

**BOARD OF COUNTY COMMISSIONERS  
ESCAMBIA COUNTY, FLORIDA**



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September 22, 2014

Via Federal eRulemaking Portal: [www.regulations.gov](http://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:

Please accept Escambia County's formal comments on the Gulf Coast Ecosystem Restoration Council's Interim Final Rule Regarding RESTORE Act Spill Impact Component Planning Allocation ("Council IFR"). As an active participant of the Gulf Consortium in Florida, Escambia County is concerned that the current Council IFR does not provide a foundation for successful development of the State Expenditure Plan ("SEP") as required by the RESTORE Act. As stated in our previous comments regarding rules and guidance on other related matters, we believe that the public should be given an opportunity to review and comment on all Council guidance and rules consistent with the Administrative Procedure Act.<sup>1</sup>

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<sup>1</sup> 5 U.S.C. Subchapter II

On August 15, 2014, Treasury published its Interim Final Rule for the Gulf Coast Restoration Trust Fund ("Treasury IFR") and the Direct Component Guidance and Application to Receive Federal Financial Assistance (August 2014) (the "Guidance Document"). While we understand that Treasury oversees and distributes funds for two (2) components and the Council oversees and distributes funds for three (3) components of Trust Funds, many provisions in the Treasury IFR and the Council IFR overlap and should be consistent. Of concern to Escambia County is the fact that numerous provisions in the Treasury and Council IFR actually conflict (even those applicable to the Spill Impact Component) and this does not create clarity for compliance purposes. We understand that the intent of this short IFR is provide funds for development of the SEPs, but there are several issues that require clarification to be consistent with the Treasury IFR, the RESTORE Act and applicable law as outlined herein.

### **1. Eligible Entities to Draft the SEP and Initial Grant Process**

Up until this time, the Gulf Consortium has been operating off of contributions from the individual 23 Florida county members of the Consortium. The Gulf Consortium is a newly created government entity through Interlocal Agreement pursuant to Florida law (Section 163.01, F.S.). As such, it has no operating budget or ability to raise revenue to pay the expenses necessary to meet the requirements of the RESTORE Act to write the SEP. In all of the other four (4) states receiving funds under the Spill Impact Component, the SEPs are written by existing agencies within the State government or headed by the Governor's Office in that particular state. Without that structure or support, transitioning to an independently functioning entity is critical to the success of the Gulf Consortium in writing its SEP.

The sections regarding "Background" and "This Interim Final Rule" make clear in some places that eligible entities (and the specifically named Gulf Consortium) must submit an application for grant funding to the Council for a specific grant to use the minimum allocation available under the Spill Impact Component for the SEP. In some places in these sections, the language says that the Council IFR facilitates expeditious development of the SEPs by the "Gulf Coast States" and in other places amounts are available to a Gulf Coast State "or eligible entity." The language in these sections and the Council IFR should match in that funds can flow directly to a Gulf Coast State or an eligible entity that is required to write the SEP such as the Gulf Consortium.

In one part of these introductory sections, the language states that those funds are available to a Gulf Coast State, or eligible entity, *for a SEP that funds planning activities only* (rather than a grant). It is unclear what a SEP is that funds "only planning activities." This seems to mean that the Council acts upon an actual SEP rather than a grant application which is contradictory to the notion that funds will be available in the form of a grant to develop a SEP, as indicated in numerous other places in these sections and the Rule itself (§ 1800.20 *stating* that ". . . the Gulf Consortium may apply to the Council for a grant to use the minimum allocation . . ."). This also contradicts the Treasury IFR (*See* §§ 34.203(a), 34.500 & 34.502).

These sections in the Council IFR also refer to the Consortium as the entity designated to prepare the SEP for Florida, but introducing the concept that those funds are available *for any SEP that funds planning activities* could be construed to mean that the State of Florida must have a role in the application for funds to create the SEP. These sections and the Rule itself should be clear that the Gulf Consortium has a direct line to apply for, and receive, grant funds to develop the SEP as required by the RESTORE Act.

