Audit Report

OIG-16-051

RESTORE ACT

Gulf Coast Ecosystem Restoration Council's Records Management System Needs Improvement

July 27, 2016

Office of Inspector General

Department of the Treasury

Contents

Appendices

Abbreviations

APA	Administrative Procedure Act
Clean Water Act	Federal Water Pollution Control Act
Council	Gulf Coast Ecosystem Restoration Council
NEPA	National Environmental Policy Act of 1969 as amended
PEA	Programmatic Environmental Assessment
Plan	Initial Comprehensive Plan
RESTORE Act	Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012
Treasury	Department of the Treasury
Trust Fund	Gulf Coast Restoration Trust Fund

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July 27, 2016

Justin R. Ehrenwerth
Executive Director, Gulf Coast Ecosystem Restoration Council

This report presents the results of our audit of the Gulf Coast Ecosystem Restoration Council's (Council) Programmatic Environmental Assessment (PEA), which was developed to evaluate the potential environmental impacts related to the Initial Comprehensive Plan (Plan). We performed this audit as part of our ongoing oversight of programs, projects, and activities to be funded by the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).[1] Our audit objective was to assess whether the PEA complies with the RESTORE Act, the National Environmental Policy Act (NEPA),[2] as well as applicable provisions of other Federal laws, regulations, and guidance. Appendix 1 provides more detail of our audit objective, scope, and methodology.

In brief, we concluded that the PEA conformed with the RESTORE Act and NEPA; however, we noted weaknesses in certain of the Council's operations related to other Federal requirements. Specifically, the Council's records management system needs improvement. Documentation was either missing or incomplete and what did exist was not organized to facilitate efficient retrieval of information. Furthermore, the Council lacked policies and procedures for maintaining records and it did not timely make all comments received related to the Draft Plan and Draft PEA available to the public as required by the E-Government Act.[3] Accordingly, we recommend that the Executive Director establish and implement appropriate records management policies and

[1] Pub. L. 112-141, 126 Stat. 588-607 (July 6, 2012)
[2] 42 U.S.C. § 4321 et seq.
[3] 44 U.S.C. § 101 et seq.

procedures to document the decision making process and ensure transparency of the Council's operations. The records management policies and procedures should address the handling and public disclosure of comments related to proposed rulemaking.

In a written response, the Council Executive Director concurred with the recommendation to establish and implement appropriate records management policies and procedures. Furthermore, management's response commented that the audit covered Council activities primarily in 2013, shortly after the enactment of the RESTORE Act and creation of the Council. At that time, the Council was administratively housed within the Department of Commerce and had very limited staffing and financial resources. Since audit fieldwork, the Council has become a fully-functioning independent agency, has hired a professional staff, and has established organizational processes, procedures, and controls. Management also stated that it took certain actions with respect to missing records. Management's response, if implemented as stated, meets the intent of our recommendation. We have summarized the response in the recommendation section of this report. Management's response is included in its entirety as appendix 2.

Background

The RESTORE Act established the Gulf Coast Restoration Trust Fund (Trust Fund) within the Department of the Treasury (Treasury) to provide funds for environmental and economic restoration of the Gulf Coast region that was damaged by the 2010 Deepwater Horizon oil spill. Deposits into the Trust Fund will be comprised of 80 percent of all civil and administrative penalties paid after July 6, 2012, under the Federal Water Pollution Control Act (Clean Water Act).[4] The Council is responsible for 60 percent of the RESTORE Act funds as the administrator of the Council-Selected Restoration Component and the Spill Impact Component. The RESTORE Act also required that the Council develop an Initial Comprehensive Plan to oversee the overall environmental and economic restoration of the Gulf Coast region. Details of the RESTORE Act are provided in appendix 3.

[4] 33 U.S.C. § 1251 et seq.

Initial Comprehensive Plan and Programmatic Environmental Assessment

The RESTORE Act required the Council to publish the Plan no later than July 6, 2013. The Initial Comprehensive Plan was to include: (1) a list of projects or programs authorized prior to July 6, 2012, that have not yet commenced, the completion of which would further the purposes and goals of the act; (2) a description of the manner in which amounts from the Trust Fund projected to be made available to the Council for the succeeding 10 years will be allocated; and (3) subject to available funding, a prioritized list of specific projects and programs to be funded and carried out during the 3-year period immediately following the date of publication of the Plan.

