

Fast-Tracking “Good” Restoration Projects in the Gulf of Mexico

EXISTING MECHANISMS FOR EFFECTIVE & EFFICIENT ENVIRONMENTAL COMPLIANCE



ENVIRONMENTAL LAW INSTITUTE

FEBRUARY 2017

The Environmental Law Institute (ELI) makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our fifth decade, we are internationally recognized, nonpartisan research and education center working to strengthen environmental protection by improving law and governance worldwide.

This paper was created by ELI's Gulf of Mexico Team. Funding for research and drafting was provided by the Walton Family Foundation.

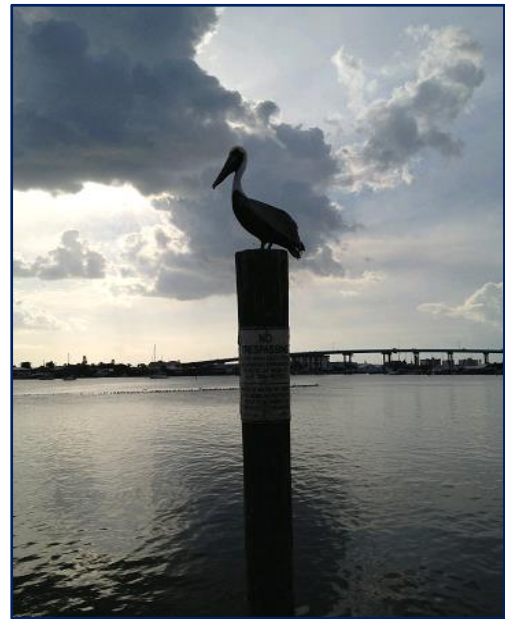
Cover Design by Davonne Flanagan. Cover Photo by ELI Gulf Team.

Fast-Tracking "Good" Restoration Projects in the Gulf of Mexico: Existing Mechanisms for Effective & Efficient Environmental Compliance.

©2017 Environmental Law Institute®, Washington, D.C. All rights reserved.

INTRODUCTION

In April 2016, a federal court approved a settlement among the United States, five Gulf states, and BP. This settlement resolved all of the federal and state governments' remaining claims against BP related to the *Deepwater Horizon* (DWH) oil spill. Under the terms of that settlement, billions of dollars will flow to the Gulf for restoration and recovery over the coming decades. This includes up to \$8.8 billion that will be distributed through the natural resource damage assessment (NRDA) process, and \$4.4 billion that will be distributed through the RESTORE Act. It is expected that the pace of restoration will accelerate and, as it does, government agencies will face "increased workload[s] regarding permitting and environmental reviews..."¹ As demand on agencies increases, it will be important to identify mechanisms that can help achieve efficiencies.



This background paper identifies some of the existing mechanisms for fast-tracking "good" restoration projects that are subject to federal environmental compliance requirements.² Environmental compliance typically involves three different elements: (1) **environmental review** (i.e. assessment and/or analysis of a proposed project's impacts on the environment and consideration of project alternatives); (2) obtaining **permits** from agencies that regulate affected resources (e.g., waters and wetlands); and (3) **consultation** with agencies overseeing public trust resources (e.g., endangered species) that may be affected by a project.³ This paper explains some of the mechanisms available to help make these elements more efficient, addresses other ways to increase efficiency, and provides examples of Gulf restoration projects that have been fast-tracked.

Why require environmental compliance when a project is good for the environment?

Environmental compliance is sometimes perceived as burdensome. However, even for projects intended ultimately to benefit the environment, these requirements are critical for a number of reasons. These include ensuring that agencies:

- Fully consider all the environmental effects of their proposed actions, including indirect effects and cumulative impacts, before a project is implemented;
- Identify and avoid potential unintended consequences; and
- Allow the public to provide input on decisions that may affect their communities.

OPPORTUNITIES FOR FAST-TRACKING ENVIRONMENTAL COMPLIANCE

The level of scrutiny applied to a project tends to vary based on a number of factors, including project type, location, and the amount of existing data. For example, very large projects that may affect the surrounding environment in complex or unknown ways are likely to require individualized review that is lengthy and rigorous.

