

MEMORANDUM

Subject: Summary of RESTORE Act Provisions

This memorandum is a summary of key provisions in the “RESTORE Act,” a subtitle¹ in surface transportation reauthorization legislation (“MAP-21”) enacted on July 6, 2012.²

The RESTORE Act establishes the Gulf Coast Restoration Fund in the General Treasury. Eighty percent of any Clean Water Act (CWA) Section 311³ penalties paid by responsible parties in connection with the 2010 *Deepwater Horizon* oil spill will provide the revenues for the fund.⁴ Amounts in the fund will be available for expenditure without further appropriation.

However, to date, no such penalties have been assessed. The potential magnitude, scope, and applicability of this funding mechanism are discussed below.

Administration—Secretary of the Treasury

The act directs the Secretary of the Treasury to promulgate implementing regulations concerning trust fund deposits and expenditures. Based on this and other provisions, the act appears to give the Secretary of the Treasury the authority to determine how much money from the trust fund should be expended each fiscal year. In the provisions of the act that concern fund distributions, the act includes the phrase: “Of the total amounts made available in any fiscal year from the Trust Fund ...” Another section gives the Secretary authority to stop expending funds to particular entities (e.g., states), if the Secretary determines funds are not being used for prescribed activities.

¹ Division A, Title I, Subtitle F.

² Moving Ahead for Progress in the 21st Century Act (MAP-21, P.L. 112-141). For more information on this legislation and related issues, see CRS Report R42445, *Surface Transportation Reauthorization Legislation in the 112th Congress: MAP-21, H.R. 7, and H.R. 4348—Major Provisions*, coordinated by Robert S. Kirk.

³ 33 U.S.C. §1321.

⁴ Unless specifically addressed otherwise, the Miscellaneous Receipts Act (31 U.S.C. §3302(b)) provides that all court, or administratively imposed, penalties are paid to the U.S. Treasury. The underlying statutory provisions of the Oil Spill Liability Trust Fund (OSLTF) effectively override this general provision by transferring Clean Water Act Section 311 penalties (among others) into the OSLTF. Thus, the RESTORE Act diverts potential penalty revenues from the OSLTF. For further information, see CRS Report R41679, *Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill*.

Funding Levels Uncertain

The amount of revenue that would be available to finance the Gulf Coast Restoration Fund is uncertain. Multiple factors could play a role in the magnitude of potential revenue.

CWA Section 311 authorizes certain civil judicial penalties to the owner, operator, or person in charge of a vessel, onshore facility, or offshore facility for violations of that provision. A civil judicial penalty applies to a violation of the CWA prohibition on discharging oil into navigable waters of the United States.⁵ The monetary penalty for this violation may be up to \$37,500 per day of violation, or up to \$1,100 per barrel discharged. If the violation is deemed a result of gross negligence or willful misconduct, the penalty is not less than \$140,000 for the violation, nor more than \$4,300 per barrel discharged.⁶ No such negligence determination has been made in connection with the 2010 oil spill.

According to the most recent estimate from the federal government, the 2010 oil spill resulted in a discharge of approximately 206 million gallons (4.9 million barrels) in the Gulf of Mexico.⁷ However, the responsible parties are reportedly disputing this estimate.⁸ Moreover, an estimated 17% of the 4.9 million barrels did not enter the Gulf environment, but was directly recovered from the wellhead by BP. It is unknown whether this portion of the oil will be counted in a potential CWA penalty determination.

The \$1,100 to \$4,300 per-barrel range is the basis of the oft-cited judicial penalty range for the 2010 *Deepwater Horizon* oil spill: \$4.5 billion to \$21.5 billion.⁹ The low end of this range is achieved by multiplying 4.1 million barrels (amount of discharge after removing the 17% directly captured by BP) by \$1,100/barrel. The upper end of the range is achieved by multiplying 4.9 million barrels (total discharge amount) by the maximum penalty of \$4,300/barrel, which presumes a determination of either gross negligence or willful misconduct.

In addition, when determining the amount of the judicial penalty, CWA §311(b)(8)¹⁰ states that “the Environmental Protection Agency (EPA) Administrator, the Secretary [of Homeland Security],¹¹ or the court, as the case may be,” must consider the following factors:

1. the seriousness of the violation or violations,

⁵ 33 U.S.C. §1321(b)(3). Other potential violations include failure without sufficient cause to carry out a removal order by the President; and failure to comply with the National Contingency Plan.

