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Preliminary Views on the Draft Early Restoration Programmatic Environmental Impact Statement and Phase III Early Restoration Plan

The Deepwater Horizon Natural Resource Damage Assessment Trustees (Trustees) released the Draft Early Restoration Programmatic Environmental Impact Statement (PEIS) and Phase III Early Restoration Plan (ERP) for public review and comment on December 6, 2013.[1] The comment period is open for 75 days, closing on February 19, 2014. The document includes the PEIS for the $1 billion Early Restoration program outlined in an April 2011 Framework Agreement between BP and the Trustees. This funding is intended to support early restoration of injured natural resources and lost public uses of those resources. The full Natural Resource Damage Assessment is ongoing, and thus early restoration is not intended to fully address the long-term impacts to natural resources by the BP Deepwater Horizon oil disaster.

Ocean Conservancy has evaluated the components of the Early Restoration PEIS and Phase III ERP and offers the following assessment:

On track

- An adequate range of restoration strategies for addressing injuries to marine resources or related services from the BP oil disaster.

Needs Improvement

- A holistic, ecosystem-wide vision and articulation for restoration;
- Greater specificity of known or potential natural resource injuries and lost public (recreational) uses for better transparency and more effective public involvement in restoration;
- Rationale for providing BP 1.5 or 2.0 credits for every dollar spent on human use projects; and
- Consistent disclosure of the cost and details of monitoring for individual projects.

Requires significant work

- A commitment to long-term monitoring (>25 years) at the program level for tracking resource recovery.

[1] 78 Fed. Reg. 73555 (December 6, 2013).

Draft Early Restoration Plan and Programmatic Environmental Impact Statement (PEIS)

The stated purpose of Early Restoration is to accelerate meaningful restoration under the Oil Pollution Act (OPA) of 1990, by identifying restoration that contributes to making the environment and the public whole for injury to or loss of natural resources and services resulting from the disaster.[2] Restoration activities need to produce benefits that are related, or have a nexus, to natural resources injured and services lost.

To meet this purpose and need, the Trustees have proposed a Draft Early Restoration Plan and Programmatic Environmental Impact Statement, which considers programmatic alternatives to restore natural resources, ecological services and recreational use services injured or lost as a result of the BP oil disaster. It also evaluates the environmental consequences of the restoration alternatives and projects under the National Environmental Policy Act (NEPA),[3] both at the overarching programmatic level and at the individual project level. This includes a description of the environment, an analysis of impacts that will result from early restoration, and an analysis of cumulative impacts of proposed alternatives. Through this PEIS, the Trustees should be able to fully evaluate and compare project types and specific project proposals. The Early Restoration Plan and PEIS should be used as a critical planning tool to consider impacts of early restoration projects in Phase III as well as in future phases, and how those projects will address oil spill injuries. This PEIS covers only the early restoration funded from the $1 billion commitment from BP. A broader PEIS is in development for the full Natural Resource Damage Assessment.

The Phase III ERP includes 44 specific Early Restoration projects, expected to cost approximately $627 million. Nine ecological projects comprise $396.9 million (63%) of this total, and 35 recreational projects comprise the remaining $230 million (37%). If all Phase III projects are approved, the remaining funding from the $1 billion Early Restoration program will be approximately $303 million. Projects not identified for inclusion in the Final Phase III ERP and PEIS may continue to be considered for inclusion in future NRDA restoration plans.

Project Types

Trustees determined that 12 project types meet the criteria defined by NRDA regulations and the Framework Agreement.[4] Project types include:

1. Create and Improve Wetlands
2. Protect Shorelines and Reduce Erosion
3. Restore Barrier Islands and Beaches
4. Restore and Protect Submerged Aquatic Vegetation
5. *Conserve Habitat**

*Italics indicate project types not included in the Phase III ERP. However, birds and turtles were included in Phase II of Early Restoration.

[2] NOAA, Deepwater Horizon Natural Resource Damage Assessment, *Deepwater Horizon* Oil Spill; Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement (December 2013), *available at* http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/phase-iii/

[3] 42 U.S.C. § 4321 et seq.

[4] Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill (April 20, 2011).