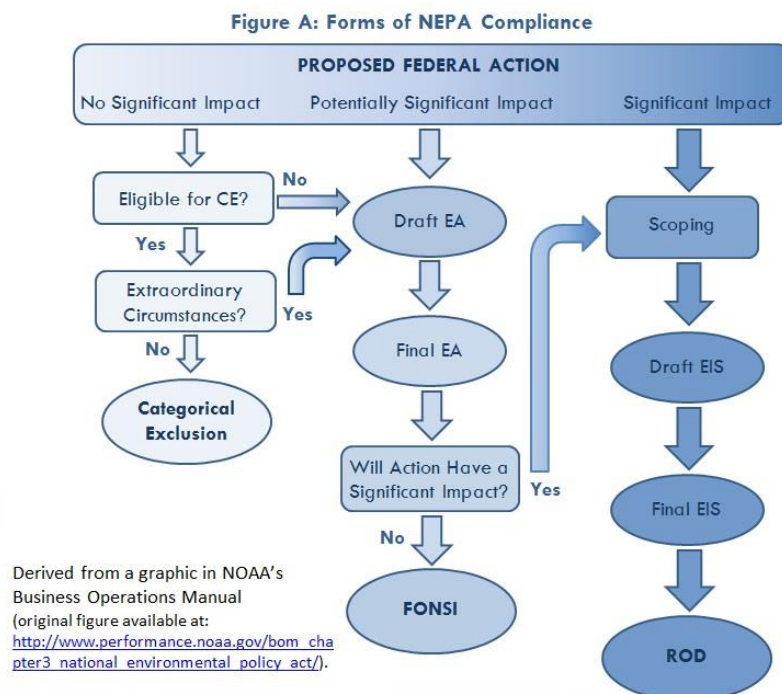
Many “good” restoration projects *can* be reviewed on a faster track, while still ensuring that environmental compliance is conducted effectively. Indeed, commitments to effective and efficient environmental compliance can be found in both the *Deepwater Horizon* NRDA trustees’ Environmental Compliance Manual and the RESTORE Council’s recently updated Comprehensive Plan.⁴ In addition, in October 2016 the White House issued a guidance memorandum “to agencies to facilitate the timely review and permitting—where appropriate—of Gulf coast environmental restoration projects.”⁵

Following is a description of three main elements of environmental compliance: (1) environmental review; (2) permitting; and (3) consultation. In this description, we use a few key laws – the National Environmental Policy Act (NEPA), the Clean Water Act/Rivers and Harbors Act (CWA/RHA), and the Endangered Species Act (ESA) – to illustrate these elements and some of the fast-tracking mechanisms in the existing regulatory framework. Keep in mind that the mechanisms addressed here may also be available under other laws that require some form of environmental compliance. Also keep in mind that other fast-tracking mechanisms and efficiencies, not discussed in this paper, may exist under the laws described here.

Environmental Review. In general, environmental compliance begins with a review to assess the environmental impacts of a proposed project. The nation’s cornerstone environmental law, the National Environmental Policy Act, applies to all agency decisions that constitute “major Federal actions.”⁶ NEPA compliance is the responsibility of the federal agency proposing the action (or, in cases of multiple agencies’ involvement, the designated “lead” federal agency). The White House Council on Environmental Quality (CEQ) has issued general implementing regulations, as well as a suite of guidance memoranda clarifying its interpretations of the law; each agency’s own NEPA procedures further specify how and when NEPA requirements are implemented during its planning and decision-making processes.

At points where NEPA review is triggered, there are three ways an agency can document compliance: a Categorical Exclusion (CE); an Environmental Assessment (EA) with a Finding of No Significant Impact (FONSI); or an Environmental Impact Statement (EIS).⁷ As illustrated in **Figure A**, the form of compliance depends on whether a proposed action is one that has the potential to “significantly affect the quality of the human environment.”⁸





According to CEQ, the most common form of NEPA compliance is the **Categorical Exclusion**, which is a “category of actions [that] are expected not to have individually or cumulatively significant environmental impacts.”⁹ A CE may be established by an act of Congress or, more commonly, by an agency adopting a regulation, after review from the public and CEQ. Where applied appropriately, CEs offer agencies an efficient way to comply with their NEPA duties: if an agency determines that its proposed action falls within the scope of a CE and there are no “extraordinary circumstances” requiring additional review (e.g., threatened or endangered species), then the NEPA process for that action can be concluded.¹⁰

Where proposed activities do not fall within an established CE, agencies must document their NEPA compliance by preparing an **Environmental Assessment/Finding of No Significant Impact** or an **Environmental Impact Statement**. Unless an agency already knows (or has reason to believe) that the environmental impacts of a proposed action will be significant, the review typically begins with preparation of an EA.¹¹ The EA can be used to determine whether a lengthier EIS is needed; however, far more commonly, the agency determines that the proposed action will not have a significant impact, and concludes the NEPA process by issuing a Finding of No Significant Impact (FONSI).¹² If the agency determines the action *is* likely to have a significant impact, it must prepare a detailed EIS that evaluates alternatives to the proposed action, describes anticipated environmental impacts and mitigation measures, and provides an opportunity for public comment.

Use of a Categorical Exclusion for Plugging Abandoned Wells

A Categorical Exclusion was used for a project approved¹³ by the RESTORE Council in 2015 to plug abandoned oil and gas wells at the Padre Island National Seashore. The Council's procedures for implementing NEPA provide that the Council can rely on a CE established by any one of the six federal agencies that are Council members, as long as that agency "is involved in the Council action" by "advis[ing] the Council that use of the CE would be appropriate..."¹⁴ For the well-plugging project, the Council relied on the Department of Interior's CE for "removal of non-historic materials and structures in order to restore natural conditions."¹⁵ Instead of preparing an EA or EIS for the project, the Council documented NEPA compliance by filling out a Categorical Exclusion Determination Form, which included a short description of the activities, an identification of the CE, and a checklist documenting the absence of extraordinary circumstances.

