

The RESTORE Act And Alabama's Objectives

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The RESTORE Act

by

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Executive Summary

On April 20, 2010, the wellhead of the *Deepwater Horizon* oil rig failed, causing a massive explosion that killed 11 workers and dumped nearly five million barrels of oil into the Gulf of Mexico. Both the environmental and economic impacts of the spill were disastrous for the region.

In the aftermath, Congress passed the RESTORE (Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States) Act in 2012 to divide and distribute funds collected as fines and penalties by the federal government from the liable parties. Its purpose is to put the control of those funds into the hands of the local governments most affected by the spill.

The RESTORE Act sets up a variety of committees and councils with agency oversight funded by a complex arrangement made up from criminal, civil, and administrative penalties. While the Act as a whole will be referenced throughout, this paper seeks to distill the aspects that specifically affect Alabama.

The RESTORE Act allows local governments to make the majority of meaningful decisions as to how the money is spent. In doing so, the RESTORE Act will likely bring upwards of \$1 billion under Alabama's control or direction. With that amount of capital, local leaders can tackle large environmental and economic problems on a scale that they would otherwise be unable to do.

With this much money at stake, special interest groups will likely attempt to get their piece of the pie through funding of specialized projects. Tough decisions will have to be made as not every project suggested can or should be funded. Projects must not expand the scope of government, nor should they benefit only a small group of people. Instead, projects should seek to have a large effect on the largest number of residents – for example, massive reef building in the Gulf to support commercial and recreational fisheries, rehabilitating miles of shorelines and wetlands, and a region-wide flood protection plan.

Alabama's leaders must recognize the immense power that they wield with the RESTORE Act. They must be good stewards, selecting the best projects for the Gulf and Alabama, doing so in a transparent and open manner. The State's leaders have a tremendous opportunity to positively improve the Gulf Coast's environmental and economic landscape for decades to come.

BACKGROUND

The RESTORE Act was born out of the urgency to repair the Gulf Coast from the damaging effects from the *Deepwater Horizon* oil spill. The law, passed by large majorities in both the U.S. Senate and the U.S. House of Representatives, was signed on July 6, 2012.¹ Without the RESTORE Act, all fines and penalties paid by the operators of *Deepwater Horizon* would have been deposited with the Oil Spill Liability Trust Fund (OSLTF), a program administered by the federal government. The OSLTF's ability to fund projects is rather limited in that it pays only for removal costs, natural resource damage assessments and restorations, research and development, and payments of claims for uncompensated damages.²

In contrast, the RESTORE Act places the administration of programs designed to heal the Gulf Coast in the hands of the states and local leaders, rather than the federal government. Without it, the money would have gone to the OSLTF under the direction of the Coast Guard and the EPA. Each state has the ability to direct funding to programs that are uniquely tailored to the state's own issues.

The RESTORE Act provides for a variety of programs and eligible activities a state may wish to fund; workforce training and economic improvement, tourism and local seafood promotion, and long-term conservation programs are all valid uses of RESTORE Act money. The central part of the RESTORE Act is the Gulf Coast Restoration Trust Fund (the "Fund") which will receive 80% of all Clean Water Act fines and administrative penalties paid primarily by British Petroleum ("BP"). The Fund will be split among five separate components:

1. The **direct component** – 35% is equally divided among the five Gulf Coast states for ecosystem restoration, economic development, and tourism protection under each state's control;
2. The **comprehensive plan component** – 30% will be spent to develop and implement a comprehensive plan for Gulf Coast redevelopment under the direction of the Gulf Coast Ecosystem Restoration Council (the "Federal Council"), which is made up of the Gulf Coast governors and federal government officials;
3. The **spill impact component** – 30% will go to the Gulf Coast regions most affected by the spill, reflected in a formula that takes into account proximity to the wellhead and coastal population, and will be spent, after approval by the Federal Council, as each state sees fit;
4. **NOAA Restore Act science program** – 2.5% will be used by the National Oceanic and Atmospheric Administration (NOAA) to establish a scientific observation and monitoring program;
5. **Centers of Excellence program** – the remaining 2.5% will be administrated by the U.S. Treasury Department to research a variety of environmental and engineering matters relating to the Gulf Coast.

