



RESPONSE TO PUBLIC COMMENTS ON  
DRAFT SPILL IMPACT COMPONENT REGULATION



Gulf Coast Ecosystem Restoration Council

# Public Comments on the Draft Spill Impact Component Regulation

## Table of Contents

Introduction.....	1
Comment Analysis Process.....	2
General Comments/Responses.....	2
Formula-Specific Comments/Responses.....	3
<i>Formula Criteria in General</i> .....	3
<i>Oiled Shoreline Criterion</i> .....	3
<i>Inverse Proportion Criterion</i> .....	4
<i>Population Criterion</i> .....	5

## Introduction

The ongoing involvement of the people who live, work and play in the Gulf Coast Region (Gulf) is critical to ensuring that these monies are used wisely and effectively. The Gulf Coast Ecosystem Restoration Council (“Council”) thanks all those who have participated in the process.

Under the RESTORE Act (“Act,” codified at 33 U.S.C. §1321(t) and *note*), thirty percent of all amounts deposited into the Gulf Coast Restoration Trust Fund will be disbursed to each of the States of Alabama, Florida, Louisiana, Mississippi and Texas (each, a “State”) through a regulation. See 33 U.S.C. §1321(t)(3). This is the “Spill Impact Component” of the Act.

The Act provides that funds made available for the Spill Impact Component be disbursed to each State based on a formula established by the Council, through a regulation that is based on a weighted average of three criteria: (1) 40% based on the proportionate number of miles of oiled shoreline in each State on or before April 10, 2011 compared to the total number of miles of shoreline that experienced oiling as a result of the *Deepwater Horizon* (DWH) oil spill; (2) 40% based on the inverse proportion of the average distance of the DWH drilling rig at the time of the explosion to the nearest and farthest point of each State’s oiled shoreline; and (3) 20% based on the average population of each State’s coastal county population per the 2010 Decennial Census. See 33 U.S.C. §1321(t)(3)(A)(ii).

The Council published the draft Spill Impact Component regulation (“Rule”) in the *Federal Register* on September 29, 2015 for a thirty-day public comment period. The comment period ended October 29, 2015.

All comments are publicly available on the Council website, [www.restorethegulf.gov](http://www.restorethegulf.gov). All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure under the protocols established by the Council under the requirements of the Freedom of Information Act.

The Council received eleven written comments addressing the draft Rule from private citizens, other government entities (such as state, county and local entities), non-governmental organizations (NGOs), and others. All comments were reviewed and carefully considered by the Council before proposing the final Rule. (The Council received fourteen additional comments not addressing the draft rule (for example, addressing specific restoration project preferences or addressing the Funded Priorities List) and did not respond to those comments.)

The Council has made one clarifying edit to the final rule. In the first sentence of 40 CFR §1800.400, the phrase “coastal political subdivisions” has been replaced by “coastal counties” in conformance with the Act at 33 U.S.C. §1321(t)(3)(A)(ii)(III).

## Comment Analysis Process

All written comments were read and analyzed, including those of a technical nature, opinions and comments of a personal or philosophical nature. The Council’s review and consideration of public comments is a critical step in finalizing the rule and surfacing issues pertinent to it.

The Council used the Department of the Interior’s Planning, Environment and Public Comment (PEPC) database to help manage the public comments. In order to respond to the public observations and recommendations, the Council grouped the comments and Council responses into topics. In some cases the comments were general observations about the Rule. In others, public comments pertained directly to specific aspects of the Rule or elements of the allocation formula, warranting more specific responses.

## General Comments/Responses

**Comment:** Several commenters suggested or encouraged the Council to allocate Spill Impact Component funds to specific projects, specific ecological or economic areas of concern, or specific geographic areas.

**Response:** The Council appreciates these comments and the expressions of concern for the ecosystems and economies of the Gulf Coast region. However, the purpose of the Rule as required by the Act is only to establish a percentage formula for allocation of Spill Impact Component funds; the Rule does not address implementation. The implementation of projects and programs under this Component will take place pursuant to other provisions of the Act (e.g., the Council’s State Expenditure Plan (SEP) Guidelines available at [www.restorethegulf.gov/sites/default/files/SEP-Guidelines-final\\_0.pdf](http://www.restorethegulf.gov/sites/default/files/SEP-Guidelines-final_0.pdf)). Additional information related to the Council’s restoration goals, objectives and activities can be found on our website at [www.restorethegulf.gov](http://www.restorethegulf.gov). No change was made to the Rule in response to this comment.

**Comment:** Several commenters referred to the SEP Guidelines (available at [www.restorethegulf.gov/sites/default/files/SEP-Guidelines-final\\_0.pdf](http://www.restorethegulf.gov/sites/default/files/SEP-Guidelines-final_0.pdf)) and suggested that they

be included, or incorporated by reference, in the Rule. One commenter also suggested specific policies that the Council follow in implementing the SEP Guidelines and approving SEPs and mentioned the Council's "discretion" in evaluating SEPs.

