 1 million barrels discharged (CLEAR Act, as passed by the House of Representatives on July 20, 2010);³¹
- Authorization of \$2.5 billion to fund Gulf restoration from 2012 – 2021 (Reid bill);³²
- Direction of 20% of civil and criminal penalties resulting from the *Deepwater Horizon* spill to an endowment to fund community restoration projects (draft legislation proposed by several NGO's);³³
- Acceleration of GOMESA funding (Landrieu bill);
- Direction of funds resulting from an increase in the per barrel tax on oil production to Gulf restoration (Reid bill);³⁴

In the Mabus Report, the Administration called on Congress to enact legislation that would direct a portion of Clean Water Act penalties resulting from the *Deepwater Horizon* spill to restoration and other recovery needs in the Gulf region, and a separate portion of these penalties directly to the Gulf states.³⁵

There are several challenges to the creation of new funding mechanisms for the Gulf-wide restoration. First, directing 80% (or another amount) of Clean Water Act penalties to the Gulf would take congressional action. Informal reports suggest that, under Congressional budget rules, these funds would likely need to be “scored,” meaning there would have to be a budgetary offset.³⁶ The mechanism passed in the CLEAR Act – imposition of additional penalties not

³⁰ Restoring Ecosystem Sustainability and Protection on the Delta Act, S. 3763, 111th Cong. (2010) (“Landrieu bill”).

³¹ Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. (2010) (“CLEAR Act”).

³² Clean Energy Jobs and Oil Company Accountability Act of 2010, S. 3663, 111th Cong. (2010) (“Reid bill”).

³³ The Nature Conservancy, *Draft Legislation: Gulf Coast Ecosystem Restoration*, <http://www.nature.org/wherewework/northamerica/gulfofmexico/explore/art33031.html>

³⁴ This funding source is also included in proposals being advanced by several non-governmental organizations, such as the Nature Conservancy and the Environmental Defense Fund. See Testimony of Brian McPeck, 284; Testimony of James Tripp, 206.

³⁵ Mabus, *America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, 6-7. The report also covers economic recovery and recommends that Clean Water Act penalties be directed to human health and economic recovery in addition to Gulf restoration.

³⁶ Interviews with Congressional staff. see also John Maginnis, “Between the flow of BP’s oil and BP’s money,” *Times Picayune* (August 25, 2010), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/between_the_flow_of_bps_oil_an.html (“Justice would be served to use BP fines to pay for coastal restoration projects and business development, but congressional budget-scoring rules make a simple swap difficult.”). Under the Statutory Pay-As-You-Go Act of 2010 (PAYGO), new legislation that reduces taxes or increases mandatory expenditures (spending not controlled by the annual appropriations process) must include offsets in the form of tax increases or cuts to other mandatory expenditures that render the legislation “budget

previously authorized under the Clean Water Act – would not be subject to the same scoring requirement. As noted above, additional funding through a per-barrel tax and through revenue sharing (including acceleration of GOMESA, which was initially proposed by Sen. Landrieu) has been proposed – but those funding measures have not gained sufficient support to advance in Congress.

B. Options for the Commission to Consider

1. Legislative Options

- a. Direction of up to 80% of the civil and criminal Clean Water Act penalties resulting from the *Deepwater Horizon* spill to Gulf restoration:
 - Pros: Ensures significant funds for Gulf restoration; generally supported by the Administration and many in Congress; not subject to the appropriations process;
 - Cons: Faces hurdles because of congressional scoring requirements; unclear how likely it is that such legislation will pass; benefits to restoration will be decreased if some of the funding goes to non-restoration uses (as is recommended by the Administration); litigation could take several years to resolve.
- b. Direction of 20% of the civil and criminal Clean Water Act penalties resulting from the *Deepwater Horizon* spill to fund an endowment for community restoration projects:
 - Pros: Ensures states and local communities have control over a portion of the restoration funds;
 - Cons: Same hurdles as noted in “Option a” above.
- c. Creation of a new retroactive penalty under the Clean Water Act that is applicable to the *Deepwater Horizon* spill:
 - Pros: At least \$1 billion directed to Gulf restoration; not subject to congressional scoring requirements;
 - Cons: One-time payment only.
- d. Congressional appropriations directed to Gulf restoration:
 - Pros: Can target funding directly to Gulf restoration;
 - Cons: Dependent on the appropriations process (i.e. not predictable).
- e. Direction of a percentage of an increased per barrel tax on oil production to Gulf restoration:
 - Pros: Extremely small percentage of the increase could result in substantial funding; not subject to annual appropriations;

neutral.” Office of Management and Budget, *The Statutory Pay-As-You-Go Act of 2010: A Description*, http://www.whitehouse.gov/omb/paygo_description/;

Cons: Faces significant hurdles in Congress.

- f. Acceleration of GOMESA or other revenue sharing measures:
 - Pros: Significant resources would be directed to Gulf states;
 - Cons: Faces significant hurdles in Congress..

- g. Reliance on GOMESA as a source to fund state restoration efforts:
 - Pros: High level of funding; in Louisiana, funds must be spent on restoration and other uses defined in GOMESA;
 - Cons: Unlikely that these funds will be made available for allocation by a multi-jurisdictional Task Force; restoration is not only allowable purpose.

2. Litigation Options

- a. Inclusion of Supplemental Environmental Projects, criminal restitution, or community service payments as part of a global settlement with BP and other responsible parties:
 - Pros: Could ensure funding goes towards Gulf restoration;
 - Cons: Depends on settlement strategy of state and federal governments and the defendants; funding would not be available until a settlement is reached, which could take years.

III. LONG-TERM RESTORATION GOVERNANCE STRUCTURE

Despite the widespread recognition that Gulf restoration requires a coordinated strategy in order to succeed, there is no single unifying structure to guide such efforts. There are several entities currently engaged in Gulf restoration – including the Gulf of Mexico Alliance, the Hypoxia Task Force, and the National Ocean Council – but none of them have developed and funded a comprehensive, unified strategy for Gulf-wide restoration.

Prior to the Gulf spill the Administration created the Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, which identified, in its *Roadmap for Restoring Ecosystem Resiliency and Sustainability*, a near term strategy for addressing ecosystem degradation along the Mississippi and Louisiana coasts.³⁷ Following the spill, and as recommended by the Mabus report,³⁸ the President created the Gulf Coast Restoration Task Force. That Task Force is a critical first step towards a coordinated Gulf-wide restoration effort. But, the Administration has stated that it views the Task Force as “transitional,” and has asked Congress to pass legislation establishing a long-term council with greater, and different, authority. Several legislative proposals build upon the new Task Force in useful ways. This section: (1) describes the new Task Force and summarizes existing proposals for a new Gulf-wide restoration council; and (2) discusses factors relevant to the new council’s governance structure.