¹ MAP-21, H.R. 4348, 112th Cong. §§1601-08 (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4348enr/pdf/BILLS-112hr4348enr.pdf>.

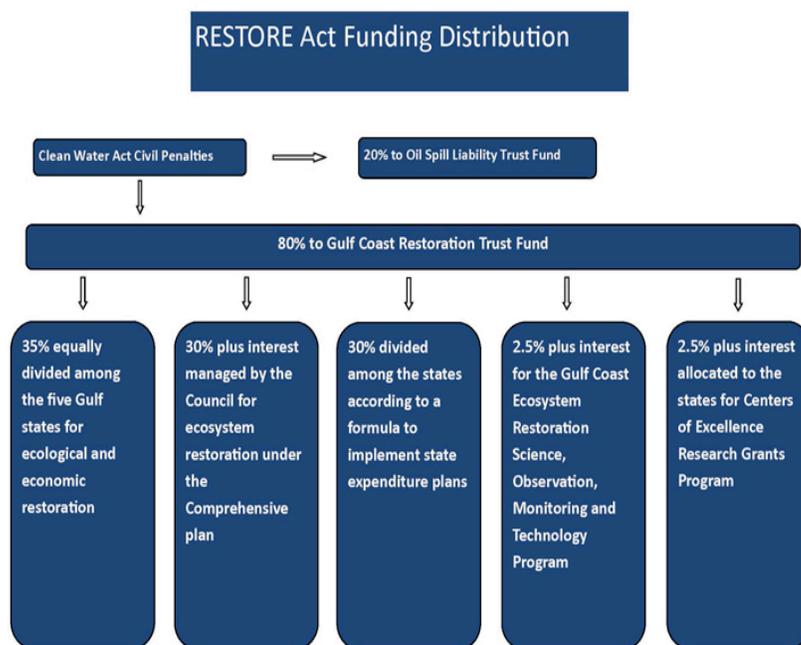
² NPFC MISSION OVERVIEW, NATIONAL POLLUTION FUNDS CENTER, U.S. COAST GUARD, (2008), available at http://www.uscg.mil/npfc/docs/PDFs/Reports/Mission_Overview_2008.pdf.

While the allocation of the Fund is set, the total amount of the Fund is still in question. A federal court must decide how much BP, which has earlier been found criminally negligent in the spill, will have to pay. The federal government has estimated BP'S Clean Water Act penalties at about \$18 billion, while BP has argued the figure is much lower at \$2.7 billion.³ Using the government's estimate, Alabama would have direct and sole control over \$1 billion⁴; with the potential for many more millions authorized by the RESTORE Act's other provisions. It is an incredibly large figure under Alabama's control; to put it in perspective, Alabama's General Fund budget for FY2015 is \$1.84 billion.⁵

The final phase of the BP trial is set for January 20, 2015.⁶ Any penalties that the judge assesses may be appealed, potentially delaying any major programs paid for out of the Fund until 2016. Additionally, administrative responsibility in writing guidelines and rules for dispersal of the money has been slow. This has caused the money already in the Fund, albeit small, but not insignificant, to be delayed.⁷

As mentioned above, each state has control over its portion of the direct component - 7% of the total Fund. In Alabama, the direct component will be managed by the Alabama Gulf Coast Recovery Council (the "Alabama Council"). The Alabama Council also has control over the slightly smaller "spill impact" component (30%), so long as it is approved by the Federal Council, which is made up of one member from each Gulf State and various federal agencies.

Lastly, 5% of the Fund will go to funding scientific research and monitoring programs and the creation of Centers of Excellence in each Gulf State.



