



August 2, 2013

Via Email and U.S. Mail

Deepwater Horizon Natural Resource Damage Assessment Trustee Council
c/o U.S. Fish and Wildlife Service
P.O. Box 2099
Fairhope, AL 36533

Re: Notice of Intent to Prepare a Programmatic Environmental Impact Statement (PEIS) for a Phase III Early Restoration Plan and Early Restoration Project Types, and to Conduct Scoping Meetings (“Scoping Notice”)

Dear Trustees,

Thank you for your continued efforts to repair the Gulf of Mexico in the wake of the largest oil disaster in U.S. history—the Deepwater Horizon oil spill. The National Wildlife Federation (NWF) has a long history in the Gulf Coast region and with the National Environmental Policy Act (NEPA). On behalf of over 4 million members and supporters, we appreciate this opportunity to comment on your Gulf Coast restoration efforts.

While we recognize that the Trustees have wide discretion when determining whether to complete a PEIS, **we provide the following policy perspectives for your consideration as you decide whether to proceed with an early restoration PEIS.**

As a result of the Exxon-Valdez oil disaster, Congress enacted the Oil Pollution Act of 1990 (OPA). Among other things, this law established a framework for federal, state, and tribal entities to pursue claims against a responsible party for damage to natural resources held in trust for the benefit of the public: the Natural Resource Damage Assessment (NRDA). NRDA is primarily intended to address and rectify ecological harm caused by oil pollution. NRDA also allows for other compensable damages to the public, including loss of ecological services and loss of human use of natural resources that are damaged by the oil spill. Consequently, NRDA allows compensation to the public both for injury to natural resources and also for loss of ecological services and public use of those resources.

Louisiana loses approximately a football field of land an hour into the ocean. The combined impacts of poorly planned water resource projects, decades of oil and gas extraction, and land subsidence have caused the state to lose approximately 1,900 square miles of land,

primarily marshes, since the 1930's.¹ Hurricanes and sea-level rise further exacerbate the problem. Recent research indicates that Macondo oil that coated coastal marshes accelerated their deterioration. In addition to the millions of barrels of oil that escaped from the Macondo well, over 1.84 million gallons of chemical dispersants were released into the Gulf of Mexico—one of the most productive ecosystems in the world.² In 2013, a 40,000 pound tar mat was found off Grande Terre Louisiana that had the chemical signature of Macondo oil. Each day that we delay restoration efforts in the Mississippi River Delta, the harm becomes more difficult to remedy. This ecosystem is on the brink, and the oil disaster threatens to be the tipping point.

NWF was encouraged that the Department of Justice, BP, and the Trustees were able to agree to early restoration in the “Framework Agreement” on April 21, 2011. Natural resource impacts resulting from this disaster are complex, long-lasting, and far-reaching. NWF recognizes that full assessment and resolution of those claims might take time—and the Framework Agreement appeared to provide an opportunity to address the most immediate environmental needs. **We strongly encourage the Trustees to take timely advantage of early restoration funding and focus on urgent ecosystem restoration needs of the region.** Each project selected must undergo thorough NEPA analysis, and **the Trustees should avoid delay on restoration projects that have already been thoroughly vetted through the NEPA process.**

Additionally, if the Trustees fail to fully calculate losses and develop projects to restore damaged natural resources, projects designed to increase human use of those resources may be incomplete or otherwise deficient in material ways. For example, construction of a pier without a project to improve fish habitat does not restore the human use of that resource because there may not be an abundant fish population to access. NWF strongly urges the Trustees to maintain a sharp focus on restoring the ecosystem first, and provide sustainable public access as a corollary (and integral) objective.

The scoping notice confirms that the responsible parties must fully compensate the public for all damage to natural resources caused by the Deepwater Horizon disaster—and notes that at this stage early restoration is not intended to fully address injuries caused by the oil spill. **Ideally, the Trustees would produce a single comprehensive PEIS.**

In the event the Trustees elect to continue development of a separate early restoration PEIS in addition to a more comprehensive approach, NWF urges expeditious completion of this assessment.

NWF provides the following legal considerations for NEPA analysis of NRDA and Gulf restoration generally.

NEPA assesses significant federal actions in light of a specified purpose and need. A key element of an EIS is an agency “Purpose and Need” statement. The agency preparing an EIS will

¹ "ClimateWatch Magazine. Underwater: Land Loss in Coastal Louisiana since 1932." *ClimateWatch Magazine. Underwater: Land Loss in Coastal Louisiana since 1932.* National Oceanic and Atmospheric Association, 11 July 2013.

<<http://www.climatewatch.noaa.gov/image/2013/underwater-land-loss-in-coastal-louisiana-since-1932>>

² The Use of Surface and Subsea Dispersants During the BP Deepwater Horizon Oil Spill. Draft (Report). National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. 6 October 2010.

