



September 22, 2014

Via Federal eRulemaking Portal: www.regulations.gov

Gulf Coast Ecosystem Restoration Council
Justin R. Ehrenwerth
c/o US Custom House
Suite 419
423 Canal Street
New Orleans, Louisiana 70130

**Re: Comments on Gulf Coast Ecosystem Restoration Council
Interim Final Rule Regarding RESTORE Act Spill
Impact Component Planning Allocation
Docket Number: 140819111-4111-01**

Dear Mr. Ehrenwerth:

This correspondence provides the Gulf Consortium's formal comments on the Restoration Council's Interim Final Rule Regarding RESTORE Act Spill Impact Component Planning Allocation ("CIFR").

The Consortium appreciates the CIFR's recognition of the Gulf Consortium as the entity responsible for development of Florida's State Expenditure Plan ("SEP") in §1800.1.

Regarding other aspects of the rule, the CIFR needs more detail, revision and clarification, including the planning assistance grant submission process, the scope of the planning assistance grants, and reimbursement of pre-award costs consistent with law. Other provisions should be added, including a description of the path the Consortium can follow to secure federal funding for the costs of the Consortium to accomplish the work required by the RESTORE Act. Additionally, the Consortium

requests future Council guidance and rules be promulgated with a public comment period prior to finalization consistent with the Administrative Procedures Act.¹

1. **Clarification on Grant Submission Process.**

On August 15, 2014, the Treasury published its Regulations for the Gulf Coast Restoration Trust Fund Interim Final Rule ("TIFR") and shortly thereafter published the RESTORE Act Direct Component Guidance and Application to Receive Federal Financial Assistance (August 2014) (the "Guidance Document"). The TIFR provides that planning assistance grants are available to the Florida counties and the other eligible entities to develop the Multi-Year Implementation Plans ("MYIPs"). Section 34.201(j) provides that the counties are not required to submit a MYIP prior to submitting a grant for planning assistance. The TIFR contains numerous provisions related to the Direct Component, but also processes related to all five Components as well as definitions for common terminology.

Unlike the clarity in the TIFR, the process for submitting a planning assistance grant is unclear in the CIFR. The CIFR says it requires a grant, the Preamble states it requires a State Expenditure Plan that funds planning activities only, an eligible activity under the Spill Impact Component, before any funds can be disbursed. A clarification is needed to describe the process to access funds for planning activities as a grant directly submitted to the Council by an eligible entity. To clarify, submitting a planning assistance grant directly to the Council by the Consortium is what the CIFR outlines, yet the Preamble states that an actual SEP be developed that funds only planning activities.

With regard to the Spill Impact Component and the planning grants for the SEP developed by the Consortium, the TIFR clearly states that applications for planning assistance grants can occur prior to the submission of an SEP. Specifically, the TIFR provides:

State entities may apply for a grant from the total amount allocated to that state under the Spill Impact Component *before the Council has approved the State Expenditure Plan to fund eligible activities that are necessary to develop and submit that plan.*

§ 34.302(a), TIFR (emphasis added).

Shortly after the TIFR was published, the Council published the CIFR. The CIFR provides for an allocation of the Spill Impact Component to the Gulf Consortium for planning purposes for the development of Florida's State Expenditure Plan. The CIFR states that planning would be requested through a grant. The specific language provides:

¹ 5 U.S.C. Subchapter II

A Gulf Coast State or its administrative agent, or the Gulf Consortium, may apply to the Council for a grant to use the minimum allocation available in a fiscal year under the Spill Impact Component of the RESTORE Act for planning purposes.

§ 1800.20, CIFR.

However, the CIFR Preamble says that planning funds would be available for an SEP that funds planning activities only. It states the following:

Under this regulation an amount of funds less than or equal to the statutory minimum allocation (five percent of funds available under the Spill Impact Component) would be available to a Gulf Coast State, or eligible entity for a *SEP that funds planning activities only*, an eligible activity under the Spill Impact Component. 33 U.S.C. 1321(t)(1)(B)(i)(VIII); 33 U.S.C. 1321(t)(3)(B)(i)(I).

See, § II, Preamble, CIFR (Emphasis added).

This Preamble provision implies that the application for a planning assistance grant must be in the form of submitting an SEP for planning activities.