³ Dennis Pillion, *Putting a price on Deepwater Horizon: For BP, \$27 billion and counting*, AL.COM, (Apr. 20, 2014), http://www.al.com/news/beaches/index.ssf/2014/04/tracking_the_26_billion_bp_say.html.

⁴ *See id.* It should be noted that the \$27+ billion that has already flowed to the Natural Resources Damage Assessment, cleanup efforts, and personal and business claims are not related to the Fund or state control. Those funds came from criminal penalties from other companies involved with *Deepwater Horizon* and from other earlier payments BP set aside shortly after the spill.

⁵ STATE GENERAL FUND APPROPRIATIONS COMPARISON SHEET FOR FY 2015, *available at* <http://www.lfo.state.al.us/pdfs/FY%202015%20Spreadsheets/SGF/SGF%20FY%202015%20Enacted.pdf>.

⁶ Terry Wade, *Damages phase of BP Gulf spill trial set for January*, REUTERS, (Apr. 22, 2014), <http://www.reuters.com/article/2014/04/22/us-bp-spill-idUSBREA3L1X020140422>.

⁷ Michael Finch II, *Lawmakers say federal government too slow in carrying out RESTORE Act*, AL.COM, (July 29, 2014), http://www.al.com/business/index.ssf/2014/07/lawmakers_say_federal_governme.html.

PROJECT GUIDELINES

Any number of interested groups can submit projects; many already have. In order to maximize the restorative ability of the projects, each submission must adhere to a core set of principles:

- 1. High-impact projects** – As a rule, RESTORE Act funds should not be used for the general operations of state and local government. Alabama, in particular, has a penchant for using one-time infusions of resources to directly or indirectly bolster its operating budgets.⁸ Projects should not be similar to those that are normally funded in the daily course of government. At the same time, significant capital improvements or other long-term projects that have been put off because they might require government borrowing or tax hikes could be paid for up front and in full by use of RESTORE Act funds.
- 2. Cost-benefits analysis** – Many projects may be able to demonstrate a positive impact on the State and region, but they must also articulate how the impact is a superior dollar-for-dollar benefit over other eligible submissions. The Alabama Council should use fair market prices to ascertain the true costs of projects rather than relying on the estimates of the project’s supporters. While immediate “job creation” estimates will undoubtedly be a focal point for measuring the projected impact of projects, the Alabama Council must also evaluate the positive long-term fiscal impact of an improved coastline and various protections that could improve the area’s ability to withstand and quickly recover from future extreme weather events.
- 3. Transparency** – When hundreds of millions or even a billion dollars are available, overpriced projects, cronyism, and graft are potential pitfalls. Thankfully, the Alabama council and the State have demonstrated a dedication to transparency. The public is free to comment on, review, and submit project proposals on alabamacoastalrestoration.org. As the Alabama Council begins reviewing projects, it must be diligent in rooting out potential conflicts of interests and inefficient projects. The website also lists public meetings dates, news, press filings, and contact info. This openness that the Alabama Council and the State have displayed so far must continue once the money begins to flow.
- 4. Connection to the oil spill** – The RESTORE Act’s purpose is to put the Gulf Coast area on better economic and environmental footing than it was prior to the *Deepwater Horizon* spill. It can do that by benefitting those most directly affected by the spill. Therefore, programs must be related to the oil spill, be it Gulf Coast economic development and infrastructure, nurturing beaches, rebuilding fisheries, or creating nature preserves. Areas that were most heavily impacted should have first priority.

⁸ Kyle Whitmire, *Anemic General Fund budget passes House, leaves many state needs short*, AL.COM, (Feb. 26, 2014), http://blog.al.com/wire/2014/02/anemic_general_fund_budget_pas.html.