⁶ Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note) to ensure that inflation over a long period does not erode the deterrent force of a penalty ceiling. Through a rulemaking process, EPA has adjusted (for inflation) the maximum penalties on several occasions. In a December 1996 rule (61 *Federal Register* 69360, December 31, 1996), EPA increased the per barrel penalties from \$1,000/barrel and \$3,000/barrel to \$1,100/barrel and \$3,300/barrel (the higher amounts for gross negligence). These amounts applied between January 30, 1997, through March 15, 2004. The gross negligence penalty was increased to \$4,300/barrel in a 2004 rulemaking (69 *Federal Register* 7121, February 13, 2004), going into effect March 15, 2004. A table documenting these changes is in 40 C.F.R. Section 19.4.

⁷ Federal Interagency Solutions Group, Oil Budget Calculator Science and Engineering Team, *Oil Budget Calculator: Deepwater Horizon-Technical Documentation*, November 2010. See also CRS Report R41531, *Deepwater Horizon Oil Spill: The Fate of the Oil*, by Jonathan L. Ramseur.

⁸ See e.g., Steven Mufson, “BP lawyers challenge government’s size estimate of Gulf of Mexico oil spill,” *Washington Post*, December 4, 2010.

⁹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President, January 2011, p. 211.

¹⁰ 33 U.S.C. § 1321(b)(8).

¹¹ The Coast Guard is part of the Department of Homeland Security.

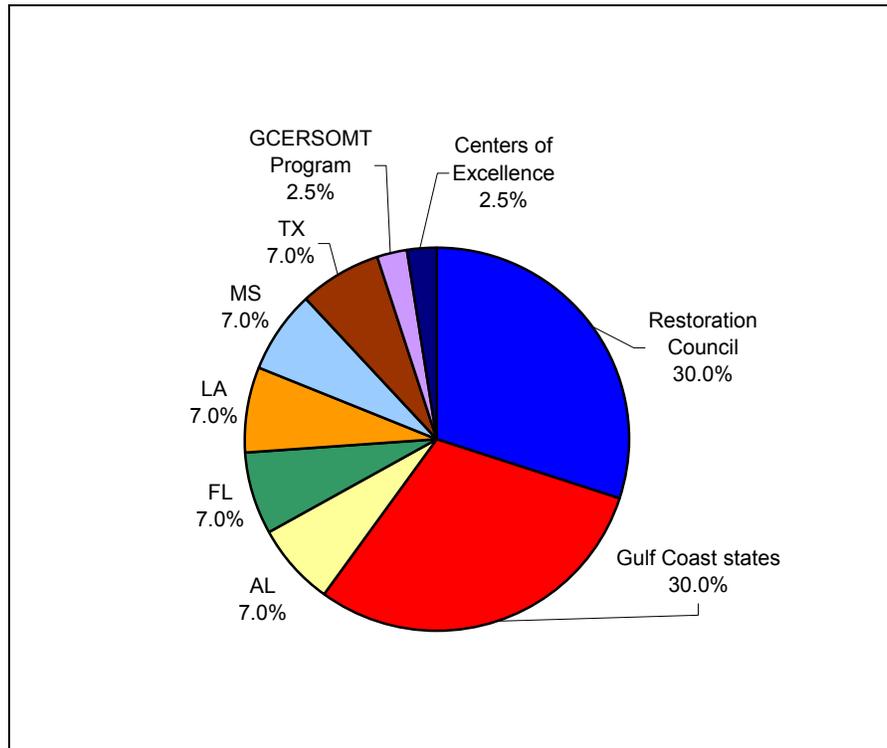
2. the economic benefit to the violator, if any, resulting from the violation,
3. the degree of culpability involved,
4. any other penalty for the same incident,
5. any history of prior violations,
6. the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge,
7. the economic impact of the penalty on the violator, and
8. any other matters as justice may require.

Therefore, the judicial penalty for the incident could be less than the low end of the above range (\$4.5 billion), even if gross negligence or willful misconduct is determined. The **Appendix** to this memorandum contains a table that provides some CWA civil penalty data for past oil spills within EPA's jurisdiction. The data indicate that, for many oil spills, the federal government agreed to a CWA penalty settlement at per-barrel rates well below the maximum authorized by the CWA. However, in some instances, the settlements approached the maximum authorized penalty amount. For example, in a 2011 settlement concerning a 2007 oil spill from a BP pipeline in Alaska, the parties settled for a penalty of \$20 million, a rate of \$4,042/barrel.

