



# **RESTORE Update: Litigation and Regulation**

Erin L. Deady, AICP, Esq.

May 5, 2014

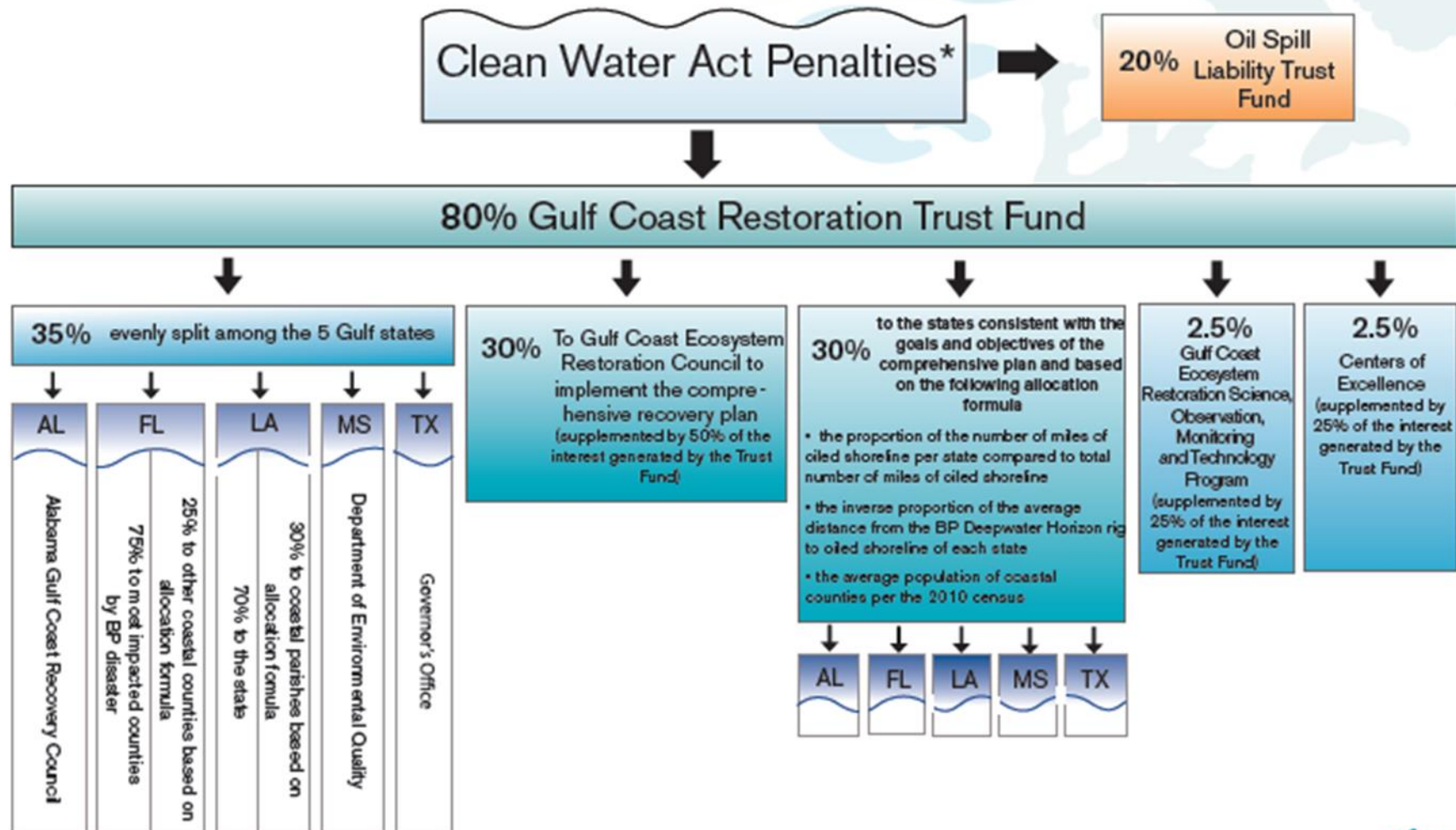


# Overview

1. Introduction
2. Litigation Update
3. Settlement Update
4. Treasury Regulations Update
5. Questions



# Distribution of Clean Water Act penalties to Gulf recovery per the RESTORE Act



\* Clean Water Act penalties are a per barrel penalty of \$1100 for release of pollution into the environment. If 'gross negligence' is determined in release of the pollution, the penalty per barrel increases to \$4300. In the case of the BP Deepwater Horizon incident the following are estimates:

\$1100 X (4.9 million barrels of oil released into the environment) = approx \$5.39 billion

\$4300 X (4.9 million barrels of oil released into the environment) = approx \$21.07 billion [gross negligence]

All amounts are subject to negotiation via a settlement between the government and responsible parties.