³⁷Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, *Roadmap for Restoring Ecosystem Resiliency and Sustainability*.

³⁸Mabus, *America’s Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, 10-12.

A. Existing or Proposed Region-Wide Governing Entities

1. The Mabus Report and the Gulf Coast Restoration Task Force

On October 5, 2010, Executive Order 13554 created the Gulf Coast Ecosystem Restoration Task Force (Gulf Coast Task Force).³⁹ The Task Force was recommended by the Mabus Report.

Membership: The Gulf Coast Task Force is comprised of representatives of 7 federal agencies, four offices within the Executive Office of the President, the five affected Gulf states, and potentially affected tribes.

Functions of the Task Force include:

- coordinating intergovernmental efforts to improve restoration actions;
- supporting the Natural Resource Damage Assessment effort by referring potential restoration actions to the Natural Resource Damages trustees;
- developing a Gulf of Mexico Regional Ecosystem Restoration Strategy;
- engaging stakeholders to ensure that their needs and viewpoints are shared in order to inform the work of the Task Force; and
- providing leadership and coordination in relation to research needs.

Strategy: The Gulf Coast Task Force must propose a restoration agenda that includes: restoration goals, performance indicators, and a means of coordinating restoration efforts guided by shared priorities. In developing its Strategy, the Task Force shall:

- define ecosystem restoration goals and describe milestones;
- consider existing research and planning efforts;
- identify major policy areas where coordinated intergovernmental action is necessary;
- propose new programs or actions to implement elements of the Strategy where existing authorities are not sufficient;
- identify monitoring, research, and scientific assessment needs and evaluate existing monitoring programs and gaps in current data; and
- describe circumstances under which termination of the Task Force would be appropriate.

Source and Allocation of Funding: The Executive Order contains no explicit direction regarding funding for restoration projects or the method for allocating any funding that is secured. Rather, the Executive Order directs federal agencies, to “consider ways to align their relevant programs and authorities with the Strategy.”⁴⁰

As noted above, the Administration has stated that it considers the Gulf Coast Task Force to be “transitional”⁴¹ and, through the Mabus Report, it has called upon Congress to enact

³⁹ Exec. Order No. 13554, 75 Fed. Reg. 62313 (Oct. 5, 2010).

⁴⁰ *Ibid*, at 62315.

⁴¹ Lisa Jackson (EPA), *Remarks on the Gulf Coast Ecosystem Task Force*, EPA (October 5, 2010); Lisa Jackson (EPA), *Remarks on the Gulf Coast Ecosystem Task Force*, EPA (September 29, 2010).

legislation that would establish a Gulf Coast Recovery Council that would oversee and implement restoration funding sources. The Mabus Report recommends that the Council be structured to incorporate transparency, accountability to the public and relevant scientific and technical knowledge.⁴²

2. Legislative Proposals for a Gulf Coast Restoration Task Force in the 111th Congress

There were several legislative proposals in the 111th Congress for long-term Gulf restoration task forces, including:

- H.R. 3534, Title V (the CLEAR Act, passed by House of Representatives on July 20, 2010);
- S. 3763, Section 4 (Senator Landrieu's RESPOND Act); and
- S. 3663, Title XLII (Senator Reid's Clean Energy Jobs and Oil Accountability Act of 2010).

All of these bills would establish a Gulf Restoration Task Force, with representation by relevant federal agencies and governors of the Gulf states. In addition, they recommend that the Task Force develop a Comprehensive Plan, which incorporates existing Gulf restoration plans, to promote long-term Gulf-wide restoration. The three bills vary on the content of the Comprehensive Plans they require:

- The CLEAR Act lists particular restoration programs and projects to be addressed in the plan, which range from specific resources (oyster reefs, wetlands, fish passages) to more general goals (research, restoring biological productivity and ecosystem function, improving resilience, restoring fisheries).
- The Landrieu bill requires the plan to list specific restoration projects that give priority to: projects established by the Water Resources Development Act of 2007; the Louisiana Master Plan; projects that maximize beneficial uses of dredge material; and projects benefitting the areas most affected by the *Deepwater Horizon* spill. Projects are then further selected based upon ability to generate ecosystem sustainability, biological productivity, flood protection, and ecosystem function.
- The Reid bill calls for a plan that prioritizes projects based upon their ability to promote ecosystem sustainability, biological productivity, flood protection, and ecosystem function.

Other features in the three bills include:

- Public involvement in restoration planning through a Citizens Advisory Council that advises the Task Force (CLEAR Act).
- Representation on the Task Force for local jurisdictions from each Gulf state, in addition to representation for the states themselves (Landrieu and Reid bills).
- A heightened role for the Chair of Task Force (Reid bill).

⁴² Mabus, *America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, 8, 12.

B. Analysis and Factors to Consider

Based upon an analysis of four existing region-wide governance restoration efforts throughout the United States⁴³ and a review of the status of existing restoration efforts in the Gulf, as well as legislative proposals, several themes emerge that are valuable in assessing any proposal for a future Gulf restoration governance structure. Each of these themes is described below, with an accompanying analysis of their application to the Gulf. Hereinafter, a long-term Gulf restoration governing structure will be referred to as a “council.”

1. Commitment to Restoration Goals

a. Shared Vision

A key element of successful regional restoration efforts is the development of a consistent set of shared restoration goals.⁴⁴ In the Gulf, a coherent plan will help ensure stakeholder support and will provide a basis for developing specific restoration criteria.⁴⁵ The Executive Order establishing the Gulf Coast Task Force, and the legislative proposals, all establish a vision, or purpose, for a region-wide Gulf Coast Task Force.⁴⁶

Any Gulf-wide restoration effort will benefit from a clear description, in the governing legislation, of restoration goals. In addition, if ecological restoration is truly the focus, then that point should be stated explicitly, so that funding and project implementation are directed solely towards restoration, and activities aimed at navigation structure, flood or hurricane protection, or other objectives are implemented in a manner consistent with restoration goals.⁴⁷

⁴³ Staff reviewed features of the Exxon Valdez Trustee Council, the Chesapeake Bay Program, the South Florida Ecosystem Restoration Task Force (Everglades Task Force), and the California Bay-Delta (CALFED) program as examples of existing regional initiatives, through research and interviews with individuals who have participated in, or are knowledgeable about, these region-wide efforts. These efforts have had many successes, but each of these initiatives is complex, and complex in its own way, so none of the four is a perfect fit as a model for the Gulf. However, certain themes and lessons learned emerge from an analysis of these other models.

