

MEMORANDUM

TO: Gulf Consortium Board of Directors
FROM: Sarah M. Bleakley, Interim General Counsel
DATE: August 21, 2014
RE: Initial Analysis of the Treasury Interim Final Rule

This memorandum is intended to provide an initial analysis of the Treasury Interim Final Rule or "TFIR." References are to the Treasury Rule as published in the Federal Register on August 15, 2014. The counties' and the Consortium's comments on the TFIR are due to Treasury on September 14, 2014. The TFIR becomes final on October 15, 2014.

Treasury heard us and responded favorably. The Consortium's comments on November 5, 2013 to the original Treasury Rule suggested twelve major points of clarification and changes. Treasury favorably addressed eleven of twelve in the TFIR. Because work of the counties and the Consortium, the TIFR is much better in so many ways than the original Treasury rule from last year.

Regarding the format of the Rule, the Rule includes a Preamble which addresses the comments received by Treasury and includes an explanation for many of the TFIR's changes from the original Treasury Rule. The Rule text begins on page 48054.

Rule Provisions Relating to the Counties' Direct Component (Pot #1)

The TIFR addresses the Direct Component primarily in Subpart D, beginning with Rule 34.300 on page 48057. Some of the highlights include the following issues.

Formulas. The TIFR adopts the formulas approved by the Disproportionately and Non-Disproportionately affected counties for the allocation of Florida's Direct Component funds. See, Rule 34.302, page 48057. We advise counties to review the allocation for accuracy.

Planning Assistance Costs and Grants. The TFIR clearly establishes that grants are the mechanism for all funding. See, for example, Rule 34.303 on page 48058 and the definition of "Direct Component" in Rule 34.2 on page 48054. Regarding

planning costs, the TFIR provides that counties can apply for planning assistance grants to be used in developing a Multi-Year Improvement Plan. Rule 34.201(j), page 48057. The TFIR states that it is not necessary for a county to submit a Multi-Year Improvement Plan prior to applying for a planning assistance grant.

"Planning assistance" is broadly defined in Rule 34.2 to include typical planning type of activities. The Preamble states that the definition is intended to include public involvement. See, page 48043. It also includes one-time preparations for establishing a grant administration system, including audit functions. See, Rule 34.2 and page 48043. Planning assistance costs are not included in the three percent cap on administrative costs. The TFIR provides that the OMB Uniform Guidance applicable to all federal grants to local governments also applies in the administration of Direct Component grants. See, Preamble, page 48040.

Multi-Year Implementation Plans (MYIP). Rule 34.303 enumerates the requirements for the counties' MYIPs. County plans can be phased and incremental, and can be amended. Rule 34.303. The only other significant change from the earlier Treasury Rule is the requirement that the MYIP be available for broad based public content at least 45 days prior to submittal to Treasury.

National Environmental Protection Act (NEPA). For counties, TFIR does not expressly address NEPA requirements for the counties' MYIPs. Instead, the Preamble provides that Treasury will soon publish agency-wide NEPA policy and procedures. However, the Preamble states that Treasury does not anticipate that its review of the MYIPs or the issuance of grants will require a NEPA review, because Treasury's role is administrative and ministerial. See, section III of the Preamble at page 48051.

Geographic Location of Projects ("carried out" language in the Rule). Rule 34.201 provides that eligible activities can be funded when the activity is "carried out" in the Gulf Coast region. An activity is considered to be carried out in the Region "when, in the reasonable judgment of the . . . [county], each severable part of the activity is primarily designed to restore or protect that geographic region." The Preamble indicates the "carried out" language is broad enough to include an upstream water quality project designed to reduce nutrient loading at the Gulf Coast. See, page 48043

Treasury's Direct Component Guidance and Application to Receive Federal Financial Assistance (August 2014). The Guidance document provides a road map to plan submittal.

Availability of Trust Funds. Funds will be available upon the finalization of the TFIR. Treasury will not accept grants for amounts that exceed funds available in the Trust Fund for the county. Treasury has published a chart on its website showing the amounts currently in the Trust Fund that are available to each of the 23 Florida counties.

*Discussion of Rule Provisions Relating to the
Spill Impact Component for the Consortium (Pot #3)*

The Gulf Consortium Not Officially Recognized in the Rule. While the Preamble is replete with references to the Consortium's comments on the original Treasury Rule, neither the Preamble nor the TFIR specify that the Consortium is the entity which will receive Spill Impact Component funds. Nor does the Rule address costs for starting up the Gulf Consortium. This issue is the point in our comments to the original Treasury Rule that the TFIR does not address.

Planning Assistance Costs and Grants. The TFIR clearly establishes that grants are the mechanism for all funding. For the Consortium Spill Impact Component, the TFIR provides that the Council is responsible for awarding and administering the grants. Rule 34.501 and Rule 34.504. Regarding planning costs, the TFIR provides that States can apply for planning assistance grants to be used in developing its State Expenditure Plan. See, Rule 34.201(j), page 48057, which is included for the State in a cross reference in Rule 34.203. The TFIR clearly states that it is not necessary for a State to submit a State Expenditure Plan prior to applying for a planning assistance grant. "Planning assistance" is broadly defined in Rule 34.2 to include typical planning type of activities. The Preamble states that the definition is intended to include public involvement. See, page 48043. It also includes one-time preparations for establishing a grant administration system, including audit functions. See the definition in Rule 34.2 and Preamble comments on page 48043. Planning assistance costs are not included in the three percent cap on administrative costs. The TFIR provides that the OMB Uniform Guidance applicable to grants to local governments also applies in the administration of Spill Impact Component grants. See, Preamble, page 48040.

Formula for Five Gulf States. The TFIR directs the Council to determine the allocations of Spill Impact Component funds among the five Gulf Coast States. Rule 34.502.

State Expenditure Plan: Grants and Procurement. Rule 34.502 provides the Council is responsible for grants for the Spill Impact Component for the States. The TFIR indicates that the OMB Uniform Guidance applicable to grants to local governments also applies in the administration of Spill Impact Component grants. See, Preamble, page 48040.

State Expenditure Plans and Procurement. Regarding the State Expenditure Plan, Rule 34.503 provides that the Plan may be phased and incremental and amended. The Rule directs the Council to address categories of Plan amendments that will not be subject to Council approval. It also includes new requirements that the plan must include descriptions of processes that prevent conflicts of interest in the development and implementation of the plan, and assess the capability of third party entities that will implement activities in the plan. Otherwise, procurement is not directly

addressed in the TFIR, although it is clear that the OMB Uniform Guidance governs procurement. More detail may be included in the Council Rule which is forthcoming.

NEPA. NEPA requirements for the Consortium will be determined by the Council. More detail may be included in the forthcoming Council Rule.

Geographic Location of Projects ("carried out" language in the Rule). Rule 34.203 provides that eligible activities can be funded when the activity is "carried out" in the Gulf Coast region. An activity is considered to be carried out in the Region "when, in the reasonable judgment of the . . . [State], each severable part of the activity is primarily designed to restore or protect that geographic region." The Preamble indicates the "carried out" language is broad enough to include an upstream water quality project designed to reduce nutrient loading at the Gulf Coast. See, page 48043.

Consortium Rule

For the Consortium, the Council will issue its own Rule on some of the issues not addressed in the TFIR. Our understanding is that the Council Rule will be available sometime this summer.

SMB:sb