# Funding Sources and Claims

- NRDA- Natural Resource Damage Assessment under Oil Pollution Act
- RESTORE Act-80% of damages under OPA go to implementation
- Private Claims-Gulf Coast Claims Facility/DWH Claims Center
- US Claims- Includes civil penalties under Clean Water Act \*\*\*

# The Main Litigation

- Three phases of litigation:
  - Phase I- determine the liability of BP, Transocean, Halliburton, and other companies and if they acted with gross negligence and willful misconduct (February 25, 2013-April 2013).
  - Phase II- how much oil spilled into the Gulf and who was responsible for stemming and controlling the spill (September 30, 2013-October 2013).
  - Phase III- how much BP will be paying in fines (status conference March 21, 2014 to determine what new evidence and testimony to be presented during penalty trial).
- CWA Penalty Phase III Trial set for January 20, 2015, with the trial expected to last approximately three (3) weeks.
- No additional hearings or other scheduled events to take place during the nine (9) months between the judge's most recent ruling and the penalty phase trial.



# State's Litigation

- **State of Florida v. BP and Halliburton** (Case 5:13-cv-00123-RS-GRJ) was filed April 20, 2013 by Attorney General Pam Bondi against BP and Halliburton for not changing the batteries on the rig's blowout preventer and accused Halliburton of installing faulty cement barriers
- Seeks economic and compensatory damages (state government economic losses Florida suffered as a result of the oil spill, including sales tax, cigarette surcharges, beer taxes, among other things)
- **Florida Department of Environmental Protection and Florida Fish and Wildlife Commission v. BP, Anadarko Petroleum Company, Anadarko E&P Company, Transocean Ltd., Transocean Holdings, Transocean Offshore Deepwater Drilling, Transocean Deepwater Inc. and Triton Asset Leasing** (Case 3:14-cv-00112-MCR-CJ) filed March 5, 2014 in the US District Court in Panama City to hold the named defendants accountable for injuries to the natural resources and environment the state suffered as a result of the oil spill, including "Florida's sandy beaches, salt marshes, wetlands, estuaries, submerged aquatic vegetation, deepwater communities and coral reefs as well as wildlife such as manatees, oysters, sea turtles, birds and fish"
- Seeks recovery for natural resources and environmental damage, not economic losses (alleges defendants are responsible and strictly liable for past and/or future removal costs and natural resource damages, including the loss of recreational and other uses of those resource)

# Settlements and Funds to Date

- MOEX Civil Penalties-- \$70 million total with \$10 million to State of Florida.
- Transocean Civil and Criminal--\$1 billion in Clean Water Act penalties and \$150 million dollars to National Fish & Wildlife Foundation of which \$21 million available for Florida projects.
- BP Criminal--\$4 billion of which \$2.394 billion paid over 5 years to National Fish & Wildlife Foundation. (\$335,160,000 for Florida projects).
- Halliburton--\$55 million to National Fish & Wildlife Foundation.

# NRDA

- \$1 billion in early restoration dollars of which the State of Florida will receive \$100 million dollars.
- NRDA Trustees have approved Phase I and II round of projects and proposed Phase III list of projects.
- Programmatic NEPA scoping under way for Phase III projects and remaining early restoration projects.



# NFWF - Gulf

## Environmental Benefit Funds

- Not NRDA, product of “plea agreements”, \$2.544 Billion in recovered funds over 5 years
- \$356 million for natural resource projects in each of the states of Alabama, Florida, and Mississippi (for FL: FWCC and DEP are lead)- GRANT process
- Remedy harm and eliminate or reduce the risk of future harm to Gulf Coast natural resources
- NFWF to consult with state natural resource agencies, NOAA and the U.S. Fish and Wildlife Service in identifying projects to be supported by the Fund-Projects that: Advance priorities in natural resource management plans
- Reasonable proximity to where impacts occurred as appropriate,
- Cost-effective, Maximize environmental benefits, Science-based and that produce measurable and meaningful conservation outcomes to habitats and species of a type impacted by the oil spill

# RESTORE Act Outline

- Trust Fund established
- Authorized project eligibility (11 project purposes)
- State Plans/Coastal Political Subdivisions
- Conditions of funds (auditing, procurement/multi-year implementation plans)
- Approval process
- Public engagement
- Cost sharing
- Council procedures and planning process (contents of Comprehensive Plan & restoration priorities)
- Oil spill impact allocation (state plans)
- Monitoring
- Centers of Excellence

# Eligible Activities



- Restoration and protection of natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands
- Mitigation of damage to fish, wildlife, and natural resources
- Implementation of a federally approved marine/coastal management plan, including fisheries monitoring
- Workforce development and job creation (broadly defined)
- Improvements to state parks affected by the oil spill
- Infrastructure projects benefitting the economy or ecological resources, including ports (broadly defined)
- Flood protection and infrastructure
- Promotion of tourism, including recreational fishing
- Promotion of Gulf seafood consumption
- Planning assistance
- Administrative costs (up to 3%)