6. Restore Oysters
7. *Restore and Protect Finfish and Shellfish**
8. *Restore and Protect Birds**
9. *Restore and Protect Sea Turtles**
10. Enhance Public Access to Natural Resources for Recreational Use
11. Enhance Recreational Experiences
12. Promote Environmental and Cultural Stewardship, Education and Outreach

Trustees considered additional project types but determined that they were not appropriate for Early Restoration. These include projects that would protect and restore marine mammals and the deep benthic environment.[5] The explanation of this omission indicates that more information is needed to understand the injuries to these resources before they can determine appropriate restoration methods.

Restoration Alternatives Considered in the PEIS

According to NEPA, the alternatives analysis must "present environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."[6]

There are four programmatic alternatives considered:

1. No action;
2. Contribute to Restoring Habitats and Living Coastal and Marine Resources (includes project types 1-9);
3. Contribute to Providing and Enhancing Recreational Opportunities (includes project types 10-12); and
4. (Preferred alternative) Contribute to Restoring Habitats, Living Coastal and Marine Resources, and Recreational Opportunities (includes project types 1-12).

If considering the 44 proposed Phase III projects as a whole, it may be reasonable to conclude that the ERP achieves the preferred fourth alternative, because it includes projects that *Contribute to Restoring Habitats, Living Coastal and Marine Resources, and Recreational Opportunities*. However, in the Environmental Review for individual projects, Trustees conclude that if a project meets the standard for alternative 3, that project also meets the standard for alternative 4 even when the project does not include any components included in alternative 2. This conclusion is unclear and requires additional explanation.

[5] NOAA, Deepwater Horizon Natural Resource Damage Assessment, *Deepwater Horizon* Oil Spill; Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement (December 2013), Chapter 5, Section 2.
[6] 40 C.F.R. § 1502.14.

Early Restoration Project Selection Process

The Trustees identify a four-step process for selecting projects for Early Restoration, which includes: (1) project solicitation, (2) project screening, (3) negotiation with BP and (4) public review and comment.

Trustees invited the public to provide restoration project ideas through a variety of mechanisms, including submitting project ideas through web portals. However, they indicate seven websites where the public could go to submit and/or review projects (see sidebar for a list of the websites). It is unreasonable to assume that the average member of the public could participate meaningfully in the restoration process if it requires them to visit seven different websites in order to obtain information and submit projects. Further, until recently, websites for Alabama and Mississippi did not exist and thus did not include lists of projects being considered for Early Restoration. In addition, without sufficient information about the Trustees' decision-making process and a better understanding of the types of injuries or lost public uses documented, it is difficult for the public to identify appropriate projects.

Websites for Public Information about Injury and Restoration

National Oceanic and Atmospheric Administration
http://www.gulfspillrestoration.noaa.gov/

Department of Interior
http://www.fws.gov/home/dhoilspill/

Texas Parks and Wildlife Department
http://www.tpwd.state.tx.us/landwater/water/environconcerns/damage_assessment/deep_water_horizon.phtml/

Louisiana Oil Spill Coordinator's Office
http://losco-dwh.com/

Mississippi Department of Environmental Quality
http://www.restore.ms/

Alabama Department of Conservation and Natural Resources
http://www.outdooralabama.com/nrdaprojects/

Florida Department of Environmental Protection
http://www.dep.state.fl.us/deepwaterhorizon/default.htm

In selecting projects, the Trustees considered criteria per NRDA regulations[7] and the Framework Agreement.[8] The Trustees have also considered additional criteria that, although not legally mandated, were used in the screening process. These criteria require that, in evaluating projects, the Trustees must:

- Take into account how quickly a given project is likely to begin producing environmental benefits;
- Seek a diverse set of projects providing benefits to a broad array of potentially injured resources;
- Focus on types of projects with which they have significant experience, allowing Trustees to predict costs and likely success with a relatively high degree of confidence and making it easier to reach agreement with BP on the offsets attributed to each project, as required by the Framework Agreement; and
- Give preference to projects that are closer to being ready to implement.

As Trustee recipients of Early Restoration funding, The Department of Interior (DOI) and the National Oceanic and Atmospheric Administration (NOAA) focused on projects that would benefit resources under their trust. DOI focused on projects that would take place both on and off DOI-managed lands,

[7] 15 C.F.R § 990.53(a)(2).
[8] Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill (April 20, 2011), para. 6.

and NOAA prioritized projects that would restore injuries specifically to NOAA trust resources, both nearshore and offshore. The Trustees also considered a variety of Gulf restoration reports, research, management plans and related restoration efforts in the region.[9]

Injuries Assessment

The BP oil disaster injured a wide range of natural resources, including pelagic, deep-water, nearshore, and coastal resources, as well as human uses, such as fishing, boating and other recreational activities. However, the Trustees' description of the Gulf of Mexico ecosystem in chapter 3 is incomplete, as acknowledged in a disclaimer included in the PEIS.[10] The description omits the deep-water environment, excluding even corals and benthic habitat. By contrast, the injuries assessment in chapter 4 includes injuries to deep-water benthos and marine species, even though the overall picture in the previous chapter did not include the marine environment.