While developing the Plan, the Council was creating the Plan's companion PEA to ensure compliance with NEPA and other applicable environmental laws and statutes. NEPA is a law designed to support compliance with environmental laws and regulations. NEPA requires Federal agencies to consider the potential environmental consequences of their "proposed actions", as well as a range of reasonable alternatives, before deciding whether and in what form to take an action. At the time the Council was developing the Plan and PEA, litigation was still ongoing with BP Exploration & Production Inc. and the Council faced many uncertainties with regard to the timing and scale of the RESTORE Act programs. Due to these uncertainties, the Council ultimately decided to publish the Plan without including specific programs and projects.[5] With no projects and programs in the Plan, the Council decided to change the stated "proposed action" of the PEA from implementation of programs and projects to the creation of the Plan. Development of a programmatic-level NEPA document, under the above circumstances is not required but is considered a best practice for programs of the scale and duration similar to that described in the Council's Plan. A Council official told us that even though the PEA was not required, the Council voluntarily

[5] *RESTORE Act: Gulf Coast Ecosystem Restoration Council Faces Challenges in Completing Initial Comprehensive Plan,* OIG-14-003 (October 25, 2013), reported that the Council published its Initial Comprehensive Plan but did not include all of the elements required by the RESTORE Act.

completed the PEA to demonstrate its commitment to complying with environmental laws and regulations.

The Council issued the Draft Plan and Draft PEA for public comment in the Federal Register on May 23, 2013. Following publication of the Draft Plan and Draft PEA, the Council held six public comment meetings prior to the close of the comment period for both documents on July 8, 2013. The Council approved the Plan and Final PEA on August 28, 2013.

Results of Audit

We concluded that the PEA conformed with the RESTORE Act and NEPA. Specifically, the RESTORE Act required the development of the Plan, and the PEA was developed to evaluate the potential environmental impacts related to the Plan. The PEA complied with NEPA in that it addressed the required aspects of the Council's "proposed action" which was creation of the Plan.[6] That said, we noted weaknesses in the Council meeting other Federal requirements related to records management and accessibility.

Finding — Records Management System Needs Improvement

Records Management

Council's documentation related to the Plan and the PEA was either missing or incomplete and what did exist was not organized to facilitate efficient retrieval of information. Furthermore, the Council lacked policies and procedures for maintaining records. The Federal Records Act[7] requires each agency to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential

[6] NEPA, specifically 42 U.S.C. § 4332(c), requires the responsible official of major Federal actions significantly affecting the quality of the human environment to include in proposals a detailed statement on: (1) the environmental impact of the "proposed action"; (2) any adverse environmental effects which cannot be avoided, should the proposal be implemented; (3) alternatives to the "proposed action"; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the "proposed action" should it be implemented.
[7] 44 U.S.C. § 3101 et seq.

transactions of the agency designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

The Council was missing the following records, which are typically part of NEPA-related action and decision files: (1) organizational governance and standard operating procedures, (2) technical and programmatic references cited in the PEA, and (3) documentation of the analysis and disposition of individual comments received related to the Plan and PEA. In addition, we found that the Council's records did not include a summary for one of the public comment meetings related to the Draft Plan and Draft PEA, although summaries for other meetings were present.[8]

Records related to the Plan and the PEA were primarily comprised of comments received from the public in response to the Federal Register publication of the Draft Plan and Draft PEA on May 29, 2013. Council staff posted the comments on the Council's external website as well as retained them internally. Although the Council summarized its disposition of comments overall, it did not maintain any records documenting its dispositions to individual public comments. Furthermore, there were no written procedures describing how comments should be sorted, inventoried, and ultimately addressed in the PEA. The Executive Director told us that the official "Response to Public Comments" document, made available on the Council's website, represents the Council's disposition of comments; notes and analyses on the disposition of specific comments were not maintained after the comments were reviewed and categorized. Additionally, some records supporting the Plan and PEA were housed in individual staff email accounts. The retention of those records in multiple locations and within individual email accounts does not allow for efficient document retrieval and creates a risk of potential loss or corruption of data.