⁴⁴ See, e.g., Government Accountability Office, *Chesapeake Bay Program: Improved Strategies Are Needed to Better Assess, Report, and Manage Restoration Progress* (October 2005), 4; Government Accountability Office, *Chesapeake Bay Program: Recent Actions Are Positive Steps Toward More Effectively Guiding the Restoration Effort* (July 2008), 7-8; Little Hoover Commission, *Still Imperiled, Still Important: The Little Hoover Commission's Review of the CALFED Bay-Delta Program* (November 17, 2005), iv, 46.

⁴⁵ Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, *Roadmap for Restoring Ecosystem Resiliency and Sustainability*, 8 (defining a shared vision ecosystem restoration along the Louisiana and Mississippi coasts); Testimony of Thomas Strickland (Department of the Interior), Hearing before the National Commission, September 28, 2010, 295.

⁴⁶ For example, the CLEAR Act states that the Task Force will “maximize efforts in restoring biological integrity, productivity and ecosystem functions in the Gulf of Mexico.” CLEAR Act § 501. The Executive Order states that “The United States needs a vibrant Gulf Coast, and the Federal Government is committed to helping Gulf Coast residents conserve and restore resilient and healthy ecosystems in the Gulf of Mexico and surrounding regions that support the diverse economies, communities and cultures of the region.” Exec. Order No. 13554, 75 Fed. Reg. 62313 (Oct. 5, 2010).

⁴⁷ As a point of comparison, the multi-pronged goals set forth in the statute that authorized the Everglades Task Force (including water supply, restoration, and flood protection) have complicated decision making and slowed restoration. Scarlett, interview; see Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3767 (1996)

b. Binding Goals

Experience in the Gulf and other regions has shown that, absent binding goals to drive the restoration process, restoration projects are not sufficiently funded, focused, or coordinated.⁴⁸ This stands to reason because natural resource managers are constantly subject to multiple demands, and will of necessity give a higher priority to specific requirements than they give to general aspirations. Indeed, it is sometimes a lawsuit or other regulatory driver imposing specific requirements that results in action to achieve restoration goals. Examples are: (1) the Chesapeake Bay, where Clean Water Act litigation has led to a requirement that local jurisdictions develop Watershed Implementation Plans;⁴⁹ and (2) the Exxon Valdez restoration process, where a court-ordered consent decree required projects to meet specific statutory requirements for restoration.⁵⁰

The Executive Order creating the Gulf Coast Task Force directs it to develop a Strategy, but does not impose any requirements on project selection, or otherwise *require* adherence to the purposes of the Strategy in Gulf restoration efforts. The Senate legislative proposals, on the other hand, require the legislatively-created Task Force to: (1) develop a comprehensive plan for Gulf restoration (consistent with purposes set forth in the legislation); (2) identify in the plan projects that are eligible for funding and implementation; and (3) select only projects that are consistent with the plan.⁵¹ Thus, the Senate bills create binding goals (in the legislation), and an obligation to implement projects consistent with criteria laid out in a comprehensive plan. Legislation of this nature appears to be the surest way to require governments to commit to restoration, and to provide a basis for accountability.

c. Specific Restoration Criteria

The legislation or other legal authority that establishes the Gulf restoration council, or the comprehensive plan implementing the purposes set out in the legislation, can be more or less explicit regarding the overall criteria applicable to projects eligible for funding. Criteria must be broad enough to endure over time, specific enough to inform project selection, and flexible enough to allow for adaptive change as the decision makers' understanding of the underlying ecology, or the ecology itself, changes.

⁴⁸ Scarlett, interview; Mark Bryer (Chesapeake Bay Director, The Nature Conservancy), interview with Commission staff, October 15, 2010; Written Statement of Brian McPeck (The Nature Conservancy), Hearing before the National Commission, September 28, 2010, 6-7.

⁴⁹ See Settlement Agreement, *Fowler v. United States*, No. 09-cv-05 (D.D.C. dismissed May 17, 2010), and litigation leading up to that settlement.

⁵⁰ Agreement and Consent Decree, *United States v. Exxon Corp.*, No. A91-82 CIV (D. Alaska, Sept. 30, 1991); see also Government's Memorandum in Support of Agreement and Consent Decree, *United States v. Exxon Corp.*, No. A91-082 CIV (D. Alaska, Oct. 8, 1991).

⁵¹ See, e.g., Landrieu bill § 4(c); Reid bill § 4201(c). The CLEAR Act also requires the development of a comprehensive plan, but does not explicitly require project selection consistent with that plan. § 501. There seems to be little or no disagreement that a comprehensive plan is a key part of any restoration effort. The benefits of this approach are numerous: the plan elaborates on the goals of the governing entity and provides specific milestones and restoration objectives; it helps ensure that projects are not duplicative; it could include a map that ties projects to specific places; and it provides a useful mechanism for public involvement. The disadvantage is that developing comprehensive plans take time and a significant amount of coordination. To address this "plan fatigue" and to maximize the use of state plans, some of the legislative proposals require that the region-wide comprehensive plan incorporate existing state plans. Landrieu bill § 4(c); Reid bill § 4201(c).

There are several advantages to greater specificity in applicable criteria. Specificity ensures discipline in spending, helps decision makers target funding to particular projects, and minimizes the risk of financing projects that do not contribute to overall restoration goals.⁵² Specificity also makes project choices (including decisions not to fund a project) easier to explain to the public. Finally, specificity also takes some responsibility away from local decision makers, which has the benefit of insulating decisions from near-term and near-space demands that are not necessarily consistent with larger restoration goals.⁵³ In some cases, local decision makers may actually welcome this approach. On the other hand, because circumstances, scientific knowledge, and ecosystems change, overly restrictive criteria may unnecessarily prevent otherwise effective restoration projects. Also, the more specific the applicable criteria, the less discretion and flexibility are left to decision makers. One way to balance these factors would be to provide general goals and criteria in the governing legislation, and more specific priorities and criteria in the comprehensive restoration plan.

Options for specifying restoration goals and criteria include:

- Listing a small number of guiding principles;⁵⁴
- Listing restoration programs and projects to be addressed in the comprehensive restoration plan (e.g. oyster reefs, wetlands restoration, fish passage);
- Listing goals such as biological productivity, improving ecosystem resilience, and restoring fisheries;
- Defining desired outcomes or performance objectives (e.g. number of acres restored);
- Listing types of habitats to be restored (e.g., key estuaries, sea grass, wetlands, coral reefs).