**Response:** The Council appreciates the comment and the thoughtful attention paid to the Council's Spill Impact Component processes. Under the Act, each State will create an SEP setting forth the projects and programs on which the State will expend Spill Impact Component funds. However, the SEPs and their implementation are not the subject of this Rule. The Council published the Rule pursuant to the section of the Act requiring a regulation to establish the Spill Impact Component allocation formula, *see* 33 U.S.C. §1321(t)(3)(A)(ii), and the Council limited the Rule to that purpose.

The Council's SEP Guidelines were carefully drafted to ensure effective and efficient implementation of the relevant requirements in the Act. These Guidelines, which do not establish any Council discretion in evaluating or approving SEPs (*see* the "Environmental Compliance" section of the Supplementary Information accompanying the draft Rule), remain in effect regardless of whether or not they are incorporated into a Council rule or regulation. The Council may in the future issue further regulations as circumstances warrant. No change was made to the Rule in response to this comment.

## Formula-Specific Comments/Responses

### Formula Criteria in General

**Comment:** One commenter criticized the formula's 40%-40%-20% weighting of the three criteria (miles of oiled shoreline; inverse proportion of the DWH drilling rig distance from oiled shoreline; and average coastal county population) used to establish the Spill Impact Component funding allocation. The commenter suggested using a 50%-40%-10% respective weighting, stating that the formula set forth in the draft Rule gives too much weight to coastal county populations and not enough to miles of oiled shoreline.

**Response:** The Council appreciates this comment and the analysis behind it. However, the formula's criteria percentage weightings of 40%-40%-20% as described above are specified by the Act and cannot be changed by the Council. *See* 33 U.S.C. §1321(t)(3)(A)(ii). No change was made to the Rule in response to this comment.

### Oiled Shoreline Criterion

**Comment:** One commenter offered support for the Council's use of US Coast Guard (USCG) data in determining the miles of oiled shoreline in each Gulf State.

**Response:** The Council appreciates the commenter's support for the Council's implementation of this Rule criterion.

**Comment:** One commenter criticized the Council’s use of USCG Rapid Assessment Technique (RAT) data in determining the amount of oiled shoreline in Texas, while using USCG Shoreline Cleanup Assessment Technique (SCAT) data for determining miles of oiled shoreline in the other States. The commenter suggested that SCAT data is the only reliable method for determining the oiled shoreline resulting from the DWH oil spill because RAT data is “preliminary in nature” and not guided by a “prescribed and systematic” methodology as is SCAT data. Since there is no SCAT data for Texas, the commenter suggested that there can be no determination of miles of oiled shoreline in Texas for purposes of the Rule, and stated that the Council should therefore use a zero percentage for Texas under the first two criteria of the formula. The commenter also stated that the RAT method is not mentioned in either the USCG’s Incident Management Handbook or the National Oceanic and Atmospheric Administration’s (NOAA) Shoreline Assessment Manual.

**Response:** The Council appreciates this comment and the analysis behind it. The Council has determined that it is prudent to consider the best available data in establishing the allocation in the Rule. The location, magnitude, and persistence of exposure of nearshore habitats to DWH oil was documented through field surveys that included observations, measurements and collection and analysis of thousands of samples. Based on all data surveys, oil was observed on over 1300 miles of shoreline from Texas to Florida. Relying exclusively on SCAT data, thus excluding RAT data, would mean that Texas would appear to have had zero miles of oiled shoreline and (as the commenter concluded) result in a zero percentage for Texas under the first and second criteria of the Rule formula. This is factually inaccurate. According to the available surveys and the USCG, Texas had at least 36.0 miles of shoreline "that experienced oiling as a result of the *Deepwater Horizon* oil spill." 33 U.S.C. 1321(t)(3)(A)(ii)(I). To exclude this data because the RAT method was used instead of the SCAT method would not reflect this reality. While the RAT technique is not specifically named, the technique is described in the USCG Incident Management Handbook under the discussion of Field Observers, and in NOAA’s Shoreline Assessment Manual in its discussion of rapid assessment teams (3<sup>rd</sup> Edition) or Field Observers (4<sup>th</sup> Edition). While RAT is not as prescribed or systematic as SCAT, it is nevertheless a commonly used assessment methodology. Additionally, the oil samples from the Texas shoreline were fingerprinted by the USCG and identified as originating from the Macondo well. Moreover, the use of RAT and SCAT data together is consistent with the use of both datasets by the United States in determining the injury to natural resources in its civil lawsuits against BP in connection with the DWH oil spill. The Council thus determined that since the Texas shoreline did in fact experience oiling from the spill, it was more reasonable to consider all available data, including RAT data, in establishing the allocation formula. No change was made to the Rule in response to this comment.

### [Inverse Proportion Criterion](#)

**Comment:** One commenter supported the Council’s mathematical formula for determining the inverse proportion of the average distance of the DWH drilling rig from the nearest and farthest point of oiled shoreline in each State.

**Response:** The Council appreciates the commenter’s support for the Council’s implementation of this criterion of the Rule.

## Population Criterion

### *Average Population Calculation*

**Comment:** One commenter criticized the Council’s calculation of the part of the Rule formula based on the third criterion, “the average population ... of coastal counties ... within each Gulf Coast State,” stating that the calculation in the Rule gives too much weight to States with smaller total coastal populations. The commenter suggested calculating the total population of each State’s coastal counties as a percentage of the total population of all of the Gulf States’ coastal counties in calculating this part of the Rule formula.

