

**National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling**

**THE STORY OF THE LOUISIANA BERMS PROJECT**

Staff Working Paper No. 8

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Former Louisiana governor Huey Long once described himself to an interviewer as follows: “Just say I’m *sui generis*, and let it go at that.”<sup>1</sup> Indeed, Louisiana’s politicians and politics are unique. And it was this unique environment that served as the primary staging grounds for the response to the Deepwater Horizon spill. The leaders of the spill response could not divorce key decisions from their political context.

Louisiana’s offshore berms project involved the construction of massive and costly linear sand barrier systems, seaward of the coast, adjoining or extending existing barrier islands. Federal decision-making on the project implicated a variety of scientific and environmental concerns but evolved into a political issue. The State of Louisiana’s “central priority for fighting the encroaching Gulf oil,”<sup>2</sup> berms became a lightning rod both for the state’s criticism of the federal spill response and for federal officials’ skepticism about the state’s priorities.

The term “berms” encompasses different types of projects. During the Deepwater Horizon spill response, Alabama and Florida proposed or used *beach berms*,<sup>3</sup> temporary walls of mounded sand along beaches to guard against oil washing up into dunes or developed areas. Alabama, Florida, and Louisiana proposed or used *inlet barriers*,<sup>4</sup> which involved the construction of barriers in coastal passageways to block the flow of oil-laden water through to coastal lakes or estuaries. This staff working paper focuses on Louisiana’s large-scale *offshore barrier berms*. Unlike beach berms and inlet barriers, offshore barrier berms were, and continue to be, the subject of significant controversy regarding their timing, design, cost, and environmental impacts.

This staff working paper is separated into four parts. Part I discusses the review of the berms project by the Army Corps of Engineers (the Corps). Part II examines the decision by National Incident Command to approve the Louisiana berms project. Part III summarizes developments in the berms story after the Corps and National Incident Command approved the project, and Part IV provides our conclusions.

The scope of this staff working paper has an important limitation. The paper examines the Louisiana berms only as an oil spill response measure. As used for spill response, berms are a temporary, “sacrificial” barrier to landward oil intrusion, designed without the capability to

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<sup>1</sup> Richard D. White, *Kingfish: The Reign of Huey P. Long* xii (2006).

<sup>2</sup> Chris Kirkham, *Sand Barrier Faces Bureaucratic Delays, Ecological Questions*, Times-Picayune (May 21, 2010).

<sup>3</sup> See *infra* note 111.

<sup>4</sup> *Id.*; *infra* Section III.B.

withstand long-term wave, tide, storm, and other dynamic forces. The Louisiana berms, however, also implicate broader coastal restoration issues. On November 1, the state announced a plan to convert the berms it has constructed — initially touted as an oil spill response measure — into a barrier island restoration project.<sup>5</sup> This report does not consider the merits of the Louisiana berms project as a coastal restoration initiative.

## I. Corps Review

### A. Genesis of the Berms Project

In early May 2010, Deltares, a Dutch independent research institute focused on water, soil, and subsurface issues, working with Van Oord, a Dutch dredging and marine contractor, sent a PowerPoint presentation to BP,<sup>6</sup> the State of Louisiana's Coastal Protection and Restoration Authority (CPRA), and officials from Plaquemines Parish, Louisiana.<sup>7</sup> The presentation outlined a conceptual plan to construct offshore sand berms — essentially artificial islands fronting existing barrier islands on the seaward side — east of the Mississippi River.<sup>8</sup> It appears that President Obama, along with National Incident Commander Admiral Thad Allen, learned about the berms plan from Louisiana officials during a visit to Venice, Louisiana on May 2.<sup>9</sup>

By May 8, at both the state and parish level, the idea had picked up steam.<sup>10</sup> No end to the spill was in sight, and state and local officials increasingly viewed the federal response as ineffective. Reinforcing the barrier islands, moreover, had long been a component of Louisiana's and Plaquemines Parish's coastal restoration plans.<sup>11</sup> In 2005, 2007, and 2008, the State of Louisiana submitted sixteen funding requests totaling \$101 million to the Federal Emergency Management Agency for barrier island restoration projects (all of which were denied as ineligible).<sup>12</sup> The spill presented an opportunity for state and parish officials to facilitate construction of a large-scale, temporary oil spill response measure whose purpose might, they

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<sup>5</sup> Press Release, Office of the Governor, State of Louisiana, Governor Jindal Announces Agreement with BP for Seafood Safety, Coastal Restoration & Tourism Funding (Nov. 1, 2010), *available at* <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=2&articleID=2550> [hereinafter Nov. 1 Release].

<sup>6</sup> BP has not responded to the Commission staff's repeated requests for an interview on the Louisiana berms project.

<sup>7</sup> Presentation, Van Oord and Deltares, *Save the Delta, The Dutch Perspective* (May 6, 2010) (on file with Commission staff); Telephone Interview by Commission Staff with Garret Graves et al., Louisiana Coastal Protection and Restoration Authority (Oct. 27, 2010); Non-Public Telephone Interview (Oct. 22, 2010).

<sup>8</sup> Van Oord and Deltares Presentation.

<sup>9</sup> E-mail from Colonel Alvin Lee, U.S. Army Corps of Engineers, to Miles Croom, National Oceanic and Atmospheric Administration, et al. (May 9, 2010) (on file with Commission staff); Telephone Interview by Commission Staff with Colonel Alvin Lee, U.S. Army Corps of Engineers (Dec. 6, 2010); *see also* Telephone Interview by Commission Staff with Admiral Thad Allen, U.S. Coast Guard (Nov. 2, 2010).