One cautionary note: The more goals that are identified in a plan or strategy, the greater the risk that efforts will be dispersed, the region-wide vision will be diluted, and desired results will not be attained. This was one challenge in the initial effort to restore the California Bay-Delta.⁵⁵ Although the parties agreed on the general goals set forth in the governing documents,

⁵² Swanson, interview. In analyzing other region-wide initiatives, commentators have identified the lack of specificity in the goals established in guiding documents as an obstacle to achieving desired results. For example, the California Legislative Analyst's Office made similar criticisms of the California-Bay Delta (CALFED) process, stating that CALFED was "not being guided currently by clear, specific goals that reflect the state's priorities for the program." While the governing Record of Decision and legislation have objectives for the program, "these are stated very broadly, thereby leaving decisions to be made in the future about the specific means to pursue them." California Legislative Analyst's Office, *Reforming the CALFED Bay-Delta Program* (Feb. 2006), http://www.lao.ca.gov/analysis_2006/resources/res_02_anl06.html.

⁵³ Scarlett, interview.

⁵⁴ For example, the Mabus Report lists the following five principles for ecosystem restoration: (1) coastal wetland and barrier shoreline habitats should be healthy and resilient; (2) fisheries should be healthy, diverse, and sustainable; (3) coastal communities should be adaptive and resilient; (4) a more sustainable storm buffer should exist; and (5) inland habitats, watersheds, and off-shore waters should be healthy and well-managed. Mabus, *America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, 38-39.

⁵⁵ CALFED was created in 1994 as a consortium of state and federal agencies with regulatory authority over water and resource management responsibilities in the Bay-Delta region. Funding was later authorized by federal statute; federal law also set forth objectives. California Bay-Delta Authorization Act, Pub. L. 108-361, 118 Stat. 1681 (Oct. 25, 2004). The objectives of the program were to: provide good water quality for all uses; improve fish and wildlife habitat; reduce the gap between water supplies and projected demand; reduce the risks from deteriorating levees. *See*

they did not agree on priorities for project implementation.⁵⁶ Despite the expenditure of billions of dollars, evidence of tangible results was lacking, and this outcome is often cited as a central reason for CALFED's ultimate dissolution.⁵⁷ In a different way, in the Everglades the existence of multiple divergent goals has generated some criticism that projects are too focused on water delivery and not sufficiently focused on ecosystem restoration.⁵⁸ A Gulf-wide restoration effort risks this same result, given the multitude of distinct causes of Gulf degradation.

2. Decision-Making Authority and Council Structure

Factors to be considered in analyzing the decision-making structure of a Gulf restoration council are: (1) the extent of the council's decision-making authority; (2) the relative roles of state and federal governments; (3) the council's authority to allocate funding; and (4) the extent to which agencies are required to align their policies and budgets.⁵⁹

a. Overall decision-making structure and conflict resolution

One common criticism of existing region-wide restoration initiatives – which could apply to the new Gulf restoration council – is that the lack of authority to select projects and/or make funding decisions limits their effectiveness. Many existing initiatives have coordination but not decision-making functions.⁶⁰ Coordination of multiple jurisdictions' activities, if carried out with discipline, is a critical step to restoration at an ecosystem scale. But an exhortation by Congress or the President to coordinate is not sufficient to ensure the most efficient use of resources, or the accountability necessary to achieve restoration goals.⁶¹ Even where there is a binding, comprehensive plan for the region, restoration will be more easily achieved if a single decision-making council has the authority both to determine whether proposed projects are consistent with the plan and to prioritize and select projects.

Factors that bear upon a Gulf restoration council's decision-making structure are:

- **Degrees of authority:** Legislation could authorize the council to do one of a range of things: for example, the council could set goals, against which all projects are measured;

California Legislative Analyst's Office, *Reforming the CALFED Bay-Delta Program* (Feb. 2006), http://www.lao.ca.gov/analysis_2006/resources/res_02_anl06.html

⁵⁶ See Little Hoover Commission, *Still Imperiled, Still Important: The Little Hoover Commission's Review of the CALFED Bay-Delta Program*, ii, 36 (lack of agreement on priorities stalled progress and impeded ability to achieve goals).

⁵⁷ Giorgos Kallis, Michael Kiparsky and Richard Norgaard, "Collaborative Governance and Adaptive Management: Lessons from California's CALFED Water Program," *Environmental Science & Policy* 12 (2009), 632, 639.

⁵⁸ See, e.g., Pervaze Sheikh and Nicole Carter, "South Florida Ecosystem Restoration and the Comprehensive Everglades Restoration Plan," *Congressional Research Service* (2008), 5; Scarlett, interview.

⁵⁹ The roles of the public, and of scientists, are also relevant to this question are described in Sections III.B.3 and III.B.4, below.

⁶⁰ Mabus, *America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, 10 ("While the Task Force would not direct the actions of other federal agencies, it would serve in a critical advisory capacity to ensure that Gulf restoration efforts are coordinated, collaborative, and effective.").

⁶¹ See, e.g., Little Hoover Commission, *Still Imperiled, Still Important: The Little Hoover Commission's Review of the CALFED Bay-Delta Program*, 63 (lack of clear authority and accountability impeded CALFED partners' ability to achieve results).

it could prioritize projects according to factors such as geography or restoration need; it could select individual projects; and it could allocate funding to individual jurisdictions and allow them to select projects.

- Identity of the actual decision maker: Most region-wide restoration initiatives are led by a Task Force or governing council.⁶² The Reid and Landrieu bills, which establish Gulf-wide decision making bodies, vest increased authority in a single individual (the Chair of the Task Force) who is appointed by the President and advised by the Task Force. In these proposals, funds are made available to the Chair, who has authority to select projects and, presumably, transfer the funds to the agency or jurisdiction that would implement the project. The advantages of this model are efficiency and clear lines of decision-making. One major disadvantage is that decision making could be seen as “top down”; this would likely be a concern in the Gulf. The model also depends on a source of funding available to the single decision maker. A variation on this model is the “super-trustee” proposed by some for the Natural Resource Damages restoration decision making process.⁶³ Finally, there could be a “superboard” to look holistically at Natural Resource Damages and Clean Water Act funds.⁶⁴
- Level of agreement necessary to approve a project: In the absence of a single decision maker, the council should be structured to reach decisions quickly. The Exxon Valdez Trustee Council structure required unanimity, but this would likely not work in a multi-jurisdictional region like the Gulf. Other proposed models would require a majority,⁶⁵ or a lead state and lead federal decision maker.⁶⁶

b. State v. Federal Roles

Initiatives that manage and restore natural resources on a multi-state scale, and even those that only involve one state, struggle with the relative balance of state and local representation and decision-making authority. Projects are implemented at the local level and will not succeed

⁶² See, e.g., Exxon Valdez Trustee Council (comprised of three state and three federal trustees), established in a Memorandum of Agreement between the federal government and the State of Alaska. Memorandum of Agreement and Consent Decree, *United States v. State of Alaska*, A91-81 CIV (D. Alaska, August 29, 1991); Chesapeake Bay Program’s Executive Council (comprised of representatives of the federal government, Maryland, Virginia, Pennsylvania, Washington D.C., and the Chesapeake Bay Commission), established by Agreement between the federal government and several states, Chesapeake Bay Program, *1987 Chesapeake Bay Agreement* (1987); the South Florida Ecosystem Restoration Task Force (comprised of federal and state officials and chaired by the Secretary of the Interior), established by statute, Pub. L. No. 104-303, 110 Stat. 3767 (1996).