# RESTORE Act Funding and Planning

Council Plan “Comprehensive Plan”

State Expenditure  
Plan (approval by  
Council)



Multi-Year  
Implementation Plans  
(submittal to Treasury)

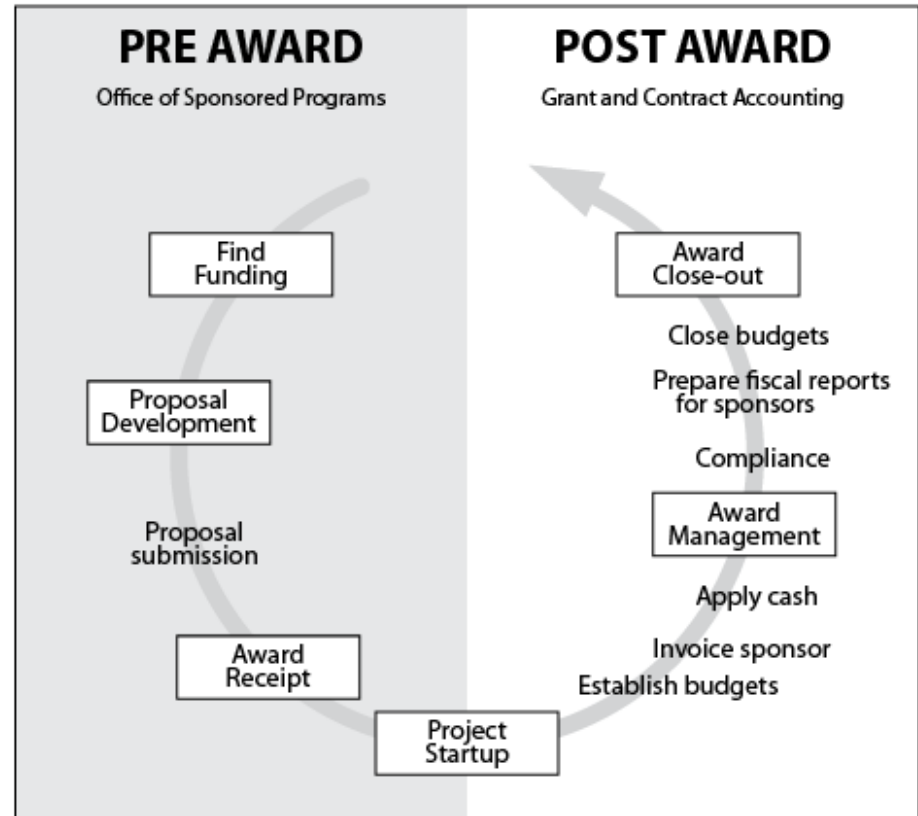
3 Distinct Planning processes

# MYIPs

- Develop and submit multi-year implementation plan (to Treasury)-
- Comply with Treasury Regulations
- Projects and plans must meet NEPA, CWA, Chapter 373, F.S., etc.
- MYIP must certify: Conforming project purpose
- Meaningful public input
- Best available science
- Applicable procurement requirements (think Stimulus/ARRA, Davis Bacon, Buy American, etc.)
- Content of MYIP
- Programmatic in nature or project specific?

# Application/Grant Management

- Multiple or single grant applications?
- Grant Agreement(s) & Obligations
- Procurement, Subgrant/Subaward process to be determined
- Reporting





# Treasury Regulations

- Several “processes” deferred to further policy or rule development
- Several clarifications and definitions are needed (pre-award costs, etc.)
- Process for application, award and agreement unclear
- Clarify administrative (3% cap) and planning costs
- Application of federal grant processes (procurement)
- Advance Payment v. reimbursement
- Form basis for Grant Agreements



# Treasury Regulations

- Environmental review and compliance
  - Projects will still require State and Federal permitting (streamline process)
  - Application of NEPA at Programmatic, Plan or project level
  - Activities subject to EIS, EA or categorical exclusions

# Speculation on Regs

- Interim Final Rule (parts go into effect immediately, also allowing for more input)
- Deferring to OMB Grant Guidelines (Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Grants, 2 CFR, Part 200)
- Advance money for planning (grant applications for planning efforts)
- Plans can be phased, incremental and modified over time
- Treasury's view of NEPA (and MYIPs) Subawards and responsibility of local governments over them
- Additional policies and procedures to be developed over time ("guidance")
- Planning activities are broad (includes public engagement), not subject to 3% cap



# On the Horizon



- Transocean funds (\$800,000,000) available upon finalizing Treasury Regulations
- Council's NEPA rule
- Treasury- new NEPA Rule?
- Logistics of Treasury to accept applications for funding



# Questions?

[erin@deadylaw.com](mailto:erin@deadylaw.com)

954.593.5102

[www.erindeadylaw.com](http://www.erindeadylaw.com)

ERIN L. DEADY, P.A. 