The CIFR contradicts itself in requiring the submission of an SEP, as stated in the CIFR Preamble, rather than a planning assistance grant, as explicitly authorized in §1800.20. The function of the planning assistance grant is to secure funds to develop the actual SEP. The Preamble SEP language implies that the Gulf Consortium and all the other Gulf Coast States must subject the planning assistance grant itself to public involvement and Council approval process required of all SEPs. This step is more appropriately directed at the engagement needed to develop the SEP, not a planning assistance grant just to access funds to start that planning process. By comparison, the TIFR does not include these same requirements for the Florida counties' planning assistance grants. In fact, the Guidance Document states that Direct Component grants for planning costs are an exception to the requirement that an applicant have a MYIP before applying for Direct Component funds. *See, § 1.5, Guidance Document*. Similarly, §34.203(a) of the TIFR states, "State entities may apply for a grant from the total amount allocated to the state under the Spill Impact Component before the Council has approved the State Expenditure Plan to fund eligible activities that are necessary to develop and submit that plan." The TIFR makes two key points: 1) the entity applies for a "grant" (as opposed to an SEP that funds planning activities) and 2) it can do so before the Council has approved the State Expenditure Plan. Finally, §34.502 of the TIFR states that the Council will make funds available through grants, not an SEP that funds planning activities only. The Gulf Consortium can find no sound public policy or

legal reason for CIFR's requiring the submission of a planning assistance grant to go through the same process as an SEP containing projects, programs and activities to be funded with the Direct Component.

The Council should clarify the nature of planning assistance grants in the CIFR by eliminating the statement in the Preamble that requires the planning assistance grants be submitted as a SEP that funds planning activities only. This can be accomplished by deleting the following sentence from the Preamble.

~~Under this regulation an amount of funds less than or equal to the statutory minimum allocation (five percent of funds available under the Spill Impact Component) would be available to a Gulf Coast State, or eligible entity for a SEP that funds planning activities only, an eligible activity under the Spill Impact Component. 33 U.S.C. 1321(t)(1)(B)(i)(VIII); 33 U.S.C. 1321(t)(3)(B)(i)(I).²~~

2. **Scope of Planning Grants.**

There is no term in the RESTORE Act authorizing "planning purposes" introduced in §1800.20. The Act refers to the term "planning assistance" which is specifically defined in the TIFR in §34.2 as:

Planning assistance means data gathering, studies, modeling, analysis and other tasks required to prepare plans for eligible activities under § 34.201(a) through (i), including environmental review and compliance tasks and architectural and engineering studies. Planning assistance also means one-time preparations that will allow the recipient to establish systems and processes needed to review grant applications, award grants, monitor grants after award, and audit compliance with respect to eligible activities under § 34.201 in a Multiyear Implementation Plan or State Expenditure Plan.

Under the TIFR, planning assistance costs are not administrative costs and therefore not within the three percent cap under the RESTORE Act. See, § 34.201(j) and (k), TIFR. The TIFR provides that the eligible activities--including planning assistance--for the Direct Component are also applicable to the Spill Impact Component through a cross reference. See, § 34.201(j), TIFR, cross-referenced in § 34.203, TIFR. Consequently, the TIFR's scope of activities explicitly authorized in the planning assistance definition apply to the Spill Impact Component.

² Text struck through are deletions; text added are underlined.

The 23 county membership of the Consortium includes seven counties that are fiscally constrained, which means that the county's tax base is so low that it struggles to provide basic government services, and as a result, they cannot afford to hire staff or consultants with the expertise and educational background necessary to comply with the TIFR.³ In response to comments from the fiscally constrained Florida counties, the TIFR provides the following avenues to pay for such costs:

The Act also provides some latitude concerning when funds are made available. In response to these comments [from Florida counties], Treasury has revised the rule to make grants available to develop Multiyear Implementation Plans, including related public engagement activities. These grants will include funds to cover administrative costs. The Florida counties and other grant recipients may also negotiate reimbursement of pre-award costs, as described in OMB's Uniform Guidance. These measures will not reduce the counties' costs in complying with the Act, or exempt the counties from any legal requirement. Every grant recipient is expected to comply with the Act and other Federal requirements that apply to Federal awards. However, these measures do make funding available for allowable costs.

Id.

The RESTORE Act contains one term describing this eligible activity, "planning assistance".⁴ Inconsistent with the TIFR and the RESTORE Act itself, the CIFR takes a much more restricted approach. It uses a different term for planning assistance than the TIFR and the Act, and narrows the scope of planning assistance grants for developing the SEP. The CIFR provides:

A Gulf Coast State or its administrative agent, or the Gulf Consortium, may apply to the Council for a grant to use the minimum allocation available in a fiscal year under the Spill Impact Component of the RESTORE Act for planning purposes. *These planning purposes are limited to development of a State Expenditure Plan, and includes conceptual design and feasibility studies related to specific projects. It does not include engineering and environmental studies related to specific projects.* It also does not include any pre-award costs incurred prior to August 22, 2014.