⁶³ Testimony of Richard Stewart, 10 (“One step towards a solution would be for the President to provide by Executive Order for appointment of a supervisory or head federal ‘Super Trustee’ to exercise final review and decisional authority over federal decisions on restoration and NRD expenditures, and strongly encourage the states to do likewise. The arrangement could provide for joint federal-state appointment of a third Super Trustee to decide restoration priorities, plans and expenditures, along with the other two. Alternatively, Congress could establish such an arrangement by legislation.”).

⁶⁴ Written Statement of Garrett Graves (Louisiana Office of Coastal Activities), Hearing before the National Commission, September 28, 2010, 5; see also Exec. Order No. 13554, 75 Fed. Reg. 62313 (Oct. 5, 2010) (requiring coordination between the Gulf Coast Task Force and the Natural Resource Damages Trustee Council).

⁶⁵ Written Statement of Brian McPeck, 7.

⁶⁶ Written Statement of Garrett Graves, 5.

without a high degree of buy-in from local decision makers and citizens. Nor will the projects' value be maximized without the contribution of local knowledge regarding industry, culture and other local values. On the other hand, the federal government is typically the source of both funding and expertise (perhaps most importantly, scientific expertise) at a scale that state and local governments simply do not possess.

The Gulf Coast Task Force as envisioned in the Executive Order includes at least 11 federal agencies or offices, representatives of the five Gulf states, as well as representatives of affected tribes.⁶⁷ The Reid and Landrieu proposals list nine federal agencies, representatives of four states, representatives of local governments in the four states (Alabama, Florida, Louisiana, and Mississippi), and tribal representatives.⁶⁸ In the Gulf and elsewhere, states have expressed concerns about top-down decision making, as well as concerns that, with a large number of federal agencies at the table, states will simply not have a sufficient voice.⁶⁹

One way to address the tension between state and federal interests is to apportion funding so that an identified portion of available resources go to the states with flexibility as to how they can be spent (see the following section), or to have all project selection occur at the state level, consistent with a comprehensive region-wide plan. As noted below, this objective may be achieved once GOMESA funding begins to flow to the states in large amounts.

c. Allocation of Funding

One of the most contentious and challenging tasks facing any governing council is to determine how to allocate available funding. The following are several models for how allocation decisions can be made:

- Based on enumerated restoration-focused criteria. An example is the Exxon Valdez Trustee Council restoration project selection process, which was based on restoration need, according to criteria laid out in a Restoration Plan.⁷⁰
- Based on habitat type (coastal vs. marine).
- Based on an enumerated list of priorities. The Landrieu and Reid bills prioritize projects based on ecosystem function and other science-based criteria. Other proposals prioritize projects that have already been authorized under the Water Resources Development Act of 2007.⁷¹
- Based on those geographical regions most impacted by the *Deepwater Horizon* spill. This is the recommendation of the State of Louisiana.⁷²

⁶⁷ Exec. Order 13554, 75 Fed. Reg. 62313 (Oct. 5, 2010).

⁶⁸ Reid bill § 4201(g); Landrieu bill § 4(f).

⁶⁹ Testimony of Garrett Graves, 262, 301, 324; Testimony of Governor Haley Barbour (Mississippi), Hearing before the National Commission, September 28, 2010, 104-05. Similarly, when states are excluded from the process of goal setting or implementation, they have less incentive to support the goals or implementation, a result that in turn impedes achievement of goals. Swanson, interview.

⁷⁰ Exxon Valdez Oil Spill Trustee Council, *Exxon Valdez Oil Spill Restoration Plan* (November 1994), <http://www.evostc.state.ak.us/Universal/Documents/Restoration/1994RestorationPlan.pdf>.

⁷¹ Written Statement of Brian McPeck, 7.

⁷² Testimony of Garrett Graves 262, 324-25; Testimony of Thomas Strickland, 327-28.

- Based on geography more generally (e.g., a set percentage for Louisiana as well as for other Gulf states).

Ecosystem-wide restoration needs versus local jurisdictional prerogatives: Because ecosystems cross political boundaries, restoration funding, to a large degree, will not be effective unless it is targeted to the needs of the entire ecosystem. This fact is often in tension with the pressure on local decision makers to drive funding to near-term and near-place projects. There are several ways to address this:

- Restoration funding could be divided in to two pots: one that would require compliance with ecosystem-wide restoration goals, and a smaller one that would give more discretion to local jurisdictions in the selection of restoration projects. This model was successful in the Exxon Valdez context.⁷³
- The legislative proposal of The Nature Conservancy recommends that one fund (80% of Clean Water Act penalties) is dedicated to accomplishing the most expensive, large-scale projects and a separate fund (interest on 20% of the penalties) is provided to local communities for smaller projects.⁷⁴
- GOMESA funds, which are directed towards states, will provide substantial funding after 2017, and would not likely be available for allocation by the council for Gulf-wide spending. Therefore, a state and local desire for greater control over restoration funding may be addressed after 2017. Expenditure of GOMESA funds could be guided and informed by the Comprehensive Plan and the state/federal partnerships in place as part of the region-wide council.
- Under the Landrieu and Reid bills, local decision makers have some role in the decisions of the council because local jurisdictions from each Gulf state are required to have representation on the council.⁷⁵

d. Alignment of Budgets and Policies

Federal agency authorities and activities often overlap and/or are inconsistent with one another. This creates specific hurdles in the Gulf, where multiple federal agencies are deeply involved in both protection and restoration activities, and where the Army Corps of Engineers' mandates, in particular, are not entirely consistent with restoration goals.⁷⁶ A requirement that federal agencies align their policies should help ensure that individual restoration projects do not conflict with one another and that resources are maximized. One possible mechanism is an

⁷³ Molly McCammon (former Executive Director, Exxon Valdez Oil Spill Trustee Council), interview with Commission staff, October 28, 2010;

⁷⁴ The Nature Conservancy, *Draft Legislation: Gulf Coast Ecosystem Legislation*.