Funding Distribution and Authorized Uses

The RESTORE Act would distribute monies from the Gulf Coast Restoration Fund to various entities through multiple processes. All of the funds—not counting authorized administrative activities—would support activities in one or more of the five Gulf of Mexico states. The majority of the funds (65%) is allocated directly to the states (or political subdivisions), with certain conditions. The different fund allotments and their conditions are discussed below and illustrated in **Figure 1**.

Figure I. RESTORE Act Funding Distribution
Does Not Include Distribution of Interest Earned



Source: Prepared by CRS.

Notes: The GCERSOMT Program refers to the Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology Program established by the RESTORE Act.

35%—Equal Shares to the Five Gulf States

The largest portion of the fund (35%) would be divided equally among the five Gulf of Mexico states: Alabama, Florida, Louisiana, Mississippi, and Texas. The act has further requirements for specific distributions to political subdivisions in Florida and Louisiana. In Florida, 75% of its share will be distributed to the “8 disproportionately affected counties.” In Louisiana, 30% of its share goes to individual parishes based on a statutory formula.

The act stipulates that the state (or county) funding must be applied toward one or more of the following 11 activities:

1. Restoration and protection of the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region.
2. Mitigation of damage to fish, wildlife, and natural resources.
3. Implementation of a federally approved marine, coastal, or comprehensive conservation management plan, including fisheries monitoring.
4. Workforce development and job creation.
5. Improvements to or on state parks located in coastal areas affected by the Deepwater Horizon oil spill.

6. Infrastructure projects benefitting the economy or ecological resources, including port infrastructure.
7. Coastal flood protection and related infrastructure.
8. Planning assistance.
9. Administrative costs (limited to not more than 3% of a state's allotment).
10. Promotion of tourism in the Gulf Coast Region, including recreational fishing.
11. Promotion of the consumption of seafood harvested from the Gulf Coast Region.

To receive its share of funds, a state must meet several conditions, including a certification (as determined by the Secretary of the Treasury) that, among other things, funds are applied to one of the above activities and activities are selected through public input. In addition, states must submit a multiyear implementation plan, documenting funded activities.

30%—Gulf Coast Ecosystem Restoration Council

The act distributes 30% of its trust fund monies to a newly created Gulf Coast Ecosystem Restoration Council. The Council is comprised of high level officials from six federal agencies and the governor (or his/her designee) from each of the five Gulf states. Based on its Comprehensive Plan, the Council will finance ecosystem restoration activities in the Gulf Coast region.

30%—Unequal Shares to the Five Gulf States Disbursed by the Council

The act directs the Council to disburse 30% of the trust fund monies to the five Gulf states. The Council is to develop a distribution formula based on criteria listed in the act. In general, the criteria involve a measure of shoreline impact; oiled shoreline distance from the *Deepwater Horizon* rig; and coastal population. CRS is not aware of an authoritative source that has estimated how much each state would receive under these criteria.

To receive funding, each state must submit a plan for approval to the Council. State plans must document how funding will support one or more of the 11 categories listed above. However, only 25% of a state's funding can be used to support infrastructure projects in categories 6 and 7 above.¹²

2.5%—Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology (GCERSOMT) Program

The act establishes the Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology (GCERSOMT) program, funded by 2.5% of monies in the trust fund. The National Oceanic and Atmospheric Administration (NOAA) Administrator will implement the program, which will support marine research projects that pertain to species in the Gulf of Mexico.

¹² The act allows states to spend more than 25% of their funding on infrastructure if the state certifies the projects will meet particular conditions.

2.5%—Centers of Excellence

The act disburses 2.5% of monies in the trust fund to the five Gulf states to establish—through a competitive grant program—“centers of excellence.” The centers would be nongovernmental entities (including public or private institutions) in the Gulf Coast Region.

Interest Earned by the Fund

Finally, interest earned by the trust fund would be distributed as follows:

- 50% would fund the Gulf Coast Ecosystem Restoration Council, so it can “carry out the Comprehensive Plan.”
 - 25% would provide additional funding for the Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology program mentioned above.
 - 25% would provide additional funding for the centers of excellence research grants mentioned above.
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Appendix. Additional Information

Oil Spill Civil Penalty Data

CRS is not aware of a comprehensive data source that describes oil spills (particularly the volume discharged) and associated CWA civil penalties. The data in **Table A-1** were compiled largely from two EPA sources:

- EPA Cases and Settlements: an EPA website¹³ that describes selected oil spill incidents and associated penalties, including Consent Decrees for certain cases, and
- EPA's Enforcement and Compliance History Online (ECHO):¹⁴ a searchable database of enforcement activity for multiple environmental statutes, including the CWA.