³ See, § IV.A., *Preamble*, TIFR. Under Florida law, a county is fiscally constrained when the value of one mill of ad valorem property taxes generates no more than \$5 million in revenues in a year. See, § 218.67, *Fla. Stat.*

⁴ Section 311(t)(1)(B)(i)(VIII) of the Federal Water Pollution Control Act.

§ 1800.20, CIFR. (*Emphasis added*).

The CIFR “planning purposes” concept does not comply with the definition for planning assistance in §34.2 of the TIFR by omitting: “[o]ne-time preparations that will allow the recipient to establish systems and processes needed to review grant applications, award grants, monitor grants after award, and audit compliance with respect to eligible activities” See, § 34.2, *TIFR*. Nor does the CIFR allow the grants to include public engagement costs or administrative costs, as allowed for Direct Component entities, according to the RESTORE Act, TIFR Preamble and definitions. See § IV.A., *Preamble, TIFR and §34.2*. In fact, the CIFR contradicts the TIFR's clear definition for planning assistance that the TIFR makes applicable to the Spill Impact Component in §34.203. Nothing in the CIFR, including its Preamble, states any legal rationale for so narrowly limiting planning assistance for the Spill Impact Component and the Consortium and this is inconsistent with the RESTORE Act itself.

Accordingly, the CIFR should be revised to replace §1800.20's existing, narrowly construed “planning purpose” with the definition of “planning assistance” in §34.2 to mirror the TIFR in compliance with the Act:

A Gulf Coast State or its administrative agent, or the Gulf Consortium, may apply to the Council for a grant to use the minimum allocation available in a fiscal year under the Spill Impact Component of the RESTORE Act for planning assistance. “Planning assistance” means data gathering, studies, modeling, analysis and other tasks required to prepare plans for eligible activities under § 34.203 and section 34.201 (a) through (k) of the Treasury Interim Final Regulation for the Gulf Coast Restoration Trust Fund, including environmental review and compliance tasks and architectural and engineering studies. Planning assistance also means one-time preparations that will allow the recipient to establish systems and processes needed to review grant applications, award grants, monitor grants after award, and audit compliance with respect to eligible activities under § 34.201 in a State Expenditure Plan. purposes. ~~These planning purposes are limited to development of a State Expenditure Plan, and includes conceptual design and feasibility studies related to specific projects. It does not include engineering and environmental studies related to specific projects. It also does not include any pre-award costs incurred prior to August 22, 2014.~~

3. Pre-award Costs.

The CIFR could be construed to disallow the recoupment of pre-award costs incurred prior to August 22, 2014, in these initial funds for planning assistance grants to develop SEPs. Wholesale precluding the reimbursement of pre-award costs contravenes the fact that they are allowed under the TIFR and the Uniform Grant Guidance in 2 CFR, Part 200. The TIFR Preamble discusses the fact that several of the counties which make up the Consortium are fiscally constrained, and in recognition of that fact allows Direct Allocation funds to be used for pre-award costs.⁵ These same fiscally constrained counties have funded the Gulf Consortium. The Gulf Consortium has been funded through donations from the 23 Gulf Coast counties to accomplish its work to date in standing up a new governmental entity to meet the requirements of the RESTORE Act. The Consortium's budget for the 2014-15 fiscal year also depends on donations from the 23 counties, including the seven fiscally constrained counties which are members. The Consortium has no revenues independent of the counties' contribution. Unlike some of the other Gulf Coast states, the Consortium has not received a National Fish and Wildlife Foundation grant to conduct environmental assessments or develop plans that can be used in developing a SEP. In fact, the Consortium has relied upon one county, Leon County, that is not a member of the Consortium to provide procurement services in hiring a consultant to assist in the development of the SEP. The costs associated with providing those services and the other costs borne by the 23 Gulf Coast counties, including the seven fiscally constrained counties, for standing up a government and for SEP planning efforts to date should be recoupable from the Spill Impact Component. The CIFR should be revised to expressly allow the Consortium to recoup pre-award costs.

