Amid the bipartisan mantra in Washington for long-term cuts in federal spending, a potential major new program has surfaced on Capitol Hill. A bipartisan coalition of Gulf Coast legislators recently announced agreement on what could be a massive new federal spending program to restore the ecology of the Gulf of Mexico and boost the Gulf Coast region’s economy. This remarkable development was only made possible by the support of President Obama and the prospect of many billions of dollars of new revenue flowing to the federal government from Clean Water Act civil penalties predicted to be received following the Deepwater Horizon oil spill incident.

Gulf Coast Restoration Legislation Surfaces

The Gulf Coast represents an enormously valuable region, measured in both economic and ecological terms. If the five Gulf Coast states (Alabama, Florida, Louisiana, Mississippi and Texas) were considered together as an individual country, it would rank seventh in the world in global gross domestic product. The region, which is home to 13 of the nation’s top 20 ports by tonnage, produces approximately 30 percent of the nation’s gross domestic product, 33 percent of its seafood, and 90 percent of its offshore oil production. The Gulf Coast includes rich coastal and marine habitats for migratory birds and diverse indigenous marine species and provides a popular playground for millions of travelers, who spent $145 billion in the region in 2008.

Yet despite these obvious economic, ecological and aesthetic benefits to the nation, the region has suffered a prolonged environmental decline as part and parcel of its economic growth. The factors contributing to the decline are diverse, ranging from flood control and navigation projects dating from the 18th century to the increased use of high nutrient-based fertilizers in agriculture throughout the Gulf of Mexico watershed, which comprises 56 percent of the land mass of the continental U.S., and coastal and deepwater energy exploration to supply the nation’s demand for oil and natural gas. The result has been the widespread destruction of coastal wetlands, the development of a burgeoning 5,800-9,400 square-mile, oxygen-depleted “Dead Zone” at the mouth of the Mississippi River extending as far west as Galveston, Texas, and damages caused by major oil pollution incidents.

The environmental decline has not gone unnoticed. Rather, it has been the subject of many studies and reform proposals over recent decades. For example, environmental groups have repeatedly petitioned the Environmental Protection Agency over the past 15 years for action, including establishment of nutrient-based effluent limits to combat the “Dead Zone.”

But the EPA has denied the petitions, most recently citing progress from voluntary efforts. However, this progress has been both minor in scope and glacial in pace. In 2008, the EPA’s own science advisory board lamented the lack of more progress and called for stronger controls. Likewise, proposals to address the destruction of wetlands have failed for lack of the political will to devote the funding necessary to implement them and because of opposition to changing behavior, both in the Gulf region itself and by Americans and industries in upstream states and communities not directly harmed.

Potential Deepwater Horizon Funding

This is where the Deepwater Horizon incident may have a silver lining. Estimates vary widely about the potential civil penalties that the federal government may collect as a result of the incident. But in most estimates the sums are in the range of approximately $4-$21 billion. And, of course, this projected increased revenue does not require tax increases, nor is it committed to existing programs that depend on it for any pressing need. In normal circumstances, civil penalty revenues from oil pollution incidents would simply be deposited in the Oil Spill Liability Trust Fund. However, considering the historically large amounts forecast in the Deepwater Horizon incident, this seems unlikely; and the Obama Administration and Gulf Coast legislators have earmarked 80 percent of the sums as a potential lifeline for the region’s ecology and economy.
Two important reports have provided the basis for the legislative proposals garnering support on Capitol Hill. First, at the direction of President Obama, Secretary of the Navy Ray Mabus, who is also a former Democratic Governor of Mississippi, issued a report in September 2010 proposing a long-term plan to restore the region’s ecology and economy using dedicated funds from the penalties received by the government from the Deepwater Horizon incident. President Obama quickly endorsed the plan and launched the Gulf Coast Ecosystem Restoration Task Force, headed by EPA Administrator Lisa Jackson, who is a Louisiana native. The task force included representatives from each of the five Gulf Coast states, all of which are currently led by conservative Republican governors. On October 5, 2011, the task force issued its preliminary restoration report, which identified the goals and strategy to implement those goals. Simultaneously, Gulf Coast legislators were working on Capitol Hill to develop a bipartisan and bicameral coalition to support the effort.

Senator Mary Landrieu (D-LA) and Representative Steve Scalise (R-LA) emerged as the leading sponsors of the proposals. Importantly, the Senate legislation currently enjoys seven Republican co-sponsors and the House version 23 Republican co-sponsors. According to Senator Barbara Boxer (D-CA), who chairs the Senate Environment and Public Works Committee, only one Gulf Coast senator, John Cornyn (R-TX), had not signed on to the legislation when it was approved by the committee. But she has announced her intention to work with him and other senators to pass the Senate bill, which was favorably reported out of her committee on a bipartisan vote on September 21, 2011. According to Rep. Scalise, the legislation has the potential to overcome the otherwise fractious political environment of the 112th Congress. Indeed, the legislation is remarkable for the support it has gained from a diverse collection of conservative legislators and national environmental groups.