5. Cooperation – The RESTORE Act allows the Alabama Council to make decisions by simple majority vote.⁹ Situations may arise where competing mayors and county commissioners seek to fund their own local projects at the expense of more effective regional submissions. Alternatively, the Council may simply decide to divide up the money equally between each locale. Under this structure, regardless of whether a larger municipality supports a program or not, all of the leaders on the Council would have an equal vote and could be swayed one way or another on the basis of who is supporting it. Ideally, the Council will seek to fund projects which garner unanimous or near unanimous support.

POTENTIAL PROJECT IDEAS

One of the most difficult challenges posted by the RESTORE Act is thinking outside of the traditional public spending models. Here are a few areas where the Alabama Council might be wise to devote a significant portion of its time.

1. Tourism – In the years since the oil spill, Alabama’s Gulf Coast has continued to shatter records, with 2013 being the third straight year of record-breaking revenue.¹⁰ The tourism that generates hundreds of millions of dollars of revenue and thousands of jobs is crucial to Alabama’s state economy. Another disaster similar to the *Deepwater Horizon* spill could devastate the Gulf’s economy and wreak havoc on local, regional, and state budgets. While simply advertising that Alabama’s beaches are attractive for vacationers, long-term and sustained benefits derived from one-time advertising expenditures are negligible. On the other hand, projects similar to Panama City Beach’s Pier Park could bring sustained economic development. Similarly, Mobile could either incentivize a cruise ship line to utilize their vacant ship terminal or repurpose it for other use that could benefit the area.

2. Fishing – Alabama’s fishing industry is also extremely important to the State’s overall economic well-being, as over 11,000 jobs are directly related to Alabama’s commercial fisheries.¹¹ Those jobs create approximately \$500 million in direct sales and add another \$250 million in indirect impacts. Recreational fishing is also a major driver to Alabama’s economy. Another 8,177 jobs and approximately \$800 million in economic benefits are contributed from recreational fishing and equipment sales on Alabama’s Gulf Coast.¹²

⁹ Bylaws of the Alabama Gulf Coast Recovery Council, Article Four, § 4.02, *available at* <http://www.restorealabama.org/Documents/by-laws.pdf> (last accessed on June 3, 2014).

¹⁰ *Alabama beaches recover from Gulf oil spill to post third consecutive record tourism year*, GULF SHORES & ORANGE BEACH TOURISM, (Feb. 4, 2014), <http://mb.cision.com/Main/3326/9531343/206648.pdf>.

¹¹ FISHERIES ECONOMIES OF THE UNITED STATES, 2011, U.S. DEPARTMENT OF COMMERCE, (Dec. 2012), *available at* <http://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2011/FEUS%202011-Revised.pdf>.

¹² *Id.* at pgs. 122-23.

New regulations issued by NOAA Fisheries allowed recreational fishers in federal waters just nine days this summer, down from 28 days in 2013, to catch the popular sport fish red snapper.¹³ The effect of the regulation could be particularly hard on charter boat captains, deckhands, and those whose jobs depend on a longer red snapper season, especially since Alabama's waters extend only three miles into the Gulf. RESTORE Act funds could be used to further study the red snapper, provide more accurate data to their numbers in the Gulf, and allow for a more consistent length for the season. Additionally, funds could be used to create a system of large artificial reefs where juvenile red snappers and other smaller fish can grow and replenish depleted fish stocks, allowing for longer seasons and ultimately more money into Alabama's economy.

Moreover, the widespread replanting of mussels, oysters, and sea grass beds could also benefit fishermen and the environment alike. Oysters filter harmful nitrogen, from fertilizer runoff out of the water. A study by Dr. Timm Kroeger of the Nature Conservancy looked at two small scale - 3.6 miles total - oyster bed restorations in Mobile Bay and found that the local economic output would increase by about \$500,000 a year and create seven jobs related to the fishery.¹⁴

Further, the oyster beds provide a buffer to wave height and energy, limiting the effects of damaging coastal erosion along Mobile Bay, which has a medium to very high vulnerability to erosion.¹⁵ Though many acres have been restored since the spill, the RESTORE Act's objectives and resources allow for a large-scale state-wide restoration and replanting of oyster beds. The effect could have sustained and long-term effects on not only creating jobs along Alabama's Gulf Coast, but also provides key environmental benefits.