<sup>10</sup> *See, e.g.,* Chris Kirkham, *Gov. Bobby Jindal and Plaquemines Officials Float Plan to Rebuild Barrier Islands to Stop Encroaching Oil*, Times-Picayune (May 8, 2010).

<sup>11</sup> *See id.*; Tim Padgett, *Dredge, Baby, Dredge: Can Sand Stop the Oil?*, Time Mag. (June 1, 2010).

<sup>12</sup> *See* U.S. Department of Homeland Security, Summary of Ineligible PWs for Barrier Islands (Nov. 11, 2010) (on file with Commission staff) (detailing that in 2005, 2007, and 2008, the State of Louisiana requested Federal Emergency Management Agency funding for sixteen separate barrier island restoration projects. The Federal Emergency Management Agency turned down all of these funding requests); E-mail from Tod Wells, U.S. Department of Homeland Security, to Commission Staff (Nov. 8, 2010) (on file with Commission staff).

believed, “pivot” to permanent restoration of Louisiana’s barrier islands — with BP footing the bill.<sup>13</sup>

Evidence provided to the Commission staff suggests that Plaquemines Parish, led by President Billy Nungesser, intended, or attempted, to take the lead on the berms project.<sup>14</sup> But on May 11, at 11:06 p.m., CPRA applied to the Corps for an emergency permit to construct offshore sand barrier berms, in the vicinity of the Chandeleur Islands and the barrier islands from East Grand Terre Island east to Sandy Point, to “enhance[e] the capability of the islands to reduce the inland movement of oil from the Deepwater Horizon Oil Spill.”<sup>15</sup> Colonel Alvin Lee, two months shy of the end of a three-year tour as the Commander of the Corps for the District of New Orleans, was scheduled to leave for a vacation in Europe with his wife. He cancelled his trip.<sup>16</sup>

## **B. Approval Process Begins**

Corps approval is required for structures like the Louisiana berms under Section 404 of the Clean Water Act<sup>17</sup> and Section 10 of the Rivers and Harbors Act.<sup>18</sup> Pursuant to its statutory authority, the Corps’ New Orleans District offers a general permit, known as NOD-20, covering operations “to respond to such emergencies as oil or gas well blowouts . . . which would result in an imminent safety and/or environmental hazard, loss of property, or immediate economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process an application.”<sup>19</sup> NOD-20 specifically mentions “emergency

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<sup>13</sup> See, e.g., Interview with Coast Guard Rear Admiral (Aug. 30, 2010); see also Mark Schleifstein, *Barrier Berm Advocates Not Deterred by Environmental Regulators’ Misgivings*, Times-Picayune (Sept. 20, 2010) (quoting CPRA Chairman Garret Graves as saying “this is an extraordinary opportunity for us to very quickly pivot to restoration and re-engineer these berms into barrier islands, and then pump sediment to create additional back marsh platforms”).

<sup>14</sup> See E-mail from William Honker, Environmental Protection Agency, to Various Officials (May 9, 2010) (on file with Commission staff) (“The powerpoint below and the email chain that follows outline an interesting proposal which was developed by Dutch interests. Plaquemines Parish, LA will be proposing it to BP tomorrow, as a spill response measure, apparently now with the LA Governor’s support.”); Lee E-mail (May 9, 2010) (“Plaquemines Parish is developing a plan to present to BP on Monday to try and gain their approval to reestablish a continuous line of Barrier Island from approx. Grand Isle to the birds foot delta and east from the birds foot to the Chandelier [sic] islands.”); U.S. Army Corps of Engineers, Permit Evaluation Timeline (Undated) (on file with Commission staff) (noting that on May 10 the Corps “hosts presentation of conceptual barrier plan by Plaquemines Parish President Billy Nungesser. [Corps] later attends presentation of conceptual plan by Mr. Nungesser to BP at UCC in Schriever, LA”); E-mail from Pete Serio, U.S. Army Corps of Engineers, to Martin Mayer, U.S. Army Corp of Engineers (May 12, 2010) (on file with Commission staff).

<sup>15</sup> Letter from Kristi Cantu, Coastal Protection and Restoration Authority of Louisiana, to Pete Serio, U.S. Army Corps of Engineers (May 11, 2010) (contained within a compilation of documents on the Corps website related to CPRA’s NOD-20 application, available at <http://www.mvn.usace.army.mil/news/Emergency%20Permit%20Documents%20Compressed%20FINAL.pdf>) [hereinafter Emergency Permit Documents Compilation].

<sup>16</sup> Interview by Commission Staff with Colonel Alvin Lee, U.S. Army Corps of Engineers, in Washington, D.C. (Oct. 28, 2010).

<sup>17</sup> 33 U.S.C. § 1344.

<sup>18</sup> 33 U.S.C. § 403.

<sup>19</sup> General Permit Emergency Operations Within the New Orleans District (Sept. 13, 2007) (contained within Emergency Permit Documents Compilation) [hereinafter NOD-20 Permit Guidelines].

dredging and placement of fills to collect and confine oil” as one of the activities within its scope.<sup>20</sup> CPRA sought approval of its proposed berms project under NOD-20.

NOD-20 truncates normal review procedures, but with several caveats. First, work authorized under the permit must be the minimum amount necessary to respond to the emergency conditions.<sup>21</sup> Second, any authorization of work is temporary. After the emergency has ended, the applicant must either restore the project area to “as near pre-project conditions as practical” or, within 30 days of the emergency approval, apply for a standard permit to maintain the alterations.<sup>22</sup> Third, NOD-20 specifies that any dredging must be the minimum necessary to meet the emergency.<sup>23</sup> Finally, approval under NOD-20 does not relieve the applicant of the responsibility to obtain necessary