CEQ encourages agencies to perform "efficient and effective" NEPA reviews, using EAs/EISs that are "no longer than necessary to comply with NEPA and other legal and regulatory requirements being addressed..."¹⁶ There are various mechanisms available under NEPA to help make the EA/EIS process more efficient, including:

- Scoping:** CEQ regulations provide for scoping – which involves "determining the scope of issues to be addressed and...identifying the significant issues related to a proposed action" – early in the EIS process.¹⁷ CEQ guidance explains that scoping may also be useful for an EA, helping "to identify and eliminate from detailed study the issues that are not significant or have been covered by prior environmental review."¹⁸
- Adoption of Existing NEPA Documents:** Where the proposed action is substantially the same as an action addressed in an existing EA/EIS, a federal agency may find it is more efficient to adopt an existing EA/EIS (or a relevant portion), even if the EA/EIS was prepared by a different agency.¹⁹ As long as there are not new circumstances, cumulative effects, new information, or environmental impacts not previously analyzed, an adopted EA can serve as the basis for a new FONSI, or an adopted EIS can serve as the basis for a new Record of Decision (ROD).
- Incorporation by Reference of Existing Materials:** CEQ regulations provide that "when the effect will be to cut down on bulk without impeding agency and public review," agencies can "reduce excessive paperwork" by incorporating existing materials by reference (e.g., studies, reports, portions of existing NEPA documents).²⁰ Only material that is clearly cited and "reasonably available" for public review may be incorporated into an EA or EIS.²¹

RESTORE Council Adopts Existing NEPA Document

When approving funding for the Bahia Grande Coastal Corridor land acquisition project in Texas in 2015, the RESTORE Council adopted the Environmental Assessment for the Laguna Atascosa National Wildlife Refuge Conservation Plan, which had been prepared in 2010 by U.S. Fish and Wildlife Service for an adjacent tract of conservation lands.

- **Programmatic Reviews:** A programmatic NEPA document (PEA/PEIS) can be useful when an agency adopts a plan for a group of related projects, or when it plans to approve multiple proposed actions – for example, similar actions in a common geographic area.²³ By broadly analyzing general impacts, the PEA/PEIS provides the basis from which project-specific impact analyses can be “tiered” in a subsequent, more concise and narrowly focused NEPA document.²⁴ CEQ policy encourages agencies to use programmatic and tiered NEPA documents when they can help “eliminate repetitive discussions of the same issues” and instead focus on project-specific analysis.²⁵

NRDA Trustees Use Programmatic Analysis and Tiered Review

In February 2016, the *Deepwater Horizon* NRDA trustees released a final Programmatic Damage Assessment and Restoration Plan (PDARP), which was accompanied by a Programmatic Environmental Impact Statement (PEIS). In late 2016, when the time came for the Mississippi Trustee Implementation Group (TIG) to review the impacts of projects proposed in its Draft 2016-2017 Restoration Plan, the TIG saved time by tiering its accompanying draft EA from the PEIS.²²

It is important to note that when a project is subject to other laws with environmental review requirements, the NEPA process can serve as a useful framework for compliance with those laws.²⁶ In many cases, it is possible to integrate the specific analyses required to comply with those laws into the EA/EIS. For example, NEPA requires evaluation of biological resources in the project area, including an evaluation of impacts to listed species; likewise, the ESA requires a federal agency to determine the presence and potential impacts of a project on listed species.

Federal Permit Requirements. Many Gulf restoration projects will require permits, including from the U.S. Army Corps of Engineers (Corps) pursuant to **Section 404 of the Clean Water Act (CWA)** and/or **Section 10 of the Rivers and Harbors Act**. Under these laws, the Corps regulates various activities that impact “waters of the United States”: Section 404 requires a permit for activities involving discharge of dredged or fill material into waters of the United States or jurisdictional wetlands; Section 10 requires a permit for activities that affect navigation, such as placing structures, discharging fill, or otherwise disturbing sediment in navigable waters.



Before issuing a permit, the Corps must evaluate the foreseeable impacts of the regulated activity on the public interest;²⁷ review any proposed discharge under EPA’s 404(b)(1) guidelines, which require examination of “practicable alternatives” that may have “potentially less damaging consequences” and prohibit approval “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem”;²⁸ and provide an opportunity for public comment.²⁹

Since issuing a permit is a federal action, the Corps may not issue a final permit until it has also complied with NEPA (by applying a CE established by the Corps or preparing an EA/EIS). The Corps also coordinates compliance with other environmental laws, and ensures the project obtains a state-issued water quality certification (WQC) and, in all five Gulf states, a Coastal Zone Management Act consistency determination from the relevant state agencies.

One way the Corps avoids duplicative or unnecessary analyses is through the use of **general permits**. These are broad authorizations issued by rule, after an analysis of impacts and an opportunity for public comment, covering categories of specific activities that have been determined to result in no more than minimal individual and cumulative adverse environmental effects.³⁰ This approach is intended to save regulators and permit applicants time and resources, by eliminating much of the individualized review and approval process that would otherwise be required.