3. Flood Protection - Alabamians have purchased approximately 38,000 flood insurance policies in the Mobile and Baldwin County area.¹⁶ Creating new retention ponds and storm water systems and improving upon existing infrastructure would save governments money from future clean-up costs and save residents money via lower flood insurance premiums. FEMA created a tiered Community Rating System (CRS) that determines the amount that a resident pays for flood insurance, the higher the classification, the higher the discount. For each classification an area moves up in the CRS, a 5% reduction in flood insurance premiums is provided for those living in a special flood zone hazard area (SFHA) with smaller increments of reduction for those living in preferred risk areas.¹⁷

¹³ Jeff Dute, *Gulf recreational red snapper season reduced to 9 days*, AL.COM, (May 14, 2014), http://www.al.com/sports/index.ssf/2014/05/gulf_recreational_red_snapper.html#incart_river_default.

¹⁴ Timm Kroeger, *Dollars and Sense: Economic Benefits and Impacts from two Oyster Reef Restoration Projects in the Northern Gulf of Mexico*, THE NATURE CONSERVANCY, (May 2012), <http://www.nature.org/ourinitiatives/regions/northamerica/oyster-restoration-study-kroeger.pdf>.

¹⁵ *Id.* at vii.

¹⁶ *NFIP Policyholders: Total Number of Subsidized Policies by State and County*, FEDERAL EMERGENCY MANAGEMENT AGENCY, (Dec. 2012), <http://fema.maps.arcgis.com/home/webmap/viewer.html?webmap=32d0531895a8423fb9aa1813bca56e00>.

¹⁷ *National Flood Insurance Program Community Rating System*, FEDERAL EMERGENCY MANAGEMENT AGENCY, (May, 2014), <http://www.fema.gov/national-flood-insurance-program-community-rating-system>.

Most of Alabama’s coastal cities have relatively low classification ratings. The two highest are Orange Beach, which is a Class 7, providing a 15% discount for residents who live in a SFHA, and Baldwin County, which is a Class 6 and provides a 20% discount.¹⁸ A large-scale regional approach to improving flood protection will result in even more savings throughout the region, saving residents money on premiums and also attracting more business and development. Because much of the immediate areas near the coastline are rated “high risk” flood zones, (Beach/Perdido Blvd. which stretches along much of Baldwin County’s coastline, for instance) a decrease in premiums could result in more savings.¹⁹

CREDIT POINTS	CLASS	PREMIUM REDUCTION SFHA*	PREMIUM REDUCTION NON-SFHA**
4,500+	1	45%	10%
4,000 – 4,499	2	40%	10%
3,500 – 3,999	3	35%	10%
3,000 – 3,499	4	30%	10%
2,500 – 2,999	5	25%	10%
2,000 – 2,499	6	20%	10%
1,500 – 1,999	7	15%	5%
1,000 – 1,499	8	10%	5%
500 – 999	9	5%	5%
0 – 499	10	0	0

*Special Flood Hazard Area
**Preferred Risk Policies are available only in B, C, and X Zones for properties that are shown to have a minimal risk of flood damage. The Preferred Risk Policy does not receive premium rate credits under the CRS because it already has a lower premium than other policies. The CRS credit for AR and A99 Zones are based on non-Special Flood Hazard Areas (non-SFHAs) (B, C, and X Zones). Credits are: classes 1-6, 10% and classes 7-9, 5%. Premium reductions are subject to change.