<http://www.nature.org/wherewework/northamerica/gulfofmexico/explore/art33031.html>

⁷⁵ Reid bill § 4201(g)(2)(L); Landrieu bill § 4(f)(2)(L).

⁷⁶ See Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, *Roadmap for Restoring Ecosystem Resiliency and Sustainability*, 9 (describing lack of coordination and inconsistent policies and priority setting among agencies active in the Gulf); Written Statement of Garrett Graves, 4 (“While the funding stream is critical, the current dysfunctional federal water resources project development and implementation process is equally as challenging. Without changes, oil spill remediation dollars could remain escrowed as federal policy obstacles prevent critical action.”).

Executive Order modeled after the Chesapeake Bay Protection and Restoration Executive Order.⁷⁷ That Order requires a Federal Leadership Committee to publish a detailed and performance-based strategy for coordinated implementation of existing federal restoration programs and projects, and has been credited with improving federal agency coordination on efforts to address watershed pollution in the Chesapeake Bay.⁷⁸ The California Bay-Delta Memorandum of Understanding likewise creates a Federal Leadership Committee to coordinate federal agency activities and priorities.⁷⁹

The alignment of agency budgets would also improve the efficiency of federal agency restoration efforts. This goal is difficult to accomplish, especially given the large number of federal agencies involved in the Gulf, not to mention the fragmented committee jurisdictions in Congress. Some region-wide restoration initiatives, including the Everglades and California-Bay Delta initiatives, have developed “crosscut budgets” as a way to organize and coordinate agency activities.⁸⁰ Crosscut budgets provide a single locus for tracking spending and measure progress according to performance indicators; they are thus a good tool for establishing accountability among agencies.⁸¹ They also offer a process for identifying and eliminating overlaps in spending between agencies. There are challenges to using crosscut budgets effectively, including defining the level at which funding should be tracked and the scope of projects to be included in the budget.⁸² But the mechanism has considerable potential for ensuring efficient use and coordination of agency spending. A federal agency crosscut budget is an option to consider for the Gulf.

3. The Role of Science

Modern regional restoration initiatives generally recognize that sound science must inform region-wide planning and program selection.⁸³ Decisions must be based on an accurate understanding of ecological functions; physical, chemical, and biological conditions; and the impact of restoration projects on those functions and conditions. There are many benefits to an approach that relies heavily on science and input from scientists: project selection and funding allocation are more likely to lead to effective restoration results; transparency in the decision making process may increase; and restoration decisions therefore have more credibility with the public.⁸⁴ The challenge is that the science of ecological restoration, in the Gulf and elsewhere, is incomplete and often inconclusive. There is a cost to waiting for the science to be settled before

⁷⁷ Executive Order 13508, 75 Fed. Reg. 26226 (May 12, 2009).

⁷⁸ Bryer, interview.

⁷⁹ California Bay Delta Memorandum of Understanding (Sept. 29, 2009), <http://www.doi.gov/documents/BayDeltaMOUSigned.pdf>.

⁸⁰ Pervaze Sheikh, “Crosscut Budgets in Ecosystem Restoration Initiatives: Examples and Issues for Congress,” *Congressional Research Service* (2008), 7-10. See P.L. 104-303, § 529(f)(1)(f) (Everglades); P.L. 108-361 § 106 (California Bay-Delta).

⁸¹ Pervaze Sheikh, “Crosscut Budgets in Ecosystem Restoration Initiatives: Examples and Issues for Congress,” 1-3.

⁸² *Ibid.*, 3-4.

⁸³ See, e.g., Pub. L. 108-361, 118 Stat. 1681 (October 25, 2004)(authorizing the CALFED initiative); Chesapeake Action Program, “Report to Congress: Strengthening the Management, Coordination, and Accountability of the Chesapeake Bay Program” (July 2008), 2, 12; Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, *Roadmap for Restoring Ecosystem Resiliency and Sustainability*, 9.

⁸⁴ McCammon, interview.

acting. Moreover, scientific research or data can turn out to be incomplete or wrong, so there may be a cost to deferring all restoration decisions to the scientific process, or to particular models or data. Finally, the context itself is dynamic, as a consequence of the effects of climate change, continued land development and other factors. Thus, even where the science is robust, changing conditions may require new analysis and adaptation. Because all restoration decisions implicate both policy and scientific concerns, one of the most challenging (and consequential) factors in creating a governance structure is the role that science will play.

a. The Level of Scientific Engagement

One important question is the degree to which scientists should be involved in the decision-making process. There are at least two areas in which their involvement will be useful: (1) reviewing the scientific feasibility of individual projects (e.g., oyster bed restoration at a particular location), and (2) conducting research on general restoration issues (e.g., the degree to which certain restoration techniques result in oyster bed regeneration). One commentator has described five potential roles for scientists in natural resource decision-making: reporter, interpreter, integrator, advocate, and decision maker.⁸⁵ As the involvement of scientists increases, the degree of decision-making credibility and the potential for slowing down project selection and implementation increase as well.

The Gulf Coast Task Force does not include a distinct role for scientists, but clearly contemplates that they will play a role in defining ecosystem restoration goals, developing performance indicators, and identifying needed monitoring, research, and scientific assessments.⁸⁶ The current legislative proposals are similarly general in their requirements. For example, the Landrieu bill provides only that the Task Force “coordinate scientific and other research associated with restoration of the Gulf ecosystem.”⁸⁷

The following are several options for creating an institutional role for science in Gulf restoration decision-making:

- Establish a Science Panel to review all proposed individual projects both for technical merit and for consistency with the overall restoration goals (as set forth in the Restoration Plan) and annual work plans. (Example: Exxon Valdez Trustee Council.)
- Establish a Science Panel to research key scientific issues, develop adaptive management plans in coordination with program managers, identify performance indicators, monitor progress, and provide information to decision makers. (Example: Chesapeake Bay Program.)
- Establish a Science Panel that has a coordinating, but not a formal advisory role. (Example: Everglades Task Force.)

⁸⁵ Denise Lach, Peter List, Brent Steel, and Bruce Shindler, “Advocacy and Credibility on Ecological Scientists in Resource Decisionmaking: A Regional Study,” *BioScience* 53 (2) (February 2003); *see also* Lynn Scarlett, *Everglades Restoration: Governance, Science and Decision Making* (presentation to the National Research Council, February 25, 2010).

⁸⁶ Exec. Order 13554, 75 Fed. Reg. 62313, 62314-15 (Oct. 5, 2010).

⁸⁷ Landrieu bill § 4(f)(4)(D).