General permits called **Nationwide Permits (NWP)** are issued by Corps Headquarters for use nationwide. NWPs take effect once they are authorized by Corps District offices and have received WQCs from states. District engineers and states may add special conditions for using the NWP in their respective jurisdictions. Corps Districts are also authorized to issue regional general permits (**RGPs**) and statewide general permits of their own. If an NWP applies to a regulated dredge or fill project, then “the applicant needs merely to comply with [the NWP’s] terms, and no further action by the permitting authority is necessary.”³⁴

The Fast-Tracking Power of Nationwide Permits

Several NWPs have the potential to apply to ecosystem restoration projects. Notably, **NWP 27 authorizes Aquatic Habitat Restoration, Establishment and Enhancement**, provided the activities result in a net increase in aquatic resource functions and services and all applicable conditions are fulfilled. **NWP 54 for Living Shorelines** was authorized by the Corps in January 2017 (and there are current **RGPs for living shorelines in Alabama and Mississippi**).³¹

Using an NWP instead of applying for an individual permit can significantly shorten a project’s permitting timeline, from an average of 217 days for an individual permit to 40 days for an NWP.³² This faster processing time is possible because, in general, use of an NWP eliminates the need for further review under NEPA; eliminates the need for individualized review under CWA Section 404(b)(1); and eliminates the requirement to obtain individualized WQC and CZMA certification from the state.

Some critics contend, however, that “the [NWP] program has become so complex and expansive that it cannot either protect aquatic resources or provide for a fair regulatory system, which are its dual objectives.”³³

Consultation with Federal Resource Agencies. Even when environmental review and/or permitting for a restoration project is fast-tracked (e.g., through use of a CE and/or general permit), that does not exempt the project from compliance with other federal laws. For example, compliance with the consultation requirements of the **Endangered Species Act** is mandatory where a proposed federal action may affect a species that is listed as endangered or threatened by the federal government.³⁵ Specifically, under Section 7 of the ESA, whenever a federal agency authorizes, funds, or carries out an action that “may affect” a listed species, the agency must consult with U.S. Fish and Wildlife Service (for terrestrial and freshwater species), the National Marine Fisheries Service (for marine species), or both, as appropriate.

The ESA compliance process typically begins with an “**informal consultation**,” when the agency proposing an action reaches out to FWS/NMFS to help determine whether listed species may occur in the project area.³⁶ If the action will modify the physical environment in an area where any listed species or designated “critical habitat” may be present, a Biological Assessment (BA) is prepared.³⁷ One of the purposes of the BA is to help determine whether the proposed action is “likely to adversely affect” listed species or critical habitat. If FWS/NMFS concurs with a determination that adverse impacts are not likely, the ESA compliance process is complete. If adverse impacts are likely, the agency proposing the action and FWS/NMFS proceed to a more intensive “formal consultation,” followed by preparation of a detailed Biological Opinion (BiOp) by FWS/NMFS.³⁸



As with EAs/EISs, there are fast-tracking mechanisms available to help agencies more efficiently prepare a BA and/or BiOp. For example, when a proposed action is “identical, or very similar to a previous action” for which a BA was prepared and no new species have been listed in the area, an agency can fulfill its obligation to prepare a BA by certifying in writing that the existing BA is incorporated by reference and “[t]he proposed action involves similar impacts to the same species in the same area.”⁴⁰ FWS and NMFS also use **programmatic consultations, programmatic BiOps, and regional BiOps** on which project-specific analyses can be subsequently based.

Programmatic BiOps for Gulf Restoration

Many Gulf restoration projects will have the potential to impact listed species (e.g., sea turtles, Gulf sturgeon), some incidentally and some by design. In 2016, NMFS issued a Framework Programmatic Biological Opinion on the *Deepwater Horizon* Programmatic Damage Assessment and Restoration Plan to address program-level effects of the PDARP on listed species under NMFS jurisdiction. The Opinion “also describes pathways for subsequent ESA section 7 consultations on project-level actions that are tiered from the DWH PDARP.”³⁹ Other potentially relevant programmatic BiOps include the Gulf of Mexico Regional Biological Opinion for hopper dredging (NMFS) and the Statewide Programmatic Biological Opinion for Beach Placement in Florida (FWS).

Note: There are other federal laws with environmental compliance requirements that may be relevant to Gulf restoration projects. To get a sense of these, go to the DWH NRDA trustees' website, which includes an Environmental Compliance table that shows the range of federal environmental laws applicable to approved restoration projects.⁴¹

TACKLING OTHER BARRIERS TO EFFICIENCY

Improving Coordination to Increase Efficiency. Environmental compliance often requires the participation of several government agencies – federal, state, and local – and the efficiency of compliance procedures can be improved by early, effective coordination among the various agencies involved. Communicating early and often with counterparts and experts from other agencies can help an agency improve its access to existing information, clarify the different agencies' roles and timelines, and anticipate conflicts before they arise. In addition, when a proposed project is subject to environmental compliance requirements administered by multiple agencies and these requirements are substantially similar, the agencies can use a concurrent review process to achieve the same – or perhaps better – results, only more quickly.⁴²