<http://media.mcclatchydc.com/smedia/2010/10/06/18/Staff_Report_No._4.source.prod.affiliate.91.pdf>

identify all *reasonable* alternatives: technically and economically feasible alternatives that substantially meet the primary objectives of the Purpose and Need statement. Therefore, the definition of a program or project purpose significantly affects the array of alternatives that need to be evaluated.

An EIS must contain a "detailed statement" including environmental and socioeconomic impacts of the proposed project, and all reasonable alternatives to the project. This alternatives requirement in NEPA helps fulfill one of the key purposes of the law: "To identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment."³ The proposed alternatives should sharply define the issues and provide a clear basis for choice among options by the decision-maker and the public.⁴ The alternative section has been described as "the heart of the environmental impact statement."⁵

In evaluating a proposed course of action under NEPA, the action agency has a duty "to study all alternatives that appear reasonable and appropriate for study . . . , significant alternatives suggested by other agencies or the public during the comment period,"⁶ including "reasonable alternatives not within the jurisdiction of the lead agency."⁷

When evaluating alternatives in an EIS, NEPA also requires the action agency to provide a reasoned analysis for its conclusions and "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"^{8,9}

In light of the above policy and legal considerations, *NWF provides the following recommendations as the Trustees complete NEPA analysis and documents for the Deepwater Horizon program broadly and for Gulf early restoration projects:*

³ 40 C.F.R. § 1500.2(3).

⁴ 40 C.F.R. § 1502.14.

⁵ 40 C.F.R. § 1502.14. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

⁶ *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982); *Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 462 (1st Cir. 1989); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 95 F.3d 892, 903 (9th Cir. 1996).

⁷ 40 C.F.R. § 1502.14(c). *National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp.2d 1143, 1154, 1155 (W.D. Wash. 2002). *See also*, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 48 Fed. Reg. 18,026 (March 16, 1981) at 2b ("An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered.")

⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983).

⁹ The requirements for an alternatives analysis in an environmental assessment (EA) differ from those for an EIS. The EA is intended to help the agency determine whether to prepare an EIS or a Finding of No Significant Impact (FONSI), which would obviate the need for an EIS. Nonetheless, in preparing the EA the action agency is required to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). *See also*, 40 C.F.R. § 1508.9(b). The environmental documentation, either an EA or EIS, "shall briefly specify the underlying purpose and need to which the agency is responding in proposing alternatives including the proposed action." 40 C.F.R. § 1502.13. While action agencies have discretion in deciding what the "purpose and need" of the project is, they cannot craft a purpose and need statement so narrowly that it unduly restricts alternatives. *Davis v. Mineta*, 302 F.2d 1104 (10th Cir. 2002); *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666-70 (7th Cir. 1997).

The scoping notice lists the following as examples of early restoration project types the Trustees intend to evaluate:

- Create and improve wetlands;
- Protect shorelines and reduce erosion;
- Restore barrier islands and beaches;
- Restore submerged aquatic vegetation;
- Restore oysters;
- Restore and protect finfish and shellfish;
- Restore and protect birds;
- Restore and protect sea turtles;
- Enhance public access to natural resources for recreational use;
- Enhance recreational experiences;
- Promote environmental and cultural stewardship, education, and outreach;
- Enhance management of recreational uses; and,
- Remove and reduce land-based and marine debris.

NWF recommends the Trustees also evaluate the following types of projects:

- Protect, restore, or enhance water quality;
- Restore and protect marine mammal populations—including dolphins, manatees and whales;
- Restore, protect, and enhance marine, tidal, and coastal habitat;
- Restore and enhance marine, tidal, and coastal vegetation;
- Restore wetland function, including hydrological restoration in deltaic systems to restore movement of water and sediment.

In addition to identifying types of early restoration projects, the PEIS scoping notice also contemplates NEPA assessment of proposed projects selected for phase III.

Oil Pollution Act compensable NRDA damages¹⁰ include:

- Injury to,
 - Destruction of,
 - Loss of, or
 - Loss of use of
- ...“natural resources,”¹¹ defined to include:
- Land
 - Fish
 - Wildlife
 - Biota
 - Air
 - Water
 - Groundwater
 - Drinking water supplies, and
 - Other such resources

¹⁰ 33 U.S.C. §2702(b)(2)(A).

¹¹ 33 U.S.C. §2701(20).

Through the NRDA process, Trustees are directed to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources, as well as loss of ecological services and loss of human use of those resources attributable to the injury.

NWF strongly urges the Trustees to begin this process by defining the Purpose and Needs for both the comprehensive NRDA program as well as the early restoration process. From the Purpose and Needs statement, the Trustees should develop a reasonable range of alternatives for each project based upon the compensable damage category and the relevant natural resource in question as defined in the statute, and further tailored to address scientific findings of the ongoing assessment process.

For example, there will likely be a project to address the “loss of use” of “fish,” because at one time, over 1/3 of the Gulf of Mexico was closed to fishing. This is the manner in which the agency should seek to define the project Purpose and Need.