- Ensure that scientists have the opportunity for formal or informal interaction with decision makers as individual projects and research needs are evaluated.
- Ensure that scientists have a seat at the decision-making table during project selection.

b. Adaptive Management

“Adaptive management” is a method for testing decisions regarding planned activities and adjusting the course of action if those activities are not achieving their intended purposes. A robust adaptive management plan establishes clear restoration goals, identifies indicators of whether the goals are being achieved, monitors those indicators, and based on information gained, considers new courses of action. Adaptive management offers a means to proceed iteratively to reduce uncertainty through the refinement of management actions,⁸⁸ and avoid investing in projects that do not ultimately promote restoration goals.⁸⁹ Adaptive management is critical to any long-term restoration plan because of underlying uncertainty regarding ecological processes, and the high likelihood that natural or human-caused activities will change the circumstances affecting restoration while the plan is underway.⁹⁰

In order to ensure that adaptive management principles inform the decision-making process, the Gulf restoration council’s structure could require an adaptive management plan as part of the comprehensive plan. The adaptive management plan could include a 5-year review and update of the comprehensive plan, and smaller adaptive management plans, requiring more frequent review, could be required for individual projects or groups of projects. The adaptive management plans could contain explicit performance measures against which progress may be measured.

4. Public Involvement

Leaders of restoration efforts repeatedly emphasize the importance of gaining the support of the people directly impacted by restoration projects.⁹¹ Local citizen support is important for several reasons: (1) it can reduce delay of projects due to litigation or other opposition; (2) it contributes to political support for overall goals and funding in the short and long terms; and (3) it contributes to overall trust in government, which results in greater support for local projects.

⁸⁸ National Research Council, *Progress Toward Restoring the Everglades: The First Biennial Review* (2006), <http://www.nap.edu/catalog/11754.html> (citing K. Lee, *Appraising adaptive management*, *Conservation Ecology* 3(2):3 (1999), <http://www.ecologyandsociety.org/vol3/iss2/art3/>; and C. Walters and C. Holling, *Large-scale management experiments and learning by doing*, *Ecology* 71:2060-2068(1990)).

⁸⁹ Testimony of Brian McPeck, 282-83.

⁹⁰ See, e.g., Ann Swanson, “Lessons from the Chesapeake Bay Have Applications Elsewhere,” *Bay Journal* (2001), <http://www.bayjournal.com/article.cfm?article=2113&print=yes>. In at least one region-wide initiative, the California Bay-Delta initiative, key scientific assumptions about the effect of implementation projects turned out to be wrong, resulting in failure to achieve restoration goals. See *Natural Resources Defense Council v. Kempthorne*, 2007 WL 4462395 (E.D. Cal. 2007) (authorized water pumping and conveyance operations had an adverse effect on the Delta smelt fish, a threatened species under the Endangered Species Act). An effective adaptive management plan can address situation where course corrections are needed.

⁹¹ Testimony of Terrance “Rock” Salt, Hearing before the National Commission (Sept. 28, 2010), 288-90; Testimony of Thomas Strickland, 293-95; Swanson, interview; McCammon, interview.

All multi-jurisdictional restoration initiatives have some mechanism for local involvement, providing for varying degrees of participation in the decision-making process. The creation of a mechanism for consolidating public involvement in an advisory group is beneficial for several reasons. First, it provides a venue where comments from a wide range of interests can be presented. Second, it complements formal public meetings and public comment processes by identifying and filtering key substantive issues of interest to the public. Third, it gives “ownership” to a group of citizens, who are then more likely to be accountable for the quality of their work. And, finally, it encourages long-standing citizens’ efforts, which results in greater local understanding of the history and substance of restoration efforts and, in many cases, greater trust within the citizens’ group, and between the citizens’ group and decision makers.⁹² On the other hand, in an area as vast as the Gulf, it may be difficult to balance full representation of interested stakeholders with the need to have a manageably-sized decision-making entity.

The Executive Order creating the Gulf Coast Task Force contains no formal direction regarding public involvement, but directs the Task Force to “engage local stakeholders [and others] to ensure that they have an opportunity to share their needs and viewpoints to inform the work of the Task Force.”⁹³ Given the importance of meaningful public participation in region-wide planning and decision making, any long-term governance entity would benefit from a formal citizens advisory group. One issue to consider is the manner in which the citizens’ group provides advice. In the Exxon Valdez Trustee Council context, the Public Advisory Group provided advice on every proposed restoration project.⁹⁴ This may not be a feasible approach in the Gulf. The citizens’ group could, however, review and provide advice on comprehensive plans, restoration priorities, and categories of projects that should receive funding.

The following are several options for providing a role for local citizens in Gulf restoration decision-making:

- Exxon Valdez Public Advisory Group: The Public Advisory Group established to advise the Exxon Valdez Trustee Council had a formal opportunity to review all individual projects and provide input on larger research issues. The composition of the group was based on specific interests (e.g., fishermen, environmental groups, outdoor sporting groups),⁹⁵ but a similar group could also have been based upon geographical representation.
- Citizens’ Advisory Group: The CLEAR Act creates a citizens’ group to advise the Task Force, but does not require that the group have as strong a role in the process as the Exxon Valdez Public Advisory Group did.⁹⁶ A group under the CLEAR Act model could offer advice on comprehensive plans, review priorities, or review categories of projects to be funded.
- Regional Citizens’ Advisory Councils: The Oil Pollution Act established Regional Citizens’ Advisory Councils for Cook Inlet and Prince William Sound. These Councils

⁹² McCammon, interview.

⁹³ Exec. Order No. 13554, 75 Fed. Reg. 62313 (Oct. 5, 2010).

⁹⁴ Mccammon, interview.

⁹⁵ Exxon Valdez Trustee Council, “Public Advisory Committee (PAC),” <http://www.evostc.state.ak.us/people/pac.cfm>.

⁹⁶ CLEAR Act § 501(b)(4).

are comprised of voting members (members of the public representing identified interest groups and geographical groups) and nonvoting members (state and federal representatives). The Councils, among other things, provide advice and recommendations to government decision makers on regulatory issues, including permitting, review the adequacy of oil spill prevention and contingency plans, and review relevant scientific work.⁹⁷ In practice, the Councils play as much of a watchdog role as they do an advisory role.⁹⁸

- **Representation on Council:** Another option for public involvement is to include representatives of local jurisdictions, in addition to state officials, on the council itself. The Everglades Task Force includes such representation, as does the Task Force proposed by the Landrieu bill.⁹⁹ While this mechanism increases local representation – and gives a decision-making role to local officials – it is unlikely to ensure full representation of the range of interested stakeholders. Additionally, government officials, even local ones, do not represent the views of all their constituents. The most effective approach may be to have both a citizens’ advisory council and local representation on the council itself.¹⁰⁰

IV. SCENARIOS AND RECOMMENDATIONS

A. Natural Resource Damages Awards

Currently, a Trustee Council comprised of state and federal officials is overseeing the Natural Resource Damage Assessment process. It is unclear how this process will play out and when damages will be awarded, but it is likely that federal and state trustees will maintain control over the process of spending the recovered funds. The Commissioners may want to consider the following recommendations related to the Natural Resource Damages process:

1. Spending of funds should be integrated and coordinated with other restoration projects in the Gulf, in order to maximize the ecological benefits of individual projects.

