United States Department of the Interior

OFFICE OF THE SECRETARY
Office of Environmental Policy and Compliance
Post Office Box 649
Albuquerque, New Mexico 87103

IN REPLY REFER TO:

July 7, 2003

ER 03/423

Dr. William Conner, Chief
Damage Assessment Center
Office of Response and Restoration/NOS
National Oceanic and Atmospheric Administration
1305 East-West Highway, SSMC#4, 10th Floor
Silver Spring, MD 20910

Dear Dr. Conner:

The U.S. Department of the Interior (DOI) has reviewed the Draft Programmatic Environmental Impact Statement (DPEIS) for the Louisiana Regional Restoration Planning Program (LRRPP). In this regard, the following comments are provided for your consideration as you develop the final document.

General Comments

The document describes the potential effects of implementing a proposed action that is intended to assist the natural resource trustees (Trustees) in conducting Natural Resource Damage Assessment and Restoration (NRDAR) activities within the State of Louisiana, as mandated by the Oil Pollution Act of 1990 and related State legislation. Such NRDAR activities are conducted to restore resources and resource services injured by discharges (or substantial threats of discharges) of oil.

The U.S. Fish and Wildlife Service (USFWS) frequently represents the DOI in the NRDAR process, and has served as a cooperating agency, pursuant to the National Environmental Policy Act (NEPA) of 1969 and its implementing regulations, throughout development of the DPEIS. The proposed LRRPP and DPEIS are precedent-setting; it is the first proposal of its kind to reach this stage of development in the Nation. Although our comments are extensive, they are intended to further the level of cooperation and coordination that will ultimately be essential to successfully implementing the proposed LRRPP.

Overall, the document is well-written and concise; it provides a comprehensive description of the natural resources, services, policies, and regulations that would likely be affected as a result of implementing the proposed action. The final PEIS, and the NEPA compliance documentation for subsequent Regional Plans and specific restoration projects tiered from it, will provide the affected public and industry a better understanding of, and greater predictability about, the NRDAR process in Louisiana. The LRRPP could also potentially improve the efficiency and cost-effectiveness of NRDAR activities to restore oil spill-related injuries of natural resources within the trusteeship of the DOI, if implemented. To that end, we offer the following specific comments appearing below.

In addition, the programmatic consultation with the USFWS required by section 7 of the Endangered Species Act (ESA) is still in progress, according to our administrative record, including NOAA's June 25, 2003, letter to the USFWS. We recommend that neither a final PEIS nor a Record of Decision (ROD) for the proposed action be issued until consultation has been completed. Because the programmatic effects of implementing the proposed action on listed species and their critical habitat will be determined via the ongoing endangered species consultation, those impacts and the outcome of the consultation should be documented in the final PEIS and ROD. The USFWS' Lafayette, Louisiana, Field Office will remain the primary contact to assist NOAA with completion of that consultation.

Specific Comments

Page E-3, Section 2.0, Purpose of the Proposed Action/Regional Restoration Planning Program, third sentence - We suggest deleting "simultaneously" and replacing it with "potentially." For consistency with page 91, first bullet, and the transmittal letter to reviewers, we also recommend inserting the word "potentially" throughout the document when referring to the projected benefits (e.g., cost-efficiency, reduced assessment time, etc.) of the LRRPP. While we certainly agree that the intent of, and justification for, the LRRPP is to obtain those benefits and improvements in the NRDAR process, a cost analysis has not been conducted; thus, we cannot state with certainty that the LRRPP will absolutely achieve those benefits.

Page E-7, Section 4.0, Evaluation of Alternatives, third paragraph - "Notice of Intents" should be revised as "Notices of Intent."

Page 5, Figure 1.1, Status of NRDA for incidents in the State of Louisiana (1990-2002), seventh column - Data in the "Preferred Alternative" and the "Restoration Project" columns are confusing and inconsistent. We suggest changing those data from "Preassessment Phase" to "To be Determined" as necessary for consistency. Similarly, the "Type of Habitat Injured" column should be carefully revised for consistency with the potentially injured resources/services list on page E-5 and section 3.2.2.