NEPA does not mandate any specific recordkeeping practices; however, the NEPA process is subject to judicial challenge under

[8] The Council conducted eight public engagement sessions during the development process for the draft Plan and PEA, as well as six public comment meetings during the review period for the draft documents.

the Administrative Procedure Act (APA).[9] NEPA specifies the process by which Federal agencies should review and document impacts on the environment, incorporating other laws, statutes, executive orders, and regulations, which specify the threshold criteria for pollutants and other environmental and natural resource considerations. Since NEPA is procedural, Federal agency NEPA actions are generally considered administrative actions, and therefore, judicial review of NEPA cases is brought to the courts under the APA. The APA enables individuals and groups to challenge actions or decisions made by Federal agencies if they believe an agency did not appropriately follow its procedures, or that procedures were improperly implemented. Judicial review of administrative actions is generally confined to the administrative record compiled by an agency, including development of NEPA documents. Accordingly, a strong records management system is critical to demonstrate compliance with requirements and withstand judicial challenges.

When asked about the issues identified with the records management, a Council official told us the primary cause was that there are no documented policies or procedures for recordkeeping by individual Council staff or contractors, and no person or group was designated to handle the recordkeeping system. Council officials also attributed the incomplete records to the fact that the Council was a new Federal entity with limited resources operating under time constraints imposed by the RESTORE Act for issuing the Plan and the PEA.

Records Accessibility

As another matter, we noted issues regarding the public accessibility to the Council's records. Although the Council attempted to make all comments on the Draft Plan and Draft PEA available, an administrative error resulted in stakeholders not having timely access to all comments. Only 24,000 of the 41,000 comments received by the Council could be found on the Council's

[9] 5 U.S.C. § 500 et seq.

website as of May 2013.[10] The E-Government Act requires that to the extent practicable, agencies shall make all submissions made by interested parties through the rulemaking process publically available online.

When asked about the discrepancy in comments, the Executive Director told us that former staff made an error posting form letters from non-governmental organizations to the Council's website. Once the error was brought to his attention, he ensured that the correct form letters were promptly posted. Council officials noted that limited resources and the tight deadlines involved with developing and finalizing the Plan and PEA contributed to the administrative error. Another contributing factor was the fact that the Council outsourced its website hosting and the Council had limited access to updating the website.

As a result of the posting error, the public was unable to timely review all comments made on the Draft Plan and Draft PEA.

Recommendation

We recommend that the Executive Director establish and implement appropriate records management policies and procedures to document the decision making process and ensure transparency of the Council's operations. The records management policies and procedures should address the handling and public disclosure of comments related to proposed rulemaking.

Management Response

The Council Executive Director concurred with the recommendation to establish and implement appropriate records management policies and procedures. The response noted that the policies and procedures have been implemented and address records management generally, and specifically the handling and

[10] Comments that were missing from the original posting were submitted from one organization, the National Wildlife Federation. Of the approximately 17,000 comments that were missing, fewer than 200 were unique modifications to the National Wildlife Federation form letter. Form letters are used by non-governmental organizations to encourage their members to voice support or opposition to Federal proposed rulemaking.

public disclosure of comments related to proposed rulemaking and other Council actions requiring public notice and comment.

Furthermore, management's response commented that the audit covered Council activities primarily in 2013, shortly after the enactment of the RESTORE Act and creation of the Council. At that time, the Council was administratively housed within the Department of Commerce and had very limited staffing and financial resources. Since audit fieldwork, the Council has become a fully-functioning independent agency, has hired a professional staff, and has established organizational processes, procedures, and controls.

Management also stated that it took certain actions with respect to missing records: [our report identified that the Council was missing the following records, which are typically part of NEPA-related action and decision files: (1) organizational governance and standard operating procedures, (2) technical and programmatic references cited in the PEA, and (3) documentation of the analysis and disposition of individual comments received related to the Plan and PEA.] The response provided the following:

- in 2014 the Council adopted written organizational Standard Operating Procedures that include detailed governance processes and procedures;
- NEPA regulations do not require or contemplate the maintenance of separate copies of publicly-available materials when referenced to in an environmental impact statement;
- the Council archives all public comments, Council responses, and records of public meetings in connection with Council actions for which public comment is sought; and
- the Council created an Environmental Compliance Library on the Council website.