**Response:** The Council appreciates this comment. However, the Act requires using, for this criterion, the calculation of the “average population ... of coastal counties ... within each Gulf Coast State.” See 33 U.S.C. §1321(t)(3)(A)(ii)(III). The Council interpreted this language to mean the average coastal county population within each State. This appears to be the plain meaning and intent of the term “average” in this provision. Using the total population of all coastal counties within each State, rather than the average population of each coastal county, would ignore the term “average” in the criterion and change the resulting allocation percentages in a way not permitted by the Act.

Thus the Council first determined which counties in each State are coastal counties, then used the 2010 Decennial Census data to determine the population of each of those counties, and finally calculated the average coastal county population within each State, compared to the respective averages of the other States, to arrive at the final percentage allocation for this criterion. No change was made to the Rule in response to this comment.

### *Coastal Counties Definition*

**Comment:** Several commenters criticized the exclusion of Harris County in Texas from the definition of “coastal counties” in the Rule formula. See 33 U.S.C. §1321(t)(3)(A)(ii)(III). One commenter mentioned that Hillsborough County in Florida, and Orleans Parish in Louisiana, appear to have geographic complexities similar to Harris County.

One commenter supported the Council’s definition of coastal counties in the Rule formula.

**Response:** The coastal counties for the State of Florida are determined by the Act and the implementing Treasury regulations (see 31 CFR §34.2). The Act does not specify the coastal

counties for the States of Alabama, Mississippi, Louisiana or Texas, and the Council referred to a generally accessible geographic map in order to determine those States' coastal counties. With respect to Texas there was additional discussion within the Council regarding the State's geographic complexity - for example, there are several interconnected waterways that are geographically distinct from the Gulf of Mexico. The Council did not consider any other State to be as geographically complex as Texas. For Hillsborough County in Florida, geographic complexity was not relevant since the Florida coastal counties are specified by the Act and the implementing Treasury regulations. The Council did not consider Orleans Parish in Louisiana to be geographically complex since it directly touches the Gulf of Mexico through Lake Borgne, a body of water contiguous with the Gulf of Mexico. Since only the Texas coast was so geographically complex, the Council looked at additional sources when considering the definition of coastal counties in Texas.

The Council thus considered the list of coastal counties used by the State of Texas Railroad Commission (TRC) (<http://www.rrc.state.tx.us/>), the Texas state agency responsible for regulating exploration, production and transportation of oil and natural gas in Texas as well as related pollution prevention measures — matters that are topically related to the purposes of the Act. The TRC list is consistent with the Texas counties identified in the Rule by using the generally accessible geographic map.

The Council also consulted other Texas information sources. For example, the Council considered using the list used by the Texas Coastal Management Program (TX CMP) setting forth all or part of eighteen counties subject to the TX CMP. The Council found that the TX CMP does not contain a list of “coastal counties,” but rather tracks a “coastal zone.” The “coastal zone” area is defined by the Coastal Zone Management Act (CZMA) (16 U.S.C. §§1451 et seq.) based on hydrologic and geographic standards (*see* 16 U.S.C. §1453(1)) that are not meaningful for purposes of the Council defining “coastal counties” pursuant to the Act at 33 U.S.C. §1321(t)(3)(A)(ii)(III).

The Council also considered the definition of “coastal political subdivisions” used in the Outer Continental Shelf Lands Act (43 U.S.C. §1356a) and rejected it because it also in part uses the CZMA definition of “coastal zone” to define “coastal political subdivisions.”

After having thus considered the TRC list and other sources, the Council concluded that the list of Texas coastal counties provided in the draft Rule is reasonable and appropriate in implementing the provisions of the Spill Impact Component of the Act. No change was made to the Rule in response to this comment.

The Council is using the TRC list only for purposes of establishing the population criterion of the Rule formula pursuant to 33 U.S.C. §1321(t)(3)(A)(ii)(III); this use of the TRC list has no bearing on any other determination of coastal counties, areas, political subdivisions or jurisdictions, under Federal or state law or otherwise.

**Comment:** Several commenters noted that Harris County was affected by the oil spill and therefore should have been included in the definition.

**Response:** The Council appreciates that numerous Texas (and other Gulf States') counties were affected by the spill, including localities both on and more distant from the Gulf Coast. The Council interprets the Act to require restricting the definition to a geographic determination of coastal counties; being affected by the spill is not a factor to be considered for this criterion of the Rule formula, which is based solely on population. No change was made to the Rule in response to this comment.

It should be noted that the Rule formula establishes only the allocation of Spill Impact Component funds to each State and has no bearing on where in a State such funds may be expended; for example, the State of Texas could elect to fund projects and/or programs within Harris County. Spending decisions will be made by each State in accordance with the State Expenditure Plan(s) to be created by each State under the Act and the implementing Treasury regulations (including the limitation of programs to those "carried out in the Gulf Coast Region," *see* 31 CFR 34.2 *and* 31 CFR 34.203(c)).