



ASSISTANT SECRETARY

JUN 13 2018

ACTION MEMORANDUM FOR EXECUTIVE SECRETARY RYAN D. BRADY

FROM: David A. Lebryk, Fiscal Assistant Secretary

SUBJECT: Notice of Proposed Rulemaking to Amend Section 31 CFR 34.204(a) of Treasury's Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act or Act) Regulations

This proposed Notice of Proposed Rulemaking (NPRM) will reduce the regulatory burden of eligible Gulf Coast States, coastal political subdivisions, and coastal zone parishes (recipients) by providing greater flexibility in the application of the statutory three percent administrative cost cap under the Act's Direct Component, Comprehensive Plan Component, and Spill Impact Component. Specifically, this proposed revision provides a recipient the option to apply the three percent cap, within each component, on either an aggregate basis or on a grant-by-grant basis. It ensures that the aggregate funds for administrative costs a recipient receives under each component will not exceed the statutory three percent limit before the program ends.

RECOMMENDATION

That you approve the NPRM for publication in the *Federal Register*.

Approve Disapprove Let's Discuss

BACKGROUND

The RESTORE Act provides that a recipient may not use more than three percent of the amounts it receives for administrative costs to carry out RESTORE Act grant projects. 33 U.S.C. 1321(t)(1)(B)(iii)(I). This limitation applies to the Direct Component, Comprehensive Plan Component, and Spill Impact Component. Treasury's implementing regulations apply the three percent administrative cost cap on a grant-by-grant basis. However, the Act does not specify how the statutory three percent limit on administrative costs is to be applied.

As eligible recipients have begun to develop their grant programs, they have expressed a need for more flexibility on how to apply the statutory limit on administrative costs. Recipients have realized that actual administrative costs on some projects will exceed the three percent cap, but that on many other projects, administrative costs will be less than three percent of the grant amount. This NPRM proposes the option to apply the three percent cap, within each component, on either an aggregate basis or on a grant-by-grant basis. Treasury believes that the amendment proposed in this NPRM would reduce the regulatory burden for recipients and would afford them greater flexibility, while maintaining compliance with the statutory limitation.

OMB has determined that this NPRM is a significant regulatory action, but not economically significant.

FINAL DOCUMENT

Pre-Decisional Draft _ Not for Distribution

There will be a 30-day public comment period. Treasury may amend the proposed rule based on the comments.

We do not expect any congressional or media interest in this NPRM. If needed, we will brief the Secretary and Deputy Secretary on next steps after the public comment period concludes.

ATTACHMENT

1. RESTORE Act Notice of Proposed Rulemaking amending 31 CFR Part 34

FINAL DOCUMENT

Clearance Sheet

Subject: Notice of Proposed Rulemaking to amend section 31 CFR 34.204(a) of Treasury's Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act or Act) regulations

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Legislative Affairs – Francisco Riojas and Brady Howell

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FINAL DOCUMENT

DEPARTMENT OF THE TREASURY

31 CFR Part 34

RIN 1505-AC55

Regulations for the Gulf Coast Restoration Trust Fund

AGENCY: Office of the Fiscal Assistant Secretary, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury (Treasury) proposes to amend its rules to revise the method by which the statutory three percent limitation on administrative costs (referred to throughout this notice of proposed rulemaking (NPRM) as the “three percent administrative cost cap”) is applied under the Direct Component, Comprehensive Plan Component, and Spill Impact Component under the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act or Act). This proposed amendment will help ensure that the Gulf Coast states and localities have the necessary funding to efficiently and effectively oversee and manage projects and programs for ecological and economic restoration of the Gulf Coast Region while ensuring compliance with the statutory three percent administrative cost cap. It does not change the definition of “administrative costs” or the indirect cost reimbursement calculation on an individual federal grant using the negotiated indirect cost rate agreement (NICRA) or de minimis rate.

DATES: Written comments on this NPRM must be received on or before: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: Treasury invites comments on the topic addressed in this NPRM.

Comments may be submitted by any of the following methods:

Electronic Submission of Comments: Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>.

Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables Treasury to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public.

Mail: Send to Department of the Treasury, Attention: Laurie McGilvray, Office of Gulf Coast Restoration, Office of the Fiscal Assistant Secretary, Room 2112; 1500 Pennsylvania Avenue NW, Washington, DC 20220.

In general, Treasury will post all comments to <http://www.regulations.gov> without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers. All comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: The Office of Gulf Coast Restoration at restoreact@treasury.gov, or Laurie McGilvray at 202-622-7340.