The Trustees' stated aim is to include only injuries related to the 44 projects contained in the Phase III ERP. While the injuries assessment included most of the published injuries we have seen, there are some injuries that were omitted. Specific information that the public needs in order to evaluate the appropriateness of restoration projects, such as where the injuries occurred, is missing from the assessment.[11] In order to evaluate restoration projects and planning, it is important to know the scale of impact across species, groups of animals and life stages. The public should also have more information on injury to birds, including the types and locations of birds or habitats that were most impacted.

While we understand the need for continued assessment of these injuries toward the full NRDA, the public must have sufficiently detailed information on injuries and lost human uses in order to propose and consider relevant restoration projects. The wide range of injuries demands NRDA restoration strategies that are ecologically comprehensive and representative of the injuries and lost uses they are intended to address. Without a comprehensive view of the Gulf environment and the injured resources, it is difficult to see how this PEIS and Early Restoration plan can be used to meaningfully guide future early restoration decisions, as well as the public review and comment on those decisions.

[9] Gulf Coast Ecosystem Restoration Task Force (GCERTF 2011), Mabus (2010), (Brown *et al*. 2011), (NRCS 2011), (Peterson *et al*. 2011) Gulf Coast Ecosystem Restoration Council's Comprehensive Plan (GCERC 2013), Louisiana's Comprehensive Master Plan for a Sustainable Coast (CPRA 2012) and the Mississippi Coastal Improvements Plan (USACE 2008).

[10] NOAA, Deepwater Horizon Natural Resource Damage Assessment, Deepwater Horizon Oil Spill; Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement (December 2013), Chapter 3, Section 3.

[11] For example, it would be helpful to know where the largest areas of impact occurred for beaches, salt marshes and seagrasses. In section 4.2.3 - Offshore Water Column Fish and Invertebrates, the Trustees mention widespread impacts across this broad resource category, which includes phytoplankton, zooplankton, bacteria, invertebrates and fish.

Issues to be addressed in the Final PEIS

- The Draft ERP/PEIS does not articulate an ecosystem-wide vision for restoration. Understanding that Early Restoration is not intended to compensate fully for injuries, it is still crucial that a comprehensive, regional pathway toward restoration is established to guide project selection. Selecting projects in a piecemeal fashion without consideration of the overall ecosystem is not likely to bring us to full recovery in the future.

- The Draft PEIS does not include a comprehensive review of the Gulf ecosystem and assessment of injuries. It is critical for the public to have a clear understanding of the oil disaster's impacts to natural resources in both the coastal and deep-water environments. With an incomplete picture, it will be difficult for the Trustees to establish a comprehensive approach to restoration, or for the public to decide whether chosen restoration alternatives will truly address the injuries that have occurred. We recommend adding the deep-water environments (e.g., deep-water soft bottom sediments, deep-water coral reefs and mesophotic coral reefs) to both the habitat section (3.3.1) and the living coastal and marine resources section (3.3.2). We understand that this description was not intended to be comprehensive and inclusive of the entire Gulf, but given the ecological importance of the deep-water environment and its nexus to injury, it is an oversight on the part of the Trustees to omit it in section 3.3.

- The Trustees should provide more detailed information on the specifics of injury to the resources. For example, more information is needed on injured species, such as what types of birds (e.g., marsh birds, colonial water birds or pelagic seabirds) were injured and which habitats were most impacted.

- Project types do not include restoration of marine mammals, pelagic seabirds or habitats, deep-water habitats, or fisheries assessment and management as restoration techniques eligible for Early Restoration funding. While it is understood that the full assessment is ongoing, these restoration strategies should be included in Early Restoration, given the existing and growing body of evidence in scientific literature on oil impacts. For example, published research has reported dolphins in Barataria Bay with compromised health including low weight and increased lung damage,[12] dead or damaged deep-water corals,[13] heavily impacted deep-sea benthic communities,[14] and oiled pelagic sargassum habitats.[15]

- The Trustees should clarify the alternatives analysis to explain how individual projects should be evaluated based on the four alternatives. The Trustees should evaluate the alternatives to

[12] Schwacke, L., *et al*. 2013. Health of common bottlenose dolphins (*Tursiops truncatus*) in Barataria Bay, Louisiana, following the Deepwater Horizon oil spill. *Environmental Science and Technology*, *48*(1): 93-103.