There are formal tools to help facilitate communication and information sharing between federal agencies. These include **Memoranda of Agreement (MOA)** and **Memoranda of Understanding (MOU)**, which address coordination among signatory agencies. Agencies can also include coordination requirements in the **procedures they establish for implementing and/or ensuring compliance with NEPA, ESA, and other laws.** For example, the RESTORE Council's NEPA implementing procedures set forth guidelines for how the Council will “[c]onsult, coordinate with, and consider policies, procedures, and activities of other Federal agencies, as well as tribal, state, and local governments” when preparing NEPA documents.⁴⁴

Gulf Coast Interagency Environmental Restoration Working Group

The 2016 White House memorandum formalized the Gulf Coast Interagency Environmental Restoration Working Group as the coordinating body for federal agencies involved in environmental compliance in the Gulf. That guidance specifically directs federal agencies to “use the Working Group to facilitate early, consistent, and effective interagency coordination for the review of projects; timely and efficient environmental compliance reviews; sharing of scientific and other information critical to project review and permitting; and early and timely identification and elevation of issues and barriers to implementation...”⁴³

While legal instruments and/or written procedures may be helpful, they are not prerequisites for improving inter-agency coordination. A **working group**, for example, can be a useful mechanism for increasing coordination among different agencies involved in environmental compliance.

Improving Coordination with the Federal Permitting Dashboard

The Federal Infrastructure Permitting Dashboard was launched by the Obama Administration in 2011 as part of a larger initiative to “significantly reduce the aggregate time required to make decisions in the permitting and review of infrastructure projects by the Federal Government.”⁵⁰ This online tool tracks federal environmental compliance for “large or complex infrastructure projects” and is intended to, among other things, increase transparency and “help shorten review timelines by encouraging early coordination and synchronization of agency review schedules.”⁵¹ In 2015, Congress passed a law (Title 41 of the FAST Act) codifying requirements for using the Dashboard.⁵²

In January 2017, the Federal Permitting Improvement Steering Council approved the State of Louisiana’s request that the Mid-Barataria Sediment Diversion project be added to the Dashboard. According to the Governor of Louisiana, the project’s inclusion on the Dashboard is “a major victory” and Louisiana’s coastal restoration efforts “will be more efficient and effective” as a result.⁵³ Now that the project is on the Dashboard, the Corps must develop a Coordinated Project Plan – including a public “permitting timetable” – within 60 days.⁵⁴

Also note that, on January 24, 2017, the Trump Administration issued an Executive Order with new guidance for identifying and fast-tracking “high priority” infrastructure projects.⁵⁵ While the Mid-Barataria Sediment Diversion project’s inclusion on the Dashboard suggests that at least some Gulf restoration projects may be eligible under this order, it is not yet clear whether any restoration projects will qualify.

Coordination Increases Funding Available for Oyster Restoration

In December 2015, the RESTORE Council approved the planning phase of Florida’s Apalachicola Bay Oyster Restoration project: \$702,000 was to be used for planning costs, including “completing all applicable environmental compliance and permitting.”⁴⁵ At the time, “[t]he estimated cost of the Project’s implementation component” – which would need to be approved separately, after the Council had completed its NEPA analysis – “was listed at \$3,978,000, which would fund the restoration of approximately 219 acres of oyster beds in [the bay].”⁴⁶

In early 2016, Council members “collaborated” to identify and adopt an existing EA that addressed the proposed activities: it was an EA that had been prepared for a general permit for live rock and marine bivalve aquaculture in the State of Florida (PGP SAJ 99), which was issued in 2015 by the Corps’ Jacksonville District office.⁴⁷ By adopting this EA to comply with NEPA, the Council achieved multiple benefits: “expediting project implementation, reducing planning costs and increasing the ecological benefits of [the Apalachicola Bay Oyster] Project by using the savings in planning funds to expand the Project by approximately 32 acres.”⁴⁸

In August 2016, the Council approved funding for the project’s implementation phase, including “reallocating \$702,000 from project planning to project implementation...” With a total of \$4,680,000 available for implementation activities, the project is now expected to “restore approximately 251 acres of oyster beds” and provide a range of ecological and economic benefits.⁴⁹

Addressing Resource Constraints. A lack of agency resources may be a significant barrier to efficient environmental compliance, especially when workloads are greater than normal. In the 2016 White House memorandum, the Office of Management and Budget “encourage[d] agencies to clearly identify any budgetary and staffing needs related to permitting and environmental review of restoration projects associated with Gulf restoration in the regular budget formulation process.”⁵⁶



In addition, where appropriate under the law, agencies may have opportunities to accept non-federal funds to expedite their review of specific project applications.