SUPPLEMENTARY INFORMATION:

I. Background

The RESTORE Act (33 U.S.C. 1321(t) and note) makes funds available for the ecological and economic restoration of the Gulf Coast Region, and certain programs

with respect to the Gulf of Mexico, through a trust fund in the Treasury of the United States known as the Gulf Coast Restoration Trust Fund (trust fund). The trust fund holds 80 percent of the administrative and civil penalties paid under the Federal Water Pollution Control Act after July 6, 2012 in connection with the *Deepwater Horizon* Oil Spill.

Treasury administers two of the five components established by the Act, the Direct Component and Centers of Excellence Research Grants Program. The Act also established an independent Federal entity, the Gulf Coast Ecosystem Restoration Council (Council), to administer two components of the Act, the Comprehensive Plan Component and the Spill Impact Component. The National Oceanic and Atmospheric Administration (NOAA) administers one component, the NOAA RESTORE Act Science Program. This NPRM only affects grants under the Direct Component, Comprehensive Plan Component, and Spill Impact Component of the Act, which are collectively referred to throughout the NPRM as the three “components.”

On December 14, 2015, Treasury promulgated a final rule on the RESTORE Act, 80 FR 77239, which became effective on February 12, 2016. The final rule contains two relevant limitations on the amount of grant funds that may be used for administrative costs.

First, the final rule subjects the grants to government-wide cost principles. Treasury’s final rule defines “administrative costs” as “indirect costs for administration” and provides that such “[c]osts must comply with administrative requirements and cost principles in applicable federal laws and policies on grants.” 31 CFR 34.2, 34.200(a)(1).

Treasury’s final rule excludes “indirect costs that are identified specifically with, or readily assignable to, facilities” from its definition of “administrative costs.”

Indirect cost principles are contained in the Office of Management and Budget’s “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” in 2 CFR Part 200, which Treasury has adopted. 2 CFR 1000.10. Indirect costs are defined in 2 CFR 200.56 and are allowable subject to Subpart E of 2 CFR Part 200 and Appendix VII.

Under Subpart E, a grant recipient’s negotiated indirect cost rate agreement (NICRA) with its cognizant agency determines the allowable indirect cost rate for the recipient’s grants, taking into account the unique circumstances and cost structure of the recipient. The NICRA, or a de minimis rate if elected, must be used across all of the recipient’s federal grants.¹ 2 CFR 200.414(c)(1). In accordance with the 2 CFR Part 200 Uniform Guidance, Appendix VII – State and Local Government and Indian Tribe Indirect Cost Proposals, these allowable indirect costs are computed on each individual Federal award.

The second limitation for RESTORE awards on the amount of grant funds that can be used for administrative costs under the three components is a three percent administrative cost cap. The Act provides that “[o]f the amounts received by a Gulf Coast State . . . , not more than 3 percent may be used for administrative costs” 33 U.S.C. 1321(t)(1)(B)(iii)(I). The Act does not specify the method by which this three percent administrative cost cap is to be applied. Treasury’s final rule, however, provides

¹ Subpart E provides that when a recipient has never had a NICRA and receives \$35 million or less in direct federal funding, a de minimis rate of 10 percent of modified total direct costs (MTDC) may be used to calculate its allowable indirect costs in lieu of establishing a NICRA. 2 CFR 200.414(f), 2 CFR Part 200, Appendix VII(D)(1)(b).

that the three percent administrative cost cap is to be applied on a grant-by-grant basis: “The three percent limit is applied to the total amount of funds received by a recipient under each grant.” 31 CFR 34.204(a). In other words, under the current regulation, the administrative costs associated with each particular grant may not exceed three percent of the total amount of that grant.

Thus, under the current regulation, allowable administrative costs for a particular grant, (i.e., the indirect costs for administration) are limited to three percent of total funds received under that particular grant even in cases where a recipient’s NICRA (or its de minimis rate) allows more.

For example, if a recipient with a NICRA with a direct labor base were to contract out the labor on a project, the indirect costs under its NICRA may be much lower than three percent of the total amount of the grant. In contrast, if the bulk of the labor is performed in-house, the indirect costs will typically be much greater than three percent of the total amount of the grant.