Page 12, Section 2.1.2, Biological Resources, Threatened and Endangered Species bullet - This section should be revised for accuracy. According to the April 16, 2003, listing provided to

NOAA by the USFWS' Lafayette, Louisiana Field Office, there are currently 34 listed species in Louisiana. Of that total, 31 are animals and 3 are plants; critical habitat has been designated for the piping plover and the Gulf sturgeon; and the Louisiana pine snake is classified as a candidate species for listing. Further, of the 31 animals, the Florida panther, red wolf, Eskimo curlew, and ivory-billed woodpecker are presumed to be extinct in the State; the Bachman's warbler has been sighted on wintering grounds during the last decade, but may be extirpated in Louisiana; and the American alligator is classified as threatened due to similarity of appearance for law enforcement purposes, however, it is biologically neither threatened nor endangered, and harvest is permitted under State law.

We also suggest that the literature citation and Appendix C be corrected accordingly.

Page 29, Figure 3.1, NRDA Process Implementation in RRP Program, Step #6 - It may be advisable to insert the "Use Program Selection Criteria" box to determine a trustee-implemented project under the non-project-specific cash out settlement alternatives.

Page 48, Section 3.2.4.2, Project Selection Screening Criteria - The wording of the project selection screening criteria should be modified slightly for consistency with the Oil Pollution Act (OPA) Natural Resource Damage Assessment (NRDA) regulations, 15 CFR 900.54. In addition, a factor should be added to address the effect of the alternative on public health and safety as required in 15 CFR 900.54 (a) (6) of the NRDA regulations. The project selection screening criteria should clearly distinguish between, and include all of the factors from, the NRDA regulations [15 CFR 990.54(a)], as well as any RRP specific factors.

Page 67, Section 3.2.6.2.3, Non-Project-Specific Cash Out - This section should be revised to clarify whether or not the DSAY unit values will account for the interim service losses sustained during the period prior to project implementation, especially in the cases of larger projects that may take years to become fully funded.

Page 75, Section 3.3.2.4, RRP Project Monitoring Team - This section should be relocated to follow section 3.3.2.1 and should be revised to clarify that the monitoring team will review results and make recommendations to the Trustee Council. Similarly, section 3.3.2 should be revised to indicate that the Trustee Council will also guide and manage Project Monitoring Team activities.

Page 76, Figure 3.6, RRP Program Case Implementation Process - This diagram attempts to depict the intricacies of the case implementation process. Because that process is so complex, consideration should be given to expanding the diagram to two pages or a fold-out page. With more available room, the diagram should also include an additional box and arrows within the lower left quadrant to indicate that the Trustee Council receives recommendations on restoration types and settlement alternatives from the Case Team and accepts or rejects them. Similarly, a box could be added to the upper left to depict presentation of project implementation oversight and monitoring results to the Trustee Council via Louisiana Oil Spill Coordinator's Office/Lead Administrative Trustee. Finally, boxes depicting public review/input nodes should be added where appropriate.

Page 79, Section 3.4.3.4 Settlement Calculation - Consideration should be given to reimbursing the substantial costs of LRRPP development to participating trustee agencies.

Page 80-81, Section 3.5, Sources of Restoration Funding - This section should be revised to clarify that funds from other programs cannot, and will not, be used to pay for restoration required to settle the natural resource liability arising from any incident. Accordingly, we recommend that the first sentence be revised by changing the word "three" to "two" and that the third bullet be converted to regular text and joined with the last paragraph.

Page 95, Section 7.2.1, Program Compliance with Federal Laws - Please add a paragraph describing how the LRRPP will comply with the National Wildlife Refuge (NWR) System Improvement Act of 1997; suggested language might include:

The National Wildlife Refuge System Improvement Act of 1997 authorized that no new or expanded use of a refuge may be allowed, unless it is first determined to be compatible. A compatibility determination is a written determination signed and dated by the Refuge Manager and Regional Refuge Chief, signifying that a proposed or existing use of a NWR is a compatible use or not. A compatible use is defined as a proposed or existing wildlife-dependent recreational use or any other use of a NWR that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the NWR System mission or the purposes of the NWR. A compatibility determination is only required when the USFWS has jurisdiction over the use. For example, proposed uses that deal exclusively with air space, navigable waters or over-lay refuges where another Federal agency has primary jurisdiction over the area would not require a compatibility determination.