⁹⁷ 33 U.S.C. § 2732.

⁹⁸ Legislative Hearing on H.R. 4195, H.R. 5192, H.R. 5388, and H.R. 5494, Before the Subcomm. on Insular Affairs, Oceans and Wildlife of the H. Comm. on Natural Resources, 111th Cong. (2010) (Written statement of Dennis Takahashi-Kelso).

⁹⁹ The Chesapeake Bay Program has a variation on this approach. It provides for two advisory councils, one comprised of citizens and the other comprised of local officials. *See* Chesapeake Bay Program, “Citizens Advisory Committee,” http://www.chesapeakebay.net/committee_cac_info.aspx?menuitem=46325; Chesapeake Bay Program, “Chesapeake bay Program Organizational Structure,” <http://www.chesapeakebay.net/committeestructure.aspx?menuitem=14890>.

¹⁰⁰ Several governing structures, albeit operating at a scale smaller than Gulf Coast Restoration, go beyond local government membership on governing councils and actually include representatives of nongovernmental organizations and citizen groups. The Boston Harbor National Recreation Area uses this public-private participatory model as does the Sonoita Valley Planning Partnership, which assists the BLM in managing the Las Cienegas National Conservation Area. *See, e.g.*, National Park Service, “Boston Harbor Islands Partnership,” <http://www.nps.gov/boha/parkmgmt/partnership-members.htm>; Sonoita Crossroads Community Forum, “Appendix D-Las Cienegas National Conservation Area-Sonoita Valley Planning Partnership,” (2002), <http://www.sonoitacrossroads.org/compplan/AppD.html>.

2. Spending of funds should be consistent with any comprehensive restoration plan developed for the Gulf.
3. The Trustees should consider establishing one or more “Super Trustees” to facilitate decision making and the prioritization of restoration projects.
4. A citizens’ advisory council should be established, similar to the Public Advisory Group that advised the Exxon Valdez Trustee Council, to inform how these funds are spent.

B. Global Settlement

It is likely that the state and federal governments will attempt to reach a global settlement with BP and other potentially responsible parties of all civil and criminal claims under the Clean Water Act, Oil Pollution Act, (including Natural Resource Damages claims), and applicable wildlife statutes. The Commission may want to consider the following recommendations:

1. Congress should direct 80% of the Clean Water Act civil and criminal penalties to Gulf restoration. All of these funds should be directed to restoration (as opposed to divided between restoration and economic recovery, as is recommended in the Mabus Report). If such funding is directed to the Gulf, funding should be spent consistent with the Long Term Governance Structure outlined in part C.2, below.
2. The parties should consider structuring any settlement to allow a significant portion of recovered funds to be used for Gulf restoration.
 - a) The parties should consider seeking a reduction of some portion of the civil penalties to secure an agreement that the responsible parties perform a Supplemental Environmental Project directed at Gulf restoration.
 - b) The parties should consider a settlement that replaces some portion of the criminal penalties with restitution payments and community service payments that are used for Gulf restoration.
 - c) The federal and state governments should agree to a plan for spending restoration funds resulting from a global settlement in a coordinated manner so that restoration opportunities are maximized.

C. Long-Term Funding and a Gulf Coast Restoration Council

As described above, there are various potential sources of funding for long-term Gulf restoration. In addition, there is now a Gulf Coast Task Force in place. The Commissioners may want to consider the following recommendations related to funding and governance structure.

1. Funding Sources:
 - a) A dedicated source of sustained funding in the amount of at least \$500 million per year for the next 15 years, or a total of \$7.5 billion, should be available to the Council for Gulf-wide restoration. Funding sources for the Commission’s consideration include:
 - Direction of at least 80% of civil and criminal Clean Water Act penalties towards Gulf restoration;

- Creation of a new, retroactive penalty (in addition to existing section 311 penalties) under the Clean Water Act of \$200 million for each 1 million barrels discharged and/or creation of a new, retroactive penalty under OCSLA;
 - Congressional appropriation of funds for Gulf restoration;
 - Direction of 20% of the civil and criminal Clean Water Act penalties to an endowment to fund community restoration projects in the Gulf;
 - Direction of an increase in the per barrel tax on oil production towards Gulf restoration;
- b) Projects funded by Natural Resource Damage awards and (if directed by Congress) Clean Water Act penalties should be consistent with a Gulf-wide comprehensive plan.
 - c) Although GOMESA funding will be directly available to the states, a large portion of it will likely go towards restoration projects. The expenditure of GOMESA funds should be guided by the Gulf-wide comprehensive plan and aided by state-federal partnerships that develop as a result of creating a Gulf restoration council.
2. Governance Structure: The recently-created Gulf Coast Task Force should be succeeded by a joint federal-state Council, created by Congress, that would be:
- a) Established to develop a binding vision for Gulf-wide restoration (this could also be enumerated in the legislation).
 - b) Directed to create a comprehensive regional restoration plan, which should incorporate the Louisiana Master Plan, the Mississippi Coastal Improvements Program, and any other existing state plans. The comprehensive plan should list goals, priorities, and, where appropriate, individual projects. It should strike a balance between specificity and flexibility. It should also include an adaptive management plan and be reviewed every five years.
 - c) Comprised of the appropriate balance of state and federal representatives, as well as representatives of local jurisdictions.
 - d) Authorized to identify priorities and/or projects for funding, consistent with the comprehensive plan. Funds could be apportioned between: (1) projects selected by the council in accordance with a comprehensive Gulf-wide plan; and (2) projects selected by individual states to meet state restoration priorities.
 - e) Authorized to require federal agencies to align their budgets and policy priorities with the comprehensive plan, and to appoint a federal lead agency or create another mechanism for resolving disputes among federal agencies.
 - f) Required to appoint or create a science advisory group that would not have a decision-making vote, but would participate significantly in project selection, the development of a research program, and the development of an Adaptive Management plan.
 - g) Required to appoint or create a citizens' advisory council.