It should also be noted that the Preamble to the TIFR explains that Treasury is relying on §2 CFR 200.458 that allow pre-award cost reimbursement to the extent that those costs would have been allowable if incurred after the date of the Federal award and only with the written approval for the Federal awarding agency. Therefore, if the cost is related to an eligible activity, it should be reimbursable as a pre-award cost. Costs related to development of the SEP and related administrative costs are clearly and explicitly authorized eligible activities for funding under the RESTORE Act. It is unclear why the Council would preclude recovery of these costs. The Council should issue further guidance on reimbursable pre-award costs consistent with the Uniform Guidance.

And § 1800.20 should be revised to delete the following sentence:

⁵ See, *Preamble and § 34.200(a)(3)*. The TIFR Preamble notes that several Florida counties had raised the scrutiny required for small entities under the Regulatory Flexibility Act in their comments on the Proposed Treasury Rule. The TIFR's allowance for pre-award costs and the broad allowance for planning grants for the Direct Component entities were relied upon as reasons the TIFR did not make other special accommodations for the small, fiscally constrained counties under the Regulatory Flexibility Act. See, *Id.*

~~It also does not include any pre-award costs incurred prior to August 22, 2014.~~

4. Clear Path to Funding the Consortium.

The CIFR does not provide a clear path for funding the Consortium to meet the requirements of the RESTORE Act. Up to now, the Consortium has stood up a new government entity, much like the Restoration Council has done, whose formation was required by the Act. But unlike the Council's membership of federal agencies and States, the Consortium's members are 23 county governments, seven of which are fiscally constrained counties which financially struggle to meet the basic safety needs of their citizens. While awaiting the TIFR and the CIFR, the Consortium has provided the services to get the organization up and running through donations from the counties and the kindness of another county that is not even a member of the Consortium-Leon County. The counties and especially the fiscally constrained counties cannot afford to continue to fund the Consortium as necessary to meet the requirements of the Act. The Council should recognize and accommodate these fiscal constraints, as the TIFR does, in part because of the Regulatory Flexibility Act. *See n. 2 Infra.*

Now that the TIFR and the CIFR are published, the Consortium finds both of them lacking a clear path to funding for the Consortium to fulfill its federally required mandates. There is no legally authorized mechanism for the Consortium to secure RESTORE Act funds to fulfill the Act's requirement of developing the SEP. The CIFR's narrow allowance for "planning purposes" will not even pay for the costs for developing the SEP, if the TIFR's definition of "planning assistance" (as the term is mandated in the Act) is not carried forward into the CIFR. And nothing in the TIFR or the CIFR indicates how the Consortium can be funded by RESTORE Act grants to meet its RESTORE Act requirements of developing the SEP through meaningful public involvement. Now is the time to address these issues, and the CIFR is the appropriate place.

The Consortium suggests revising the CIFR to specifically address how the Consortium can receive federal funds to accomplish the work required of it under the RESTORE Act. The following provision should be incorporated into the CIFR or clarified in further Council rulemaking:

A Gulf Coast State or its administrative agent, or the Gulf Consortium may apply to the Council for a grant to use the minimum allocation available in a fiscal year under the Spill Impact Component for the costs of developing a State Expenditure Plan including all authorized planning assistance, other eligible activities and necessary administrative costs consistent with applicable law.

5. Council Guidance Document and Future Rules.

The Consortium requests that the forthcoming rulemaking and Guidance Documents be promulgated in a manner that will allow comments before they are finalized consistent with the Administrative Procedures Act. The ability to comment before finalization of an important rule is fundamental to the notion of transparency. In the case of the Consortium, its status as the only entity among those eligible for SEP grant funding that is not a State, elevates the importance of being allowed to review and comment on a document establishing processes, funding limitations and other requirements that may have a unique effect on Florida's ability to comply.

Sincerely,



Grover C. Robinson IV, Chairman
Gulf Consortium

cc: The Honorable Bill Nelson
The Honorable Marco Rubio
The Honorable Steve Southerland, II
The Honorable Jeff Miller
Ms. Mimi Drew, Governor Rick Scott's Appointee to the Restoration Council
Mr. Nick Wiley, Executive Director, Florida Fish & Wildlife Commission
Ms. Rachel Cone, Deputy Chief of Staff, Executive Office of the Governor
Mr. Noah Valenstein, Office of Policy Budget, Governor's Office
Gulf Consortium Directors, Alternates and Governor Appointees
County Managers and County Attorneys of the 23 Florida Gulf Coast Counties
Mr. Chris Holley, Executive Director, Florida Association of Counties
Ms. Sarah M. Bleakley, Interim General Counsel, Gulf Consortium

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