For example, **Section 214 of the Water Resources**

Reform and Development Act of 2000 provides that the Corps, “after public notice, may accept and expend funds contributed by a non-Federal public entity...to expedite the evaluation of a permit of that entity...related to a project or activity for a public purpose under [the Corps’] jurisdiction.”⁵⁹ As guidance issued by Corps Headquarters in 2015 explains, “[e]xpediting the review process could include generally shorter review times [vs. typical times], facilitation of a smoother review process through improved coordination and communication, or the development or use of programmatic agreements or standard operating procedures.”⁶⁰ The Corps must ensure that a Section 214 agreement “will not impact impartial decision making with respect to permits, either substantively or procedurally.”⁶¹

Funding Expedites Permit Review in Louisiana

In May 2016, the New Orleans District of the Corps issued a special public notice announcing its proposal “to accept and expend funds from the State of Louisiana, Coastal Protection and Restoration Authority (“CPRA”) for the purpose of providing expedited review, evaluation, and processing of Department of Army (‘DA’) permission requests and permit applications to be submitted by CPRA for their proposed Mid-Breton Sediment Diversion Project.”⁵⁷ The notice, which announced a 20-day public comment period, stated that CPRA intended to apply for a permit under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, included a brief description of the project, and explained how CPRA funds would be expended – e.g., labor, salaries, and overhead related to application review, jurisdictional determinations, public scoping meetings, public notices, scientific and legal analyses, and “early coordination activities such as [NEPA]/404 synchronization procedures.”⁵⁸

CLOSING THOUGHTS

Environmental compliance procedures help ensure that decision-making agencies have fully considered the environmental impacts of their actions and have given the public an opportunity to provide input. There are a variety of mechanisms available for agencies to review “good” restoration projects more efficiently, while still ensuring environmental compliance is conducted effectively. Using any or a combination of the fast-tracking mechanisms described in this paper – or others that may be available – as appropriate and tackling the barriers to efficiency will help ensure that “good” Gulf restoration projects move to implementation more quickly.

END NOTES

- ¹ EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR EXECUTIVE DEPARTMENTS AND AGENCIES RE: FEDERAL COORDINATION, PERMITTING AND REVIEW OF GULF COAST ECOSYSTEM RESTORATION PROJECTS (Oct. 20, 2016), *available at* obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2017/m-17-01.pdf.
- ² Gulf restoration projects will also typically be subject to environmental compliance requirements established by state and/or local laws, regulations, or ordinances, which are not addressed in this paper.
- ³ Note that not every project will be subject to all three elements, since specific regulatory requirements vary depending on the nature of the activities and resources to be affected.
- ⁴ DEEPWATER HORIZON TRUSTEE COUNCIL, TRUSTEE COUNCIL STANDARD OPERATING PROCEDURES FOR IMPLEMENTATION OF THE NATURAL RESOURCE RESTORATION FOR THE DEEPWATER HORIZON (DWH) OIL SPILL, APPENDIX F (2016), www.gulfspillrestoration.noaa.gov/sites/default/files/DWH%20TC%20SOP%202.0%20with%20appendices.pdf; GULF COAST ECOSYSTEM RESTORATION COUNCIL, COMPREHENSIVE PLAN UPDATE 2016 at 26 (2016), *available at* www.restorethegulf.gov/sites/default/files/CO-PL_20161208_CompPlanUpdate_English.pdf.
- ⁵ EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 1.
- ⁶ 42 U.S.C. § 4332.
- ⁷ COUNCIL ON ENVIRONMENTAL QUALITY (CEQ), MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES RE: IMPROVING THE PROCESS FOR PREPARING EFFICIENT AND TIMELY ENVIRONMENTAL REVIEWS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Mar. 6, 2012), *available at* ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencis_06Mar2012.pdf.
- ⁸ 42 U.S.C. § 4332.
- ⁹ CEQ, *supra* note 7, at 3.
- ¹⁰ 40 C.F.R. §§ 1500.5(k), 1508.4.
- ¹¹ An EA must include discussion of the need for the proposal, alternatives to the proposal, environmental impacts of the proposed action and alternatives, and a list of the agencies and persons consulted. 40 CFR 1508.9(b).
- ¹² 40 C.F.R. § 1508.9. In some cases, the agency can modify the proposal during the EA “to avoid or lessen potentially significant effects ... that would otherwise need to be analyzed in an EIS,” ultimately issuing what is known as a “mitigated FONSI.” CEQ, *supra* note 7, at 4.
- ¹³ It is important to note that even where the initial action of approving funding falls within a CE, the project may be subject to further NEPA review if a separate federal action (e.g., issuance of a permit) triggers the law.
- ¹⁴ Gulf Coast Ecosystem Restoration Council National Environmental Policy Act Implementing Procedures and Categorical Exclusions, 80 Fed. Reg. 25680, 25684-85.
- ¹⁵ GULF COAST ECOSYSTEM RESTORATION COUNCIL, CATEGORICAL EXCLUSION DETERMINATION FORM -- PLUG ABANDONED OIL AND GAS WELLS (2015), *available at* www.restorethegulf.gov/sites/default/files/FPL_EClub_TX_Plug_Abandoned_Oil_Gas_Wells_CE_signed.pdf.
- ¹⁶ *Id.* at 5.
- ¹⁷ 40 C.F.R. § 1501.7.
- ¹⁸ CEQ, *supra* note 7, at 9.