## **2. Planning Assistance Grants**

The introductory language, and actual Council IFR sections, introduce new eligible activities not outlined or authorized in the RESTORE Act. These include “planning activities” and “planning purposes” associated with the development of the SEP. The Council IFR introductory sections even define planning activities as those relating solely to the development of a comprehensive SEP, including conceptual design and feasibility studies related to specific projects. For numerous reasons, the Council IFR should be modified to eliminate this terminology including, but not limited to:

- Planning activities and planning purposes are not eligible activities under the RESTORE Act. Planning assistance is the eligible activity authorized in the RESTORE Act.
- The Treasury IFR specifically defines planning assistance much more broadly than planning activities or purposes and that definition applies to Multiyear Implementation Plans as well as State Expenditure Plans.
- Creating this artificial limitation will result in significant challenges to the Gulf Consortium in meeting its obligations under the RESTORE Act to write the SEP.
- Numerous activities defined under planning assistance are necessary for the Gulf Consortium to transition to an independent entity, and not be funded by contributions from the individual underlying 23 Florida counties. These activities are necessary to comply with all the requirements under the Act such as reporting, auditing, setting up systems to review grant applications, award grants, and complete technical analysis to write the SEP.

Creating new types of planning activities or purposes under this Council IFR will result in significant challenges in creating the SEP for all of the eligible entities and States under the Spill Impact Component.

## **3. Pre-Award Costs**

It is unclear why the Council has drawn an arbitrary line in the sand disallowing pre-award costs to be reimbursed prior to August 22, 2014 in §1800.20. The section “This Interim Final Rule” states that, “It also does not include any pre-award costs incurred prior to the date of publication of this Interim Final Rule; any pre-award costs incurred after the date of publication

will be evaluated pursuant to 2 CFR, Part 200.” Additionally, §1800.20 contains the same prohibition.

The Council IFR should clarify that the intent is not to preclude reimbursement of pre-award costs prior to August 22, 2014 *ever*, but to later create a process and criteria under which pre-award costs incurred prior to that date could be recovered consistent with the Uniform Guidance. The Council should also expeditiously set up a process by which those legitimate pre-award costs can be reimbursed quickly. Recovering those costs would provide an entity like the Gulf Consortium the ability to quickly begin operating on its own.

Additionally, such reimbursement is contemplated in the Uniform Guidance. In order to help recipients recover costs expended to date that directly relate to the implementation of eligible activities authorized in the Act and implementing regulations, it would be helpful if the Council included in the IFR, or otherwise through additional Guidance, criteria for determining when pre-award costs can be reimbursed. 2 CFR §200.458 states that, “Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency.”<sup>2</sup> The Gulf Consortium has incurred costs for eligible activities that would have been allowable if incurred after the date of the Federal award and the Council has the authority to approve such costs.

Finally, Escambia County supports the comments submitted by the Gulf Consortium. As a member of the Gulf Consortium, and its current County Chair, it is critically important that the Consortium be given the tools to succeed in the development of the SEP. For any further questions regarding these comments, please do not hesitate to contact myself or Keith Wilkins at 1.850.595.4988.

Sincerely,



Grover C. Robinson, IV  
Escambia County Commissioner  
Chair, Gulf Consortium

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<sup>2</sup> Additionally, 2 CFR §200.308(d)(1) states that “All costs incurred before the Federal awarding agency makes the Federal award are at the recipient’s risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover such costs). While we recognize that pre-award costs are at the recipient’s risk, neither circumstance listed by example (no Federal award received or less than anticipated) is applicable in this circumstance. Federal awards will be received as contemplated tied to the availability of Transocean Settlement funds from 2013-2015.

# County of Monroe

## The Florida Keys



### **BOARD OF COUNTY COMMISSIONERS**

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Mayor Pro Tem, Danny L. Kolhage, District 1  
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Heather Carruthers, District 3  
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September 22, 2014

**Via Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov)**

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Justin R. Ehrenwerth  
c/o US Custom House  
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Interim Final Rule Regarding RESTORE Act Spill  
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Docket Number: 140819111-4111-01***

Dear Mr. Ehrenwerth:

Please accept Monroe County's formal comments on the Gulf Coast Ecosystem Restoration Council's Interim Final Rule Regarding RESTORE Act Spill Impact Component Planning Allocation ("Council IFR"). As an active participant of the Gulf Consortium in Florida, Escambia County is concerned that the current Council IFR does not provide a foundation for successful development of the State Expenditure Plan ("SEP") as required by the RESTORE Act. As stated in our previous comments regarding rules and guidance on other related matters, we believe that the public should be given an opportunity to review and comment on all Council guidance and rules consistent with the Administrative Procedure Act.<sup>1</sup>

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<sup>1</sup> 5 U.S.C. Subchapter II

## 1. Eligible Entities to Draft the SEP and Initial Grant Process

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The sections regarding "Background" and "This Interim Final Rule" make clear in some places that eligible entities (and the specifically named Gulf Consortium) must submit an application for grant funding to the Council for a specific grant to use the minimum allocation available under the Spill Impact Component for the SEP. In some places in these sections, the language says that the Council IFR facilitates expeditious development of the SEPs by the "Gulf Coast States" and in other places amounts are available to a Gulf Coast State "or eligible entity." The language in these sections and the Council IFR should match in that funds can flow directly to a Gulf Coast State or an eligible entity that is required to write the SEP such as the Gulf Consortium.