According to the National Flood Insurance Program, Alabamians in a “standard” risk zone with \$250,000 of coverage pay about \$2,000 per year in flood insurance premiums, with those in high risk zones paying much more.²⁰ For each 5% cost reduction of those 38,000 flood insurance policies in Mobile and Baldwin Counties, a minimum of \$3.8 million per year would remain in the pockets of Alabama property and business owners. If the entire region was able to gain an additional 15% reduction, \$11 million annually would be saved on flood insurance.²¹ Moreover, for every dollar spent on mitigation activities, society is saved an average of \$4.²² Reducing business interruptions, specifically from the loss of utilities, can have the largest return on investment.²³

¹⁸ *Community Rating System*, FEDERAL EMERGENCY MANAGEMENT AGENCY, (May, 2014), http://www.fema.gov/media-library-data/1398878892102-5cbcaa727a635327277d834491210fec/CRS_Communities_May_1_2014.pdf.

¹⁹ Flood Zone Maps, FEMA MAP SERVICE CENTER, <https://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1> (type in Baldwin County, Alabama, and then click on the individual plots near the coastline).

²⁰ *Policy Rates*, NATIONAL FLOOD INSURANCE PROGRAM, (May 18, 2014), https://www.floodsmart.gov/floodsmart/pages/residential_coverage/policy_rates.jsp.

²¹ Author’s calculation. 5% of \$2000 is \$100. Multiplied by 38,000 policies = \$3.8 million.

²² *Natural Hazard Mitigation Saves: An Independent Study to Assess the Future Savings from Mitigation Activities*, MULTHAZARD MITIGATION COUNCIL, (2005), http://c.ymcdn.com/sites/www.nibs.org/resource/resmgr/MMC/hms_vol1.pdf

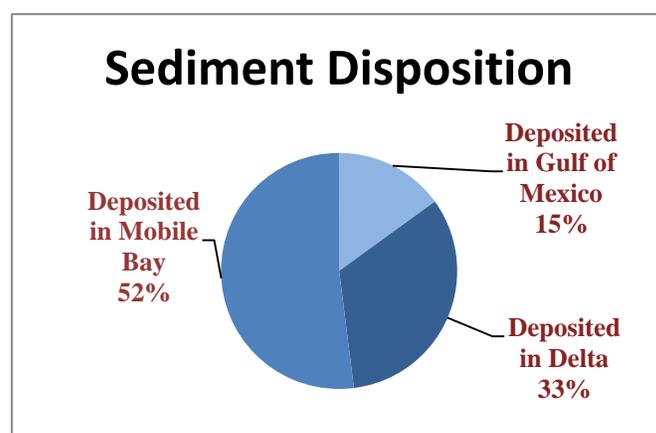
²³ Adam Rose, Keith Porter, Nicole Dash et al., *Benefit-Cost Analysis of FEMA Hazard Mitigation Grants*, NATURAL HAZARDS REVIEW, (Nov. 2007), http://research.create.usc.edu/cgi/viewcontent.cgi?article=1014&context=published_papers.

Data from FEMA shows that the City of Mobile's CRS rating has been rescinded. Using RESTORE Act funds to reinstate their rating could make areas near the water in Mobile more attractive to manufacturing and development. Some of the projects include elevation certificates, educational outreach, flood data maintenance, and implementing heightened construction regulations. The guide to CRS ratings also notes that a comprehensive flood management plan can result in extra credit for the communities. Not only is this sound economic and environmental policy, but it will put money directly back into the community.

4. Sewer and Septic Control – On April 29-30, 2014, heavy rainstorms struck the Gulf Coast, resulting in widespread flooding. Much of the Gulf Coast is flat and many residences and businesses rely on septic tanks for waste rather than sewer systems. As a consequence, during heavy rainfall and hurricanes, septic tanks often flood. After the April 2014 rainstorms, nearly half a million gallons of raw sewage flooded into the streets and waterways in Mobile and Baldwin Counties.²⁴ Many millions more gallons overflowed in neighboring communities along the Gulf Coast during the same time.