- ¹⁹ 40 C.F.R. § 1506.3.
- ²⁰ 40 C.F.R. §§ 1500.4(j), 1502.21.
- ²¹ CEQ, *supra* note 7, at 13.
- ²² MISSISSIPPI TRUSTEE IMPLEMENTATION GROUP DRAFT 2016-2017 RESTORATION PLAN/ENVIRONMENTAL ASSESSMENT at 14-15 (Dec. 22, 2016), *available at* www.gulfspillrestoration.noaa.gov/sites/default/files/MS%20TIG%20Draft%20RP-FA-12-22-16.pdf.
- ²³ EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES RE: EFFECTIVE USE OF PROGRAMMATIC NEPA REVIEWS (Dec. 18, 2014), *available at* obamawhitehouse.archives.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_final_dec2014_searchable.pdf.
- ²⁴ *Id.* at 10.
- ²⁵ 40 C.F.R. § 1500.4(j).
- ²⁶ OFFICE OF MANAGEMENT AND BUDGET ET AL., SYNCHRONIZING ENVIRONMENTAL REVIEWS FOR TRANSPORTATION AND OTHER INFRASTRUCTURE PROJECTS: 2015 RED BOOK (Sept. 2015), *available at* www.environment.fhwa.dot.gov/strmlng/Redbook_2015.asp.
- ²⁷ 33 C.F.R. § 320.4.
- ²⁸ 40 C.F.R. § 230.10.
- ²⁹ 33 C.F.R. § 325.3.
- ³⁰ 33 U.S.C. § 1344(e); 33 C.F.R. § 322.3.
- ³¹ U.S. Army Corps of Engineers Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1938 (Jan. 6, 2017). The new and reissued NWP's will take effect March 19, 2017.
- ³² U.S. Army Corps of Engineers Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1863 (Jan. 6, 2017).
- ³³ CLAUDIA COPELAND, CONGRESSIONAL RESEARCH SERVICE, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS (Jan. 2012), *available at* www.fas.org/sgp/crs/natsec/97-223.pdf.
- ³⁴ 40 C.F.R. § 230.5.
- ³⁵ 33 C.F.R. § 230.9.
- ³⁶ U.S. FISH AND WILDLIFE SERVICE (FWS) AND NATIONAL MARINE FISHERIES SERVICE (NMFS), ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT (Mar. 1998), *available at* www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf.
- ³⁷ 16 U.S.C. § 1533. "Critical habitat" is defined as a specific geographic area that is "essential to the conservation" of a listed species and "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A).
- ³⁸ FWS AND NMFS, *supra* note 36. Based on informal consultation, an agency may decide to modify the proposed project voluntarily to avoid the likelihood of adverse effects on a listed species or critical habitat – and thus avoid the need to proceed with formal consultation and a Biological Opinion. FWS, *Endangered Species Program – FAQ*, www.fws.gov/Endangered/what-we-do/faq.html (updated July 15, 2013).
- ³⁹ NMFS, FRAMEWORK PROGRAMMATIC BIOLOGICAL OPINION ON THE DEEPWATER HORIZON PROGRAMMATIC DAMAGE ASSESSMENT AND RESTORATION PLAN at 2 (Feb. 10, 2016), *available at* sero.nmfs.noaa.gov/protected_resources/section_7/freq_biop/documents/DWH_bo/dwh_biop_2016.pdf.
- ⁴⁰ 50 C.F.R. § 402.12(g).
- ⁴¹ The website currently provides information for projects approved for funding during the early restoration process. *See Deepwater Horizon Natural Resource Damage Assessment Trustees, Environmental Compliance*, www.gulfspillrestoration.noaa.gov/restoration/early-restoration/phase-iii/compliance (accessed Dec. 11, 2016).
- ⁴² CEQ, *supra* note 7, at 12.
- ⁴³ EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 1.
- ⁴⁴ Gulf Coast Ecosystem Restoration Council National Environmental Policy Act Implementing Procedures and Categorical Exclusions, 80 Fed. Reg. 25680, 25683 (May 5, 2015).
- ⁴⁵ GULF COAST ECOSYSTEM RESTORATION COUNCIL, CATEGORICAL EXCLUSION DETERMINATION FORM: APALACHICOLA BAY OYSTER RESTORATION at 1 (Dec. 10, 2015), *available at* stage.restorethegulf.gov/sites/default/files/FPL_EClub_FL_Apalachicola_Bay_Oyster_CE_signed.pdf.