[13] White, H., *et al*. 2012. Impact of the Deepwater Horizon oil spill on a deep-water coral community in the Gulf of Mexico. *Proceedings of the National Academy of Sciences*, *109*(50): 20303-20308.

[14] Montagna, P. A., *et. al*. 2013. Deep-sea benthic footprint of the Deepwater Horizon blowout. *PLoS ONE*, *8*(8): e70540.

[15] Powers, S. P., *et al*. 2013. Novel pathways for injury from offshore oil spills: direct, sublethal and indirect effects of the Deepwater Horizon oil spill on pelagic *Sargassum* communities. *PLoS ONE*, *8*(9): e74802.

identify potential conflicts among projects and explain what steps they will take to avoid these during project implementation.

- The Draft PEIS does not include programmatic long-term monitoring, beginning with Early Restoration and continuing through the duration of the restoration program. Monitoring is needed to inform the restoration process and to describe how injured resources or lost services will be tracked across all projects inside the oil spill impact zone. The only way to detect injuries and guide future restoration activities is by collecting and analyzing monitoring data. As such, ongoing monitoring of remaining oil and its impacts, ongoing evaluation and adaptive management of restoration strategies and projects, changes in the Gulf ecosystem, and the cumulative impacts of the Early Restoration projects should be included as an essential part of the PEIS/ERP.

- A process is needed to ensure that all Gulf citizens can participate meaningfully. The public should be able to easily access projects under consideration for funding without navigating multiple websites. The public review and comment opportunities for future phases of Early Restoration should occur before negotiations with BP.

Proposed Phase III Early Restoration Projects

The Trustees have proposed 44 projects for Phase III of Early Restoration, costing approximately $627 million. Nine ecological projects comprise $396.9 million (63%) of this total, and 35 recreational projects comprise the remaining $230 million (37%).

The Trustees are evaluating these projects to expedite their implementation and avoid delays that might be incurred by evaluating individual projects through separate NEPA processes. While the environmental analyses included for each project are relatively comprehensive, there are some requirements that are incomplete or in progress. It is unclear whether the public will have an opportunity to comment on compliance and consultation processes noted in section 7.5 prior to publication of the Final PEIS. For example, projects may not be approved until complying with the consultation and permitting requirements of the Marine Mammal Protection Act (MMPA).[16] Any potential interactions with marine mammals ("takes") must be authorized under the MMPA. However, the project descriptions give little to no detail on how the MMPA's requirements will be met, or whether the public will be given notice or opportunity to comment. Additionally, four of the proposed projects or project components are the subject of existing NEPA analyses prepared by other federal agencies and will be adopted by DOI.[17]

In comments previously submitted during the scoping period, Ocean Conservancy recommended that project descriptions should "summarize the relevant injuries or lost uses the restoration actions intend

[16] *See* 16 U.S.C. § 1361 et seq.

[17] NOAA, Deepwater Horizon Natural Resource Damage Assessment, *Deepwater Horizon* Oil Spill; Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement (December 2013), Chapter 7, Section 8.

to address (e.g., nexus to injury), explain what tangible recovery[18] looks like for each project, and estimate the cost and role of monitoring for each project."[19] The Trustees have included an analysis of how each project meets the NRDA and Framework Agreement criteria and an explanation of how the project intends to address injured resources. However, the PEIS fails to adequately identify the nexus to injury for all projects.

The Trustees have also included monitoring information for each project, but these details are incomplete or inconsistent across projects. For example, some project descriptions include the cost of monitoring or collection of baseline conditions at project sites, while others do not. We recommend the Trustees include standardized information on monitoring for all projects. The living shoreline restoration projects in Florida and Alabama include comprehensive descriptions of monitoring cost and activities, which might serve as good templates for other projects.