The raw sewage that flows after heavy rains or hurricanes is of particular concern for two reasons. First, there are obvious health concerns for humans. The sewage may find its way into reservoirs used for drinking water. It is also a magnet for bacteria and disease-carrying organisms when left to stagnate in the Gulf heat. Second, the sewage impacts fish and birds near the coastlines and, for a short time, can change the ecology of habitats by causing more algae growth. The Alabama Council should develop a plan that pinpoints the areas with septic tanks most prone to overflowing, especially those at or near sea level, and create either natural or artificial barriers to protect the delicate environmental balance in the area.

5. Dredging & Beach Nourishment – Mobile Bay is one of the busiest shipping ports in America, moving over 55 million tons in 2012.²⁵ Alabama's port system is responsible for nearly 130,000 jobs total.²⁶ Each year, 4.85 million metric tons of sediment enter the Mobile Bay watershed. However, only about 15% ever makes it to the Gulf of Mexico because 33% is deposited in the Mobile-Tensaw Delta and 52% in Mobile Bay.²⁷ Precise dredging can cut down on the need to dredge annually, and new techniques may result in better environmental outcomes for the organisms that live in Mobile Bay.²⁸



²⁴ Cassie Fambro, *Sewage overflows cause health concerns in Mobile, Baldwin Counties*, AL.COM, (May 1, 2014), http://blog.al.com/live/2014/05/sewage_overflows_cause_health.html.

²⁵ *Tonnage of Top 50 U.S. Water Ports*, US DEP'T OF TRANSPORTATION, (2013), http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_57.html.

²⁶ *Port Facts*, ALABAMA STATE PORT AUTHORITY, (2014), <http://www.asdd.com/portfacts.html>.

²⁷ *National Estuary Program Coastal Condition Report*, US ENVIRONMENTAL PROTECTION AGENCY, (June, 2007), http://water.epa.gov/type/oceb/nep/upload/2007_05_09_oceans_nepccr_pdf_nepccr_nepccr_gom_parte.pdf.

Expanding and improving upon Alabama's navigable rivers and port infrastructure can be a selling point for the State to attract new business developments. As one of the Alabama Council members is the CEO of Alabama Port Authority, there should be already a working relationship in place with the Mobile Bay National Estuary Program.

Similarly, Gulf beach nourishment could be beneficial. Having wider beaches lessens the risk of further land loss, protects structures on the coast, and also protects public infrastructure like roads or power lines from potential storm damage.²⁹ It may also create more areas for turtle and bird nests and help develop protective sand dunes.³⁰

The Council is, of course, not restricted to those five project areas. Alabamians will no doubt bring innovative and creative ways to restore our shorelines and Gulf region to the Council's attention. Regardless, the Council must give equal scrutiny to each project, whether it is a \$3 million or a \$300 million project.

CONCLUSION

It has been more than four years since the *Deepwater Horizon* spill occurred, but Alabama's Gulf Coast has not fully healed. Though all early indications signal that the Alabama Council appears very capable of properly managing Alabama's share of the Fund, vulnerabilities still exist. Alabama leaders must make the most of this opportunity. The projects must be chosen wisely and once projects have been funded, proper oversight and vigilance will be needed. All Alabama residents have a stake in this process. If handled in a responsible manner, the RESTORE Act could bring a lasting impact to the State's economy and environment.

²⁸ *Sediment Dynamics in Mobile Bay, Alabama: Development of an Operational Sediment Budget*, MOBILE BAY NATIONAL ESTUARY PROGRAM, Abstract, (Mar. 2013),

http://www.mobilebaynep.com/images/uploads/library/mobile_bay_sediment_budget_final_report_plus_appendices_032013.pdf.

²⁹ *Beach Nourishment: A Guide for Local Government Officials*, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, <http://www.csc.noaa.gov/archived/beachnourishment/html/human/socio/types.htm> (last visited on June 3, 2014).

³⁰ *Id.*