Array of reasonable alternatives:

- Construction or enhancement of boat ramps;
- Restoring historic water flows (quantity, quality, timing and distribution) into estuaries to restore fish habitats;
- Construction or enhancement of fishing piers;
- Construction of nearshore and offshore artificial reefs to provide for enhanced public use for fishing and diving;
- Creation or restoration of natural oyster reefs and/or living shorelines, to provide for increased fish habitat and production;
- Habitat enhancement through wetlands restoration;
- No action.

By so defining the purpose and need in this way, and then considering a broad array of reasonable alternatives, the action agency will take a hard look at the environmental, socioeconomic and historical impacts of a given project; the public will have had a meaningful and transparent opportunity to review and comment on NRDA projects and alternatives; and the legal requirements and congressional intent of NEPA will be fulfilled.

By comparison, if the agency defines the project Purpose and Need as “increased facilities for overnight visits to the Gulf Coast region,” which is not tailored to the statutorily compensable damages to a “natural resource” as defined in the OPA, the scope of the alternatives analysis will be inappropriately narrowed.

Alternatives array:

- Hotel;
- Campground;
- No action.

Instead, if the Purpose and Need statement involves compensation for loss of human use, in the example of loss of public access to beaches or other coastal areas due to coastal waters being contaminated by oil, and/or cleanup operations in beach areas, the appropriate range of alternatives could include the following:

- “Green infrastructure” projects to improve water quality in nearshore waters, such as improvements to sewage treatment facilities to improve wastewater discharges or construction of infrastructure to eliminate leaking septic systems that degrade water quality, and stormwater infrastructure improvements;
- Wetland creation, restoration, enhancement, and /or protection to improve water quality and provide fish and wildlife habitat, increase fish and wildlife populations, as well as enhancing visitor’s experiences in coastal areas;
- Land acquisition (including easements) to increase public access to coastal areas;
- Improvements to existing public access areas to increase use and enjoyment of coastal resources;
- Beach dune restoration, revegetation and construction of crossovers to protect and stabilize existing dunes and/or beaches;
- Creation of living shorelines and oyster reefs to protect and renourish coastal lands and habitats.

Therefore, to comply with the letter and the spirit of the law, the Trustees must look to NEPA, OPA, and the scientific assessment of injury to appropriately structure the restoration plan, PEIS, and project-specific NEPA compliance, including consideration and evaluation of a full range of reasonable alternatives. Moreover, NWF requests that the Trustees also provide a full description of the natural resources and/or services (as those terms are used in 15 C.F.R. §990.30) expected to result from all proposed early restoration projects (“NRD Offsets”), including methods and calculations, as required under the Trustees’ Framework Agreement.¹²

While NWF recognizes the urgency of moving forward with restoration efforts, preparation and **release of a single comprehensive PEIS would have been preferable as it would provide a vital understanding and framework to ensure effective restoration activities.** In the absence of a single comprehensive PEIS, however, the Early Restoration PEIS will provide a critical tool for environmental review provided it meets all the requirements of NEPA including evaluating the cumulative impacts of projects previously constructed under Phase I and Phase II, projects that have already been vetted through project-specific EISs, and future NRDA activities, in addition to other past, present and reasonably foreseeable future actions affecting the project area.

Full and effective NEPA review, including a hard look at a full range of reasonable alternatives, will provide a transparent and thorough vetting of Gulf restoration projects and is critical for identifying the most effective restoration approaches, for ensuring

¹² Early Restoration Stipulation – Template, Section III (NRD Offsets), page 2.

meaningful public involvement, and for fully compensating the damage to natural resources. Generally, major Federal actions covered by a PEIS cannot proceed until it is complete. However, in very limited circumstances the regulations allow for projects that meet specific criteria to proceed while a PEIS is underway.¹³ An action that qualifies for this limited flexibility must be independently justified, have already been thoroughly reviewed in an EIS, and must not prejudice the ultimate decision on the program.

NWF believes that several projects included in the Louisiana Outer Coast Restoration proposal meet these criteria and urges the Trustees to avoid duplication of analyses for such projects. Restoration of this region has been a priority for decades because the current situation places people and property in harm's way. As a result, plans for several of these projects are well-developed and have undergone rigorous scientific, regulatory, and public review, and have already been reviewed and evaluated under both programmatic and project-specific NEPA analyses. Because of the critical public safety need, Louisiana Outer Coast Restoration projects that meet the criteria established in 40 C.F.R. §1506.1 should be implemented as soon as practicable, and not be delayed during preparation of the PEIS.

Finally, the need for restoration is urgent. For decades, the Gulf ecosystem has suffered, and the disaster that began over three years ago is ongoing. NWF supports the efforts of the Trustees thus far to begin restoration in earnest, and we look forward to serving as a resource. Thank you in advance for your consideration of these comments.

Sincerely,

David J. White, Esq.
Director, Gulf of Mexico Restoration Campaign
National Wildlife Federation
1700 Fairway Avenue South, Suite 100
St. Petersburg, FL 33712
Cc: Distribution

¹³ 40 C.F.R. §1506.1