Federal agencies proposing a project that includes features on NWR system lands should contact the Refuge Manager early in the planning process. The Refuge Manager will work with the project proponent to determine if the proposed project constitutes a "refuge use" subject to a compatibility determination. If the proposed project requires a compatibility determination, a concise description of the project (refuge use) including who, what, where, when, how and why will be needed to prepare the compatibility determination. In order to determine the anticipated impacts of use, the project proponent may be required to provide sufficient data and information sources to document any short-term, long-term, direct, indirect or cumulative impacts on refuge resources. Compatibility determinations will include a public review and comment before final determination.

Page 96, Section 7.2.1, Clean Water Act (CWA) (Federal Water Pollution Control Act) 33 USC § 1251 et seq. - The first paragraph on this page, though correct, implies that Nationwide Permit (NWP) 32 would apply to all LRRPP Restoration projects. Though this implication is somewhat clarified in the last paragraph of the section, we recommend that the section be revised to more clearly show when NWP-32 would be applied to LRRPP projects. For example, if an LRRPP project is specifically identified for implementation in the Consent Decree, then no additional 404 permit would be required, provided that all other conditions of NWP-32 are satisfied. On the other hand, if the Consent Decree provides for a non-project-specific cash out settlement and

the trustees do not actually select a project for implementation until sometime later, then NWP-32 may not be applicable for that project.

Page 97, Section 7.2.1, Endangered Species Act of 1973 (ESA), 16 USC § 1531 et seq, second paragraph - Reiterating our general comment on page 2, the programmatic consultation with the USFWS required by Section 7 of the ESA is still in progress, according to our administrative record, including NOAA's June 25, 2003, letter to the USFWS. We recommend that neither a final PEIS nor a ROD for the proposed action be issued until consultation has been completed. Because the programmatic effects of implementing the proposed action on listed species and their critical habitat will be determined via the ongoing endangered species consultation, those impacts and the outcome of the consultation should be documented in the final PEIS and ROD. The USFWS' Lafayette, Louisiana, Field Office will remain the primary contact to assist NOAA with completion of that consultation.

Page 98, Section 7.2.1, The National Historic Preservation Act of 1966 (NHPA), 16 USC § 470 et seq. - Consultation with State Historic Preservation Officer should be discussed in this section or in section 7.2.3.

Page 105, Section 7.3, Louisiana North American Waterfowl Management Plan - Please strike the word "Louisiana" from this heading and the last sentence. Please replace ". . . as a joint venture. . ." with ". . . as a framework . . . " in the first sentence. The fourth sentence should be revised to replace "The Louisiana Joint Venture" with "Louisiana is within both the Lower Mississippi Valley and the Gulf Coast Joint Ventures, and includes. . . ."

Page 106, Section 7.3, Also - "Partners for Wildlife" is correctly referred to as the Partners for Fish and Wildlife Program (it is administered by the USFWS) and should be relocated to "Other Potentially Applicable Federal, State, and Joint State-Federal Programs." The remaining entities are potential LRRPP partners, so we recommend changing the sub-section title "Also" to "Potential Partners."

Page B-5, Sediment Quality - We suggest revising the last three sentences in the first paragraph as follows "It has been argued that, in the absence of disturbance and with sufficient sedimentation, contaminants may become sequestered in a reduced environment below the biotic zone. If those conditions were met, contaminants might pose little risk to the environment or to people. Although storm events, flowing water and other factors can re-mobilize contaminated sediments, consideration has been limited to surficial sediments only for the purposes of the present discussion."

Pages B-21 through B-30, Tables B-3 through B-13 - These tables should be revised for spelling, scientific accuracy, and overall applicability in accordance with the May 30, 2003, comments provided to NOAA by the USFWS' Lafayette, Louisiana, Field Office.