In general, the oil spills cover incidents that were settled between 2000 and 2011. The actual spill (or spills), in many of the cases, occurred much earlier. As these are EPA data sources, the spills listed in **Table A-1** cover spill sources that fall within EPA's jurisdiction (generally, the inland zone). Except for the 2007 *Cosco Busan* spill, none of the incidents is associated with vessel spills.¹⁵ Due to time constraints, CRS was unable to locate similar data from the Coast Guard, which might provide further information for spills in the coastal zone, capturing data for vessels and offshore facilities.

The CWA civil penalty data are captured in the **Table A-1** column labeled "Penalty Amount Transferred to OSLTF." For some incidents, this amount included penalties for discharge violations as well as other penalties, such as violations of Spill Prevention, Control, and Countermeasure (SPCC) requirements. Whenever possible (based on the available information), such non-discharge violations were excluded, but often this level of precision was not possible.

The data in the **Table A-1** column labeled "Penalty Per Barrel" were calculated by CRS, based on frequent interest in this figure. **Table A-1** also includes data regarding Supplemental Environmental Projects (SEP) when applicable.¹⁶

¹³ See <http://cfpub.epa.gov/compliance/cases/>.

¹⁴ See <http://www.epa-echo.gov/echo/index.html>.

¹⁵ The source of these data was a U.S. Department of Justice website that provides proposed Consent Decrees. Once the comment period is complete, the Consent Decrees are removed. See http://www.justice.gov/enrd/Consent_Decrees.html.

¹⁶ For more background information regarding SEPs and related policies, see CRS Report RL34384, *Federal Pollution Control Laws: How Are They Enforced?*, by Robert Esworthy.

Table A-I. Selected Oil Spills and Associated Clean Water Act Civil Judicial Penalty Settlement Amounts

Listed in Order of Settlement Date (2000 – 2011)—in Current Dollars

Vessel or Company Name	Spill Source	Date of Incident(s)	Settlement Date	Spill Volume (Barrels)	Penalty Amount Transferred to OSLTF ^a	Calculated Penalty Per Barrel ^c	Maximum Per-Barrel Penalty Range ^b	Supplemental Environmental Project Value
<i>Cosco Busan</i> ^d	Cargo ship	2007	2011	1,262	\$4,200,000	\$3,328	\$1,100 - \$4,300	\$500,000
British Petroleum Exploration (Alaska)	Pipeline	2006	2011	5,071	\$20,500,000	\$4,042	\$1,100 - \$4,300	
Meridian Pipeline	Pipeline	2007	2010	738	\$504,000	\$683	\$1,100 - \$4,300	
Central Oregon and Pacific Railroad	Rail cars	2004	2010	100	\$262,000	\$2,620	\$1,100 - \$4,300	
Plains All American Pipeline	Pipeline	2004-2007	2010	6,500	\$3,200,000	\$492	\$1,100 - \$4,300	
Pacific Pipeline	Pipeline	2005	2010	3,381	\$1,300,000	\$385	\$1,100 - \$4,300	
Plantation Pipeline	Pipeline	2002-2006	2009	810	\$520,000	\$642	\$1,100 - \$4,300	
Anadarko	Oil production facility	2003-2008	2009	30,952	\$1,100,000	\$36	\$1,100 - \$4,300	
Citation Oil and Gas Corp	Oil production facility	2004	2009	595	\$300,000	\$504	\$1,100 - \$4,300	
Explorer Pipeline	Pipeline	2007	2009	50,000	\$3,300,000	\$66	\$1,100 - \$4,300	