Further, some projects (such as hatcheries or research/interpretive centers) will require ongoing operation and maintenance. When funding for such activities is not included in the project cost, it is unclear if and how these projects would be funded for long-term operation of facilities. Trustees should include details about the availability of funding for operations and maintenance after the initial project funds are gone, so that they and the public can determine whether these projects will truly be cost-effective and sustainable over the long term. Finally, projects that will build new structures should consider the resiliency and cost-effectiveness of those structures under the threat of storms, flooding and sea level rise. Although climate change is discussed in section 6.10.4, the text merely explains the new Council on Environmental Quality guidance on considering climate change under NEPA. The draft PEIS fails to provide analysis of how climate change will affect proposed actions and how impacts from climate change will be addressed or mitigated at the project level.

Alternative 2 – Ecological restoration

Ecological restoration projects proposed for Phase III include restoration of barrier islands, living shorelines, oyster beds, seagrasses and beach dunes.

Several of the projects appear to meet the criteria and standard of OPA and NRDA,[20] including:

- Louisiana Outer Coast Restoration Projects[21]
- Mississippi Hancock County Marsh Living Shoreline Project
- Alabama Swift Tract Living Shoreline
- Alabama Oyster Cultch Restoration
- Florida Cat Point Living Shoreline Project

[18] Notice of Intent to Prepare a Programmatic Environmental Impact Statement for Phase III Early Restoration Plan and Early Restoration Project Types, and to Conduct Scoping Meetings, 78 Fed. Reg. 33431, 33432 (June 4, 2013).

[19] Ocean Conservancy, Letter submitted to the Deepwater Horizon NRDA Trustee Council, Notice of Intent to Prepare a Programmatic Environmental Impact Statement for Phase III Early Restoration Plan and Early Restoration Project Types, and to Conduct Scoping Meetings, 78 Fed. Reg. 33431, 33432 (August 2, 2013).

[20] Ocean Conservancy is still in the process of assessing all projects. We cannot, at this point, definitively conclude whether these projects meet all criteria of OPA and NRDA.

[21] The Trustees should consider the long-term sustainability of barrier island restoration understanding that these projects could require continual maintenance unless the larger ecosystem stressors causing the continual loss of these islands are addressed.

- Florida Pensacola Bay Living Shoreline Project
- Florida Seagrass Recovery Project
- Florida Oyster Cultch Placement Project

Alternative 3 – Human use restoration

Human use restoration projects proposed for Phase III include projects intended to compensate the public for lost access to natural resources by improving future access through new or improved infrastructure or educational programs designed to enhance their recreational experience. This includes park enhancements, boardwalks, fish hatcheries, beach nourishment, scallop enhancement, boat ramps and fishing piers. A review of previous damage assessment and restoration plans indicates that restoration actions previously approved to address lost or diminished human use or enjoyment of damaged natural resources include public boat ramps, boardwalks, trails, fishing piers and other recreational amenities. These types of projects facilitate public access to and understanding of natural resources and should be appropriately scaled[22] to match the amount of lost service.

Proposed Phase III projects also include artificial reefs, passenger ferries, lodging facilities, and conference and interpretive centers, some of which may be outside of the scope of permissible human use restoration projects under NRDA. Human use projects must have a clear nexus to an injured natural resource and must benefit the same user group that was impacted. To truly enhance the use of the natural resources, the Trustees must make restoring the injured resource *itself* the first priority. It is unclear how projects that provide lodging, build roads or rebuild facilities previously damaged in hurricanes meet this standard. The Trustees should be careful not to depart from the spirit and letter of the law and regulations regarding natural resource damages.

Environmental and Socioeconomic Consequences of Phase III Projects

The Trustees include an analysis of environmental consequences for each alternative and project type. This analysis aims to define the environmental impacts, both negative and positive, on each resource and the cumulative impacts of projects on the environment and on human communities. The Trustees recognize potential adverse impacts of some marine recreational use projects, such as artificial reefs and hatcheries on marine finfish populations and fisheries (e.g., overfishing, genetics or disease) and suggest best management practices that may be used to minimize impacts. These best practices should be required rather than merely suggested.

While many of the adverse impacts are adequately addressed, the Trustees must also consider how recreational use projects intended to increase public access to resources may also:

- Increase threats to wildlife (some endangered) and habitat from human traffic in environmentally sensitive areas;
- Increase auto traffic in and around project areas, such as state parks, potentially causing maintenance problems from increased use of roadways and exacerbating anthropogenic impacts to natural areas; and

[22] 15 C.F.R § 990.53(c)(2) ("Trustees must consider compensatory restoration actions that provide services of the same type and quality, and of comparable value as those injured.").