Page B-36, Threatened and Endangered Species - The acronym applied to the U.S. Fish and Wildlife Service is slightly different here (FWS) than in the rest of the document (USFWS). We suggest selecting one acronym for consistent use throughout the document. This section is

simply a discussion of the procedural aspects of the ESA. It does not specifically discuss the affected environment of federally listed threatened and endangered species and their habitats in Louisiana and should be revised accordingly. The second through fifth sentences of this paragraph are partially incorrect and conflicting. Accordingly, we recommend that they be corrected as follows: "The USFWS is responsible for federally listed terrestrial and freshwater species and certain marine mammals (e.g., manatees). The NMFS is responsible for federally listed marine fishes and whales. The USFWS and NMFS share trusteeship responsibility for federally listed interjurisdictional fishes and marine sea turtles."

Page B-37, Threatened and Endangered Species - The first paragraph on this page should be corrected to reflect the information provided in our comment on Section 2.1.2 above.

Page B-47, Refuges, second paragraph, first sentence - In addition to the 24 National Wildlife Refuges (NWRs) in Louisiana, the USFWS also operates the Natchitoches National Fish Hatchery and several Law Enforcement Offices within that State.

Page B-52, Table B-14, Federal Facilities in Louisiana - We strongly recommend that this table be carefully reviewed and revised for accuracy. For example, several Louisiana NWRs and one National Fish Hatchery are not shown in this table, and the first two NWRs in this table are not located in Louisiana. The current NWRs in Louisiana include:

1. Bayou Cocodrie National Wildlife Refuge
2. Cameron Prairie National Wildlife Refuge
3. Catahoula National Wildlife Refuge
4. Cat Island National Wildlife Refuge
5. Lacassine National Wildlife Refuge
6. Lake Ophelia National Wildlife Refuge
7. Grand Cote National Wildlife Refuge
8. D'Arbonne National Wildlife Refuge
9. Handy Brake National Wildlife Refuge
10. Upper Ouachita National Wildlife Refuge
11. Sabine National Wildlife Refuge
12. Atchafalaya National Wildlife Refuge
13. Bayou Sauvage National Wildlife Refuge
14. Big Branch Marsh National Wildlife Refuge
15. Breton National Wildlife Refuge
16. Bogue Chitto National Wildlife Refuge
17. Delta National Wildlife Refuge
18. Shell Keys National Wildlife Refuge
19. Tensas River National Wildlife Refuge
20. Mandalay National Wildlife Refuge
21. Bayou Teche National Wildlife Refuge
22. Black Bayou National Wildlife Refuge
23. Red River National Wildlife Refuge
24. Louisiana Wetlands Management District

Page C-1, Threatened And Endangered Species (Federal) as of February 26, 2003 - The threatened and endangered species list on this page should be updated for accuracy by incorporating the information provided in our comment on Section 2.1.2 above. The American black bear and the black-capped vireo should be deleted.

Page D-2, NRDA-RRP Restoration Project Information Sheet - We recommend that a "Conservation Servitude Agreement" check box be added within the Project Status block of this form in order to ensure that land owners are aware that the Trustees require a conservation servitude agreement. We also recommend that, due to unforeseeable personnel changes, "Chuck Armbruster" should be replaced with "LRRPP Manager."

Page D-3, NRDA-RRP Restoration Project Information Sheet, Project Status instructions - Consistent with our previous comment, we recommend adding language to briefly describe the conservation servitude agreement and give an example (25 years, 30 years, perpetuity, etc.) or make it a separate instruction altogether.

Page F-1 - This table should include an entry for the National Wildlife Refuge System Improvement Act of 1997, per our comment noted for Page 95, Section 7.2.1.

Thank you for the opportunity to provide comments on this draft document. We trust our comments will be of use during preparation of the final environmental documentation. If we can be of further assistance, or should you require additional information, please feel free to contact us at the above address or by telephone at (505) 766-3565.

Sincerely,

Stephen R. Spencer, Ph.D.
Acting Regional Environmental Officer

cc: James P. Burgess, III, NEPA Coordinator, U.S. Department of Commerce, NOAA/SP, Room 6121, 14th and Constitution NW, Washington, DC 20230