In one part of these introductory sections, the language states that those funds are available to a Gulf Coast State, or eligible entity, *for a SEP that funds planning activities only* (rather than a grant). It is unclear what a SEP is that funds "only planning activities." This seems to mean that the Council acts upon an actual SEP rather than a grant application which is contradictory to the notion that funds will be available in the form of a grant to develop a SEP, as indicated in numerous other places in these sections and the Rule itself (§ 1800.20 stating that "... the Gulf Consortium may apply to the Council for a grant to use the minimum allocation . . ."). This also contradicts the Treasury IFR (*See* §§ 34.203(a), 34.500 & 34.502).

These sections in the Council IFR also refer to the Consortium as the entity designated to prepare the SEP for Florida, but introducing the concept that those funds are available *for any SEP that funds planning activities* could be construed to mean that the State of Florida must have a role in the application for funds to create the SEP. These sections and the Rule itself should be clear that the Gulf Consortium has a direct line to apply for, and receive, grant funds to develop the SEP as required by the RESTORE Act.

## 2. Planning Assistance Grants

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- Planning activities and planning purposes are not eligible activities under the RESTORE Act. Planning assistance is the eligible activity authorized in the RESTORE Act.
- The Treasury IFR specifically defines planning assistance much more broadly than planning activities or purposes and that definition applies to Multiyear Implementation Plans as well as State Expenditure Plans.
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- Numerous activities defined under planning assistance are necessary for the Gulf Consortium to transition to an independent entity, and not be funded by contributions from the individual underlying 23 Florida counties. These activities are necessary to comply with all the requirements under the Act such as reporting, auditing, setting up systems to review grant applications, award grants, and complete technical analysis to write the SEP.

Creating new types of planning activities or purposes under this Council IFR will result in significant challenges in creating the SEP for all of the eligible entities and States under the Spill Impact Component.

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The Council IFR should clarify that the intent is not to preclude reimbursement of pre-award costs prior to August 22, 2014 *ever*, but to later create a process and criteria under which pre-award costs incurred prior to that date could be recovered consistent with the Uniform Guidance. The Council should also expeditiously set up a process by which those legitimate pre-award costs can be reimbursed quickly. Recovering those costs would provide an entity like the Gulf Consortium the ability to quickly begin operating on its own.

Additionally, such reimbursement is contemplated in the Uniform Guidance. In order to help recipients recover costs expended to date that directly relate to the implementation of eligible activities authorized in the Act and implementing regulations, it would be helpful if the Council included in the IFR, or otherwise through additional Guidance, criteria for determining when pre-award costs can be reimbursed. 2 CFR §200.458 states that, "Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency."<sup>2</sup> The Gulf Consortium has incurred costs for eligible activities that would have been allowable if incurred after the date of the Federal award and the Council has the authority to approve such costs.

Finally, Monroe County supports the comments submitted by the Gulf Consortium. As a member of the Gulf Consortium, and its current County Chair, it is critically important that the Consortium be given the tools to succeed in the development of the SEP. For any further questions regarding these comments, please do not hesitate to contact myself or Keith Wilkins at 1.850.595.4988.

Sincerely,



Lisa Tennyson  
Legislative Affairs Director  
Monroe County, Florida

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<sup>2</sup> Additionally, 2 CFR §200.308(d)(1) states that "All costs incurred before the Federal awarding agency makes the Federal award are at the recipient's risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover such costs). While we recognize that pre-award costs are at the recipient's risk, neither circumstance listed by example (no Federal award received or less than anticipated) is applicable in this circumstance. Federal awards will be received as contemplated tied to the availability of Transocean Settlement funds from 2013-2015.



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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

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

### 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:

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<sup>1</sup> 5 U.S.C. Subchapter II

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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

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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).<sup>2</sup>~~

## 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.

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<sup>2</sup> Text struck through are deletions; text added are underlined.

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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.<sup>3</sup> 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".<sup>4</sup> 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.

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<sup>3</sup> 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.

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

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§ 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.~~

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### 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.<sup>5</sup> 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:

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<sup>5</sup> 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.*

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~~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.

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**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  
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Mr. Chris Holley, Executive Director, Florida Association of Counties  
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