- ⁴⁶ Gulf Coast Ecosystem Restoration Council Proposed Amendment to Initial Funded Priorities List, 81 Fed. Reg. 36541, 36542 (June 7, 2016).
- ⁴⁷ *Id.* at 36542.
- ⁴⁸ Gulf Coast Ecosystem Restoration Council Amendment to Initial Funded Priorities List, 81 Fed. Reg. 59625 (Aug. 30, 2016).
- ⁴⁹ GULF COAST ECOSYSTEM RESTORATION COUNCIL, FINDING OF NO SIGNIFICANT IMPACT: APALACHICOLA BAY OYSTER RESTORATION – IMPLEMENTATION at 1 (Aug. 10, 2016), *available at* www.restorethegulf.gov/sites/default/files/FPL_ECLib_FL_FONSI_20160810_Apalachicola_Oyster_Restoration.pdf.
- ⁵⁰ Exec. Order No. 13,604, 77 Fed. Reg. 18885 (Mar. 22, 2012).
- ⁵¹ Permitting Dashboard, *About the Federal Infrastructure Permitting Dashboard*, www.permits.performance.gov/about (last accessed Feb. 8, 2017).
- ⁵² 42 U.S.C. §§ 4730m – 4730m-12. The law specifies types of infrastructure projects eligible for inclusion on the Dashboard, including “water resource projects”; it also establishes eligibility criteria related to project size, complexity, and the likely way in which environmental compliance requirements will be applied. *See* 42 U.S.C. § 4730m(6).
- ⁵³ Office of Governor John Bel Edwards, *Gov. Edwards’ Request Granted, Mid-Barataria Sediment Diversion Identified for Permit Prioritization and Streamlining* (Jan. 24, 2017), gov.louisiana.gov/news/gov-edwards-request-granted-midbarataria-sediment-diversion-identified-for-permit-prioritization-and-streamlining.
- ⁵⁴ 42 U.S.C. § 4730m-2(c).
- ⁵⁵ Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 30, 2017).
- ⁵⁶ EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 1. The memorandum encourages agencies to identify these needs “[a]s appropriate within budgetary targets.” *Id.*
- ⁵⁷ U.S. ARMY CORPS OF ENGINEERS NEW ORLEANS DISTRICT, NOTICE OF PROPOSED INTENT TO ACCEPT FUNDS FROM THE STATE OF LOUISIANA, COASTAL PROTECTION & RESTORATION AUTHORITY FOR EXPEDITING DEPARTMENT OF THE ARMY PERMISSION AND PERMIT APPLICATIONS at 1 (May 13, 2016), *available at* www.mvn.usace.army.mil/Portals/56/docs/214%20Agreements/CPRA%20MID%20BRETON%201ST%20PN%2014%20051316.pdf.
- ⁵⁸ *Id.* at 3.
- ⁵⁹ 33 U.S.C. § 2352.
- ⁶⁰ U.S. ARMY CORPS OF ENGINEERS, MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS, AND DISTRICT COMMANDS RE: UPDATED IMPLEMENTATION GUIDANCE FOR SECTION 1006 OF THE WATER RESOURCES REFORM AND DEVELOPMENT ACT OF 2014 AND GUIDANCE ON THE USE OF FUNDING AGREEMENTS WITHIN THE REGULATORY PROGRAM at 9 (Sept. 2, 2015), *available at* www.usace.army.mil/Portals/2/docs/civilworks/regulatory/WRDA_214_reg_guide_2015.pdf.
- ⁶¹ 33 U.S.C. § 2352.

OTHER REFERENCES

AG INNOVATIONS NETWORK, REGULATING FOR AGRICULTURAL AND PUBLIC OUTCOMES: PERSPECTIVES AND RECOMMENDATIONS (JAN. 2014), *available at* www.aginnovations.org/result/2015-05-10/regulating-for-agricultural-and-public-outcomes-perspectives-and-recommendations.

Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133 (2014), *available at* scholarship.law.duke.edu/dlj/vol64/iss2/1.

COUNCIL ON ENVIRONMENTAL QUALITY, FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON ESTABLISHING, APPLYING, AND REVISING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Nov. 23, 2010), *available at* ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.

GEORGETOWN CLIMATE CENTER, PREPARING OUR COMMUNITIES FOR CLIMATE IMPACTS: RECOMMENDATIONS FOR FEDERAL ACTION (2014), available at www.georgetownclimate.org/reports/preparing-our-communities-for-climate-impacts-recommendations-for-federal-action.html.

GULF COAST ECOSYSTEM RESTORATION COUNCIL, 2015 ANNUAL REPORT TO CONGRESS (Dec. 2015), available at www.restorethegulf.gov/reports/annual-reports-congress.

INTERAGENCY RESTORATION ASSESSMENT TEAM, AN APPROACH: RESOLVING INCONSISTENCIES AND INEFFICIENCIES IN THE RESTORATION PROCESS (presented at Restore America's Estuaries Conference in Tampa, Florida, Oct. 2012), available at www.estuaries.org/pdf/2012conference/room19/session7/Miller_C_RAE_2012_pres.pdf.

Keith Rizzardi, *Regulating Watershed Restoration: Why the Perfect Permit is the Enemy of the Good Project*, 27 NOVA L. REV. 51 (2002), available at nsuworks.nova.edu/cgi/viewcontent.cgi?article=1319&context=nlr.

Sustainable Conservation, *Accelerating Restoration*, www.suscon.org/acceleratingrestoration (last accessed Aug. 19, 2016).



ENVIRONMENTAL
LAW • INSTITUTE®

.....
**OCEAN
PROGRAM**