**HOW WILL THE FUNDING BE USED?**

With the issue of where the money will come from assumed by the legislators to be answered, the central question to be resolved in the proposed legislation was how the money will be spent. Gulf Coast legislators apparently realized that their cause would be advanced by resolving this question among themselves so as to present a united front to their congressional colleagues. However, settling this sensitive question required months of tough talks behind the scenes. In the end, the agreed-upon approach reflected substantive and regional compromises. The House and Senate versions propose apportioning the funds according to a similar formula. The five Gulf Coast states would divide equally 35 percent of the funds for coastal economic and ecological recovery activities. The remainder of the funds would be administered by a new federal-state council, which would fund both projects identified by the council and state restoration plans approved by the council. Hence, the states would receive 35 percent of the funds outright, to be expended consistent with the terms of the legislation, while the federal-state council would exercise control over the remaining 65 percent, consistent with further statutorily prescribed percentages and guidelines regarding the nature of the activity and minimum guarantees for each state.

The legislation would establish a new Gulf Coast Restoration Trust Fund administered by the Secretary of the Treasury in consultation with the Secretary of Interior and the Secretary of Commerce. Eighty percent of the civil penalties received by the federal government from Deepwater Horizon would be deposited in the Fund, which would also collect interest on its investments administered by the Treasury Department. Importantly, funds would be spent pursuant to a permanent appropriation requiring no further act of Congress.

**RESTORATION MEASURES AIM AT BOTH POLICY AND PROJECTS**

The legislation is based in large measure on the Gulf Coast Ecosystem Restoration Task Force Strategy. First, the plan contemplates new river management measures designed to restore the environment. Whereas historically river management policy was driven principally by flood control, navigation and economic considerations, the plan would elevate the importance of ecological restoration in river management decision-making. Second, the plan would develop, improve and implement sediment management measures to restore coastal wetlands. These would include river reintroduction projects and better use of the valuable dredged
material routinely dumped where it does little or no ecological good. Moreover, the plan identifies “increased dedicated dredging” projects aimed at ecological restoration of sediment-starved habitat. Third, the plan would expand the acquisition and preservation of existing areas into new conservation areas. Key conservation areas and habitat corridors will be developed and expanded akin to Louisiana’s coastal forest initiative to protect cypress and tupelo forests. Fourth, restoration projects will be undertaken to revive coastal and near-shore habitats, including marshes, mangroves, sea grasses, grasslands and coastal forests, which are critical to both the native and migratory wildlife species and fisheries so valuable to the region and the nation.

Perhaps one of the most difficult challenges the plan proposes to tackle is the problem manifested by the “Dead Zone,” which is largely the result of poor water-quality management throughout the entire Gulf of Mexico watershed. Run-off from nitrogen-rich fertilizers used in agriculture, soil erosion, and wastewater discharges have been identified as leading causes of oxygen depletion. For example, nitrogen levels due to human activity have tripled in the Gulf over the last 50 years. In recent years, scientists have attributed increased cultivation of corn for ethanol as contributing to the increase in nitrogen because corn depends on nitrogen-based fertilizers. According to the plan, voluntary measures and smaller-scale projects implemented in recent years demonstrate that there are workable solutions to agricultural runoff pollution. To its credit, the plan focuses first on the most significant watersheds to achieve the greatest impact as quickly as possible. And it proposes approaching the problem from multiple sides, i.e., as an initial matter by reducing the use of nitrogen-rich fertilizers and by developing riparian filtering and water treatment regimes to monitor and eliminate the pollution that occurs. But it remains to be seen how the agricultural interests of the Midwest will react to these proposals.

Experts have estimated this restoration of the Gulf region will require the expenditure of $30 billion over a period of approximately 30 years. Much of the work to restore the region’s ecology provides opportunities for the maritime industry, particularly for dredging and marine construction. Thus, the proposal holds out an historic promise for a profitable partnership of environmental and economic interests.

Larry Kiern is a partner at Winston & Strawn LLP, an international law firm of 900 lawyers. His practice concentrates on maritime issues, including legislative, regulatory, and litigation matters.

Before joining Winston & Strawn, he was a Captain and law specialist in the U.S. Coast Guard who served as the Legislative Counsel and Deputy Chief of the Coast Guard’s Congressional Affairs Office.