- Increase pressure on marine fish populations, in particular those that have been identified as overfished or undergoing overfishing.

The Trustees must ensure that these impacts are avoided or mitigated prior to project approval. For example, improving the public's access to fish stocks via new boat ramps could increase fishing pressure, which could be monitored and addressed by expanding recreational fishing surveys under the Marine Recreational Information Program.

In the analysis of Phase III projects, the Trustees address environmental justice in minority and low-income communities under Executive Order 12898.[23] Attainment of environmental justice is consistent with the goals and policies under NEPA,[24] and it is important that the Trustees considered the impacts to these communities when addressing the overall impacts of projects. However, the analysis fails to consider unintended consequences. For example, the Trustees find recreational use projects will likely have benefits to local economies, but the analysis of this alternative fails to consider the adverse impact to low-income populations from decreased access to natural resources from projects resulting in private ownership of lodging and fees for facility use. Such projects cannot make the public whole if low-income members of the public are barred from entry due to financial restrictions.

It is also important that Trustees included identification and preservation of cultural resources in the analysis. While many of the tribal communities along the Gulf Coast are not federally recognized (and thus not included in consultation with the Trustees with regard to this effort), the Trustees should include, acknowledge and consult with state-recognized tribes concerning the protection of cultural and historical resources.

The Trustees acknowledge that the potential for job creation benefiting the local economy from ecological and recreational projects depends on the use of local labor and contractors. To ensure these benefits for the region, implementing agencies should give preference to local workers and contractors.[25]

Issues of concern

- Although each project includes performance monitoring plans that contain the duration and types of monitoring activities, more detail and standardization across projects is needed. There is no information about how monitoring will be used to ensure the project achieves the level of benefits and value calculated for the offsets given to BP.

- The offsets that BP is receiving for lost recreational use projects are a benefit-to-cost ratio of either 1.5:1 or 2:1. There is no explanation of how these offsets are calculated or why BP is receiving the higher offset ratio for some projects. The benefits are not quantified for individual projects or even in aggregate across recreational use projects. No rationale for these ratios is offered in the Draft

[23] Executive Order No. 12898 (Feb. 11, 1994), 59 Fed. Reg.7630 (Feb. 16, 1994).
[24] Council of Environmental Quality, Environmental Justice: Guidance under the National Environmental Policy Act, (December 1997).
[25] Both Louisiana and Mississippi passed laws in 2012 requiring local workers be granted preference in employment on contracts related to restoration activities (*see* LA HB 720 and MS SB 2622).

Phase III ERP and PEIS. Furthermore, the amount of lost recreational use is not quantified, and thus the public cannot know if the monetized offsets given to BP are proportional to those losses.

- While the project descriptions list the agency responsible for project-level monitoring, the descriptions should also include monitoring costs and availability of funding for ongoing maintenance and operations.

- Some projects may be inappropriate for Early Restoration under OPA or the NRDA regulations, or they may violate other environmental laws. The Trustees should not propose or implement projects that could have adverse effects on locations or species that were oiled and injured by the BP oil disaster, or would not restore, replace or provide the equivalent of the public's lost use, such as access to beaches.

- Per NRDA regulations, compensatory restoration projects should "provide services of the same type and quality, and of comparable value as those injured," and Trustees "must avoid collateral injury as a result of implementing the alternative."[26] Some proposed projects do not appear to provide the same type and quality of services, and it is unclear how some projects can be implemented without harming the environmentally sensitive habitat of federally protected species. Further, Trustees should require conservation plans and incidental take permits be updated before they consider using them as part of the environmental assessments, as some plans included in this Early Restoration Plan were up to 10 years old.

In conclusion, this preliminary assessment has been developed for the purpose of evaluating the critical components of the Draft Early Restoration Plan and Programmatic Environmental Impact Statement. Ocean Conservancy will be providing more detailed comments to the Trustees on the ERP and PEIS, including an evaluation of the proposed Phase III projects. Because the Trustees will use the ERP and PEIS to guide decisions about future early restoration, Ocean Conservancy's comments will include recommendations for improvements and inclusion of additional information necessary to ensure restoration is comprehensive and achieves the goal of making the Gulf ecosystem whole. We encourage our members and partners to use this document as a guide for formal comments.

[26] 15 C.F.R. 990.53.