Vessel or Company Name	Spill Source	Date of Incident(s)	Settlement Date	Spill Volume (Barrels)	Penalty Amount Transferred to OSLTF ^a	Calculated Penalty Per Barrel ^c	Maximum Per-Barrel Penalty Range ^b	Supplemental Environmental Project Value
Magellan	Pipeline	1999-2006	2008	17,000	\$5,300,000	\$312	\$1,100 - \$4,300	
Valero	Refinery	2006	2008	3,405	\$1,700,000	\$499	\$1,100 - \$4,300	\$300,000
Puget Sound Energy	Oil storage	2006	2008	429	\$472,000	\$1,101	\$1,100 - \$4,300	
TE Products	Pipeline	2007	2007	50,000	\$2,900,000	\$58	\$1,100 - \$4,300	
Kinder Morgan	Pipeline	2004-2005	2007	4,786	\$5,300,000	\$1,107	\$1,100 - \$4,300	
Nacelle Land and Management	Oil storage	1994	2006	1,190	\$100,000	\$84	\$1,100 - \$4,300	
Mid-Valley	Pipeline	2005	2006	6,238	\$1,400,000	\$224	\$1,100 - \$4,300	
Sunoco	Pipeline	2000	2005	4,571	\$2,700,000	\$591	\$1,100 - \$4,300	
Genesis	Pipeline	1999	2004	8,000	\$500,000	\$63	\$1,100 - \$4,300	\$2,000,000
Colonial Pipeline	Pipeline	1980-2000	2003	34,524	\$34,000,000	\$985	\$1,100 - \$3,000	
Olympic Pipeline and Shell Pipeline	Pipeline	1999	2003	5,476	\$7,500,000	\$1,370	\$1,100 - \$3,000	

Vessel or Company Name	Spill Source	Date of Incident(s)	Settlement Date	Spill Volume (Barrels)	Penalty Amount Transferred to OSLTF ^a	Calculated Penalty Per Barrel ^c	Maximum Per-Barrel Penalty Range ^b	Supplemental Environmental Project Value
Alaska Railroad	Rail cars	1999	2003	286	\$150,000	\$525	\$1,100 - \$3,000	\$25,000
ExxonMobil	Pipeline	1991	2002	1,786	\$600,000	\$336	\$1,100 - \$3,000	
Torch Operating	Oil production facility	2002	2002	1,119	\$179,000	\$160	\$1,100 - \$3,000	
Chevron	Oil production facility	2001	2002	643	\$375,000	\$583	\$1,100 - \$3,000	
Monongahela Power Company	Electricity substation facility	1998	2001	452	\$205,000	\$453	\$1,100 - \$3,000	
Eureka Pipeline	Pipeline	1993-1994	2001	400	\$867,000	\$2,168	\$1,100 - \$3,000	
Arco	Pipeline	1998	2001	3,857	\$805,000	\$209	\$1,100 - \$3,000	\$145,000
Koch Industries	Pipeline and facilities	1990-1997	2000	71,429	\$15,000,000	\$210	\$1,100 - \$3,000	\$5,000,000
Amoco	Pipeline	1997	2000	5,405	\$1,100,000	\$204	\$1,100 - \$3,000	

Source: Prepared by CRS; data from several sources, including EPA Cases and Settlements at, <http://cfpub.epa.gov/compliance/cases/>, which provides Consent Decrees for some incidents; EPA's Enforcement and Compliance History Online database, at <http://www.epa-echo.gov/echo/index.html>.

Notes:

- a. For some oil spills, the penalties include violations for oil discharge, as well as other provisions, such as the Spill Prevention, Control, and Countermeasure requirements. Whenever possible (based on the available information), such non-discharge violations were excluded, but often this level of precision was not possible.

- b. The range in this column reflects the maximum penalties in place during the settlement year. The higher figure would be for spills determined to be the result of gross negligence or willful misconduct. Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. §2461 note) to ensure that inflation over a long period does not erode the deterrent force of a penalty ceiling. Through a rulemaking process, EPA has adjusted (for inflation) the maximum penalties on several occasions. In a December 1996 rule (61 *Federal Register* 69360, December 31, 1996), EPA increased the per barrel penalties from \$1,000/barrel and \$3,000/barrel to \$1,100/barrel and \$3,300/barrel (the higher amounts for gross negligence). These amounts applied between January 30, 1997, through March 15, 2004. The gross negligence penalty was increased to \$4,300/barrel in a 2004 rulemaking (69 *Federal Register* 7121, February 13, 2004), going into effect March 15, 2004. A table documenting these changes is in 40 C.F.R. Section 19.4.
- c. The data in this column were calculated by CRS. For some incidents, the penalties were split between the OSLTF and the applicable state. The above data only include penalty amounts that were transferred to the OSLTF.
- d. The source of this data was a U.S. Department of Justice website that provides proposed Consent Decrees. Once the comment period is complete, the Consent Decrees are removed. See http://www.justice.gov/enrd/Consent_Decrees.html.