OIG Comment

Management's response, if implemented as stated, meets the intent of our recommendation.

* * * * * *

We appreciate the courtesies and cooperation extended by your staff as we inquired about these matters. Major contributors to this report are listed in appendix 4. A distribution list for this report is provided as appendix 5. If you have any questions, you may contact me at (202) 927-5762 or Eileen Kao, Audit Manager, at (202) 927-8759.

/s/

Deborah L. Harker
Director, Gulf Coast Restoration Audit

As part of our oversight of programs, projects, and activities authorized by the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act), we conducted an audit of the Gulf Coast Ecosystem Restoration Council's (Council) Programmatic Environmental Assessment (PEA). The objective of our audit was to assess whether the PEA complies with the RESTORE Act, the National Environmental Policy Act (NEPA), as well as applicable provisions of other Federal laws, regulations, and guidance.

To accomplish our objective, we contracted with Booz Allen Hamilton Inc., a consulting firm with environmental service expertise, to assist us with this effort. We conducted fieldwork at the Department of Commerce's office in Washington, D.C., between October 2013 and June 2014, which comprised the following steps.

- We reviewed applicable Federal laws, regulations, and procedures related to the Council and its development of the PEA, including:
  - RESTORE Act of 2012;
  - NEPA of 1969 as amended;
  - Council on Environmental Quality NEPA Regulations, 40 CFR Part 1500-1508, November 28, 1978;
  - Federal Records Act of 1950 as amended;
  - Administrative Procedure Act of 1946 as amended; and
  - Freedom of Information Act of 1967 as amended.

- We reviewed the Council's website and key documents, including:
  - The Initial Comprehensive Plan and accompanying PEA, August 28, 2013, and
  - Public comments made on the Draft Initial Comprehensive Plan and Draft PEA.

- We performed the following steps to a sample of comments on the Draft Initial Comprehensive Plan and the Draft PEA.
  - We reviewed the comments received on the Council's website and categorized them into two categories described below.

- Form Letters used by non-governmental organizations to encourage their members to voice support or opposition to a rulemaking.
- Individual Responses comprised of comments received by mail, email, and "Council's Planning, Environmental, and Public Comment Portal".

- We selected a random sample of comments from the Form Letter and Individual Responses categories. We reviewed a sample of 20 comments from the Form Letter Category and 40 comments from the Individual Responses Category. We did not project results to the entire population.

- We interviewed key Council officials responsible for developing the PEA.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

GULF COAST ECOSYSTEM RESTORATION COUNCIL

MEMORANDUM FOR: Deborah L. Harker
Director, Gulf Coast Restoration Audit

FROM: Justin R. Ehrenwerth
Executive Director, Gulf Coast Ecosystem Restoration Council

DATE: July 20, 2016

SUBJECT: Response to the Treasury Office of Inspector General Report "Audit of the Gulf Coast Ecosystem Restoration Council's Programmatic Environmental Assessment"

Thank you for the opportunity to review the Treasury Office of the Inspector General's (OIG) above-entitled report, which was developed to evaluate the potential environmental impacts related to the Gulf Coast Ecosystem Restoration Council's (Council) Initial Comprehensive Plan and the related Programmatic Environmental Assessment (PEA) as part of OIG's ongoing oversight of programs, projects, and activities to be funded by the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).

We are pleased to concur with the finding that the PEA complied with the RESTORE Act and with the National Environmental Policy Act (NEPA). Since the Council membership includes major federal regulatory agencies, Council staff was able to call on extensive environmental compliance expertise in preparing the PEA, and will use such resources to continuously improve the efficiency and transparency of the Council's environmental compliance processes.

We concur with the recommendation that we institute effective records management policies and procedures. The Council has established and implemented a suite of formal Council administrative policies and procedures (a copy of which we have provided to you), including a records management policy.

With respect to the records management audit findings, we would generally note that your review covered Council activities primarily in 2013, beginning shortly after enactment of the RESTORE Act and the creation of the Council. At that time the Council was administratively housed within the Department of Commerce, had not yet become independently operational and had very limited staffing and financial resources.