To address this issue, Treasury proposes to provide a recipient the option to apply the three percent administrative cost cap, within each component, on either a grant-by-grant basis or on an aggregate basis. More specifically, this proposed revision provides that the three percent administrative cost cap may be applied by component to a Gulf Coast State, coastal political subdivision, or coastal zone parish’s trust fund allocation, i.e., an aggregate of 1) all grants received by it under one component, and 2) the amount in the trust fund for the same component that is allocated to, but not yet received by it. As used in this NPRM, the phrase “allocated to, but not yet received under that component by a Gulf Coast State, coastal political subdivision, or coastal zone parish”

refers only to funds presently in the trust fund and not to future deposits into the trust fund², and includes the following amounts with respect to each component: (1) with respect to the Direct Component, amounts made available in equal shares for the Gulf Coast States in accordance with 31 CFR 34.302; (2) with respect to the Comprehensive Plan Component, the estimated aggregate cost of all projects included in all approved Funded Priorities Lists; and (3) with respect to the Spill Impact Component, amounts allocated to the Gulf Coast States in accordance with 31 CFR 34.502 and 40 CFR 1800.500.

The Treasury regulations allocate precise sums to specific entities based on criteria in the Act, which allows the flexibility to administer the administrative cost cap on an aggregate basis. Permitting recipients to allocate administrative costs by component from their “pool” in the trust fund toward the indirect costs in their grants will enable them to recover the maximum amount of indirect costs allowed under the Act and to more efficiently and effectively oversee and manage projects and programs. Under this methodology, if a recipient’s allowable indirect costs for administration for one grant are less than three percent of the total amount of that grant, the difference would be available to cover allowable indirect costs for administration exceeding three percent on other grants.

The two methods for applying the three percent administrative cost cap are illustrated by the examples below.

² BP Exploration & Production Inc. began making annual civil penalty payments in April 2017, and is expected to continue to make annual payments through mid-2031 pursuant to a consent decree entered on April 4, 2016 under the Federal Water Pollution Control Act (Clean Water Act), of which 80 percent of the total will be deposited into the trust fund and invested. The annual payments into the trust fund through 2031 are expected to total \$4.4 billion. In 2032, BP will make a final payment in the form of penalty interest.

Example 1 – Grant-by-Grant Method

A recipient receives a Direct Component planning assistance grant totaling \$216,494. The grant consists of \$210,000 for direct costs and, under the three percent cap, \$6,494 for indirect costs.

Example 2 – Aggregate Method

As in the first example, a recipient with a NICRA receives a Direct Component planning assistance grant which includes \$210,000 for direct costs. Under the aggregate method, its grant may also include \$56,000 for indirect costs under its NICRA, for a grant totaling \$266,000. The recipient has a total administrative cost pool of \$2,600,000, based on three percent of its gross trust fund allocation for the Direct Component. The recipient has received indirect costs for administration totaling \$112,000 for two prior grants, leaving a net amount of \$2,488,000 available in its administrative cost pool. Therefore, the recipient may use \$56,000 for indirect costs in this grant award because the funds are available in the pool.

At least annually, Treasury will post publicly the amounts available in the administrative cost “pool” by component, simultaneously with its updates to the trust fund allocations. At no time, however, may the total amount of administrative costs of a Gulf Coast State, coastal political subdivision, or coastal zone parish exceed three percent of the aggregate of (1) all grants received by it under one of the three components, and (2) the amount in the trust fund for the same component that is allocated to, but not yet received by such Gulf Coast State, coastal political subdivision, or coastal zone parish. Also, at no time would a recipient be able to recover more in indirect costs under an individual award than it would receive under its NICRA or its de minimis rate.

Treasury invites public comments on all aspects of this proposed amendment for 30 days, and anticipates publishing a final rule on this revision soon after the 30 day public comment period. In particular, Treasury solicits comments from eligible entities on the following: (1) Is the aggregate method an attractive option and if so, describe the benefits; (2) How would you manage and track administrative indirect costs under each method; (3) Is there an additional burden associated with managing the administrative indirect cost cap using the aggregate method?

II. This Notice of Proposed Rulemaking

For the reasons described above, Treasury proposes amending the method by which the statutory three percent administrative cost cap is applied under 31 CFR 34.204(a). Conceptually, the proposed revision allows each recipient to establish a “pool” of funds for administrative costs under each component if it so chooses. Within each component, a recipient may budget these funds among its grants, consistent with the definition of administrative costs at 31 CFR 34.2 and Subpart E. Treasury believes that this NPRM will help ensure that recipients have the necessary funding to efficiently and effectively oversee and manage projects and programs while ensuring compliance with the statutory three percent administrative cost cap and a recipient’s NICRA or de minimis rate under Subpart E.

To clarify that recipients are no longer required to apply the three percent administrative cost cap on a grant-by-grant basis, Treasury proposes deleting “in a grant” from the first sentence of § 34.204(a). Treasury proposes replacing the second sentence in existing § 34.204(a), which currently requires the three percent administrative cost cap to be applied on a grant-by-grant basis, with language permitting the three percent

administrative cost cap to be applied on either a grant-by-grant basis or on an aggregated basis within each component. For the latter method, this NPRM states that amounts used for administrative costs may not at any time exceed three percent of the aggregate of: 1) the amounts received under a component by a recipient, beginning with the first grant through the most recent grant, and 2) the amounts in the trust fund that are allocated to, but not yet received under such component, by a Gulf Coast State, coastal political subdivision, or coastal zone parish under § 34.103, consistent with the definition of administrative costs in § 34.2. This proposed revision helps ensure that the recipient will not exceed the statutory three percent administrative cost cap before the termination of the trust fund. Please note the NPRM does not amend the definition of administrative costs in § 34.2.

Treasury also proposes adding “recipient and” before “subrecipient” in the last sentence of § 34.204(a) to clarify that Federal grant law and policies apply to recipient costs as well as to subrecipient costs.

Treasury will conduct a retrospective analysis of this proposed revision no later than seven years after the date it becomes effective. This review will consider whether the revision ensures that the Gulf Coast states, coastal political subdivisions, and coastal zone parishes have the necessary funding to efficiently and effectively oversee and manage projects and programs for ecological and economic restoration of the Gulf Coast Region while ensuring compliance with the statutory three percent administrative cost cap, and whether it helps them to administer RESTORE grant projects effectively and efficiently.

III. Procedural Requirements

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Six of the 20 Louisiana parishes and six of the 23 Florida counties eligible to receive grants under the RESTORE Act have fewer than 50,000 residents. (2010 U.S. Census) and thus qualify as small governmental jurisdictions under the Regulatory Flexibility Act. (5 U.S.C. 601(5)). Treasury anticipates that this proposed revision will have no significant economic impact on these small entities because all recipients have the option to continue applying the three percent administrative cost cap on a grant-by-grant basis. Accordingly, Treasury certifies that the amendment to this regulation will not have a significant impact upon a substantial number of small entities, and no regulatory flexibility analysis is required.

B. Regulatory Planning and Review (Executive Orders 12866 and 13563)

The amendment to the regulation is a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563.

C. Catalog of Federal Domestic Assistance

The affected program for Treasury is listed in the Catalog of Federal Domestic Assistance Program under 21.015, Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States. The affected programs

for the Council are listed under 87.051, and 87.052, for its Comprehensive Plan and Spill Impact Components, respectively.

List of Subjects in 31 CFR Part 34

Coastal zone, Fisheries, Grant Programs, Grants administration, Intergovernmental relations, Marine resources, Natural resources, Oil pollution, Research, Science and technology, Trusts, Wildlife.

For the reasons set forth herein, the Department of the Treasury proposes to amend 31 CFR Part 34 to read as follows:

Part 34 – RESOURCES AND ECOSYSTEMS SUSTAINABILITY, TOURIST OPPORTUNITIES, AND REVIVED ECONOMIES OF THE GULF COAST STATES

1. The authority citation continues to read as follows:

Authority: 31 U.S.C. 301; 31 U.S.C. 321; 33 U.S.C. 1251 et seq.

2. Amend §34.204 by revising paragraph (a) to read as follows:

§34.204 Limitations on administrative costs and administrative expenses.

(a)(1) Of the amounts received by a Gulf Coast State, coastal political subdivision, or coastal zone parish from Treasury under the Direct Component, or from the Council under the Comprehensive Plan Component or Spill Impact Component, not more than three percent may be used for administrative costs. The three percent limit on administrative costs may be applied to the total amount of funds received by a recipient under each of the three Components either on a grant-by-grant basis or on an aggregate basis. For the latter method, amounts used for administrative costs under each of the three Components may not at any time exceed three percent of the aggregate of: (1) the amounts received under a Component by a recipient, beginning with the first grant through the most recent grant, and (2) the amounts in the Trust Fund that are allocated to, but not yet received under such Component by a Gulf Coast State, coastal political subdivision, or coastal zone parish under § 34.103, consistent with the definition of administrative costs in § 34.2. The three percent limit does not apply to the administrative costs of subrecipients. All recipient and subrecipient costs are subject to the cost principles in Federal laws and policies on grants.

(2) Treasury will conduct a retrospective analysis of this provision no later than seven years after the date it becomes effective. This review will consider whether the revision ensures that the Gulf Coast states, coastal political subdivisions, and coastal zone parishes have the necessary funding to efficiently and effectively oversee and manage projects and programs for ecological and economic restoration of the Gulf Coast Region while ensuring compliance with the statutory three percent administrative cost cap, and whether it helps them to administer RESTORE grant projects effectively and efficiently.

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