Memorandum For: Deborah L. Harker
From: Justin R. Ehrenwerth
July 1, 2016
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Subsequent to the OIG's fieldwork—which took place from October 2013 to June 2014—the Council has become a fully functioning independent agency, has hired a professional staff and has established appropriate organizational processes, procedures and controls.

With respect to OIG's "Records Management" discussion on page 4 of the Audit letter and the documents referenced in "(1)" on that page, in 2014 the Council adopted written organizational Standard Operating Procedures that include detailed governance processes and procedures.

With respect to the documents referenced in "(2)" on page 4, the technical and programmatic references cited in the PEA are publicly-available reference materials. NEPA regulations do not require or contemplate the maintenance of separate copies of such publicly-available materials when referenced and linked to in environmental impact statements.

With respect to the documents referenced in "(3)" on page 4 and the documentation of public comments and Council responses, the Council now uses the Department of Interior's Planning, Environment and Public Comment (PEPC) system to assist in managing these processes. The Council archives all public comments, Council responses and records of public meetings in connection with Council actions for which public comment is sought.

With respect to the Records Management comment regarding environmental compliance documentation, the Council has created an Environmental Compliance Library on the Council website that will include all compliance documents for all activities on Funded Priorities Lists and other Council-administered RESTORE activities.

In conclusion, we concur with OIG's recommendation that the Executive Director establish and implement appropriate records management policies and procedures, and have done so; such policies and procedures address records management generally, and specifically the handling and public disclosure of comments related to proposed rulemaking and other Council actions requiring public notice and comment.

We appreciate OIG's review of the Council's work as we move forward with our mission to restore the Gulf.

As of April 2016, the Trust Fund had received approximately $816 million as a result of the government's settlement with the Transocean defendants and $127 million as a result of its settlement with Anadarko Petroleum Corporation.[1] In July 2015, BP Exploration & Production Inc. agreed to settle with the Federal government and the Gulf Coast States. A U.S. District Judge from the Eastern District of Louisiana approved the terms of the settlement on April 4, 2016, where BP Exploration & Production Inc. agreed to pay $20.8 billion. Of the $20.8 billion, $5.5 billion plus interest relates to civil and administrative penalties under the Clean Water Act. Of this amount, $4.4 billion (80 percent) will be deposited into the Trust Fund over 15 years.

The RESTORE Act allocates money in the Trust Fund to five components, as follows: (1) 35 percent will be made available to the Gulf Coast States (Alabama, Florida, Louisiana, Mississippi, and Texas) in equal shares under the Direct Component; (2) 30 percent plus 50 percent of interest earned on the Trust Fund will be made available for grants under the Council-Selected Restoration Component; (3) 30 percent will be made available for grants under the Spill Impact Component; (4) 2.5 percent plus 25 percent of interest earned on the Trust Fund will be made available to the Science Program Component; and (5) 2.5 percent plus 25 percent of interest earned on the Trust Fund will be made available to the Centers of Excellence Research Grants Program Component. Treasury's Office of the Fiscal Assistant Secretary is responsible for administering the Direct Component and the Centers of Excellence Research Grants Program Component. The National Oceanic and Atmospheric Administration is responsible for administering the Science Program Component. The Council is responsible for administering the Council-Selected Restoration Component and the Spill Impact Component.

[1] On February 19, 2013, the civil settlement between the Department of Justice and Transocean defendants (Transocean Deepwater Inc., Transocean Offshore Deepwater Drilling Inc., Transocean Holdings LLC, and Triton Asset Leasing GmbH) was approved. Among other things in the settlement, the Transocean defendants paid a $1 billion civil penalty plus interest. Of this amount, $800 million plus interest was deposited into the Trust Fund. On December 16, 2015, the civil settlement between the Department of Justice and Anadarko Petroleum Corporation was approved. Anadarko agreed to civil penalties of $159.5 million. Of this amount, approximately $127 million has been deposited into the Trust Fund.

Deborah L. Harker, Audit Director
Eileen J. Kao, Audit Manager
Marco T. Uribe, Auditor-in-Charge
Usman Abbasi, Auditor
Kajuana A. Britt, Referencer

Gulf Coast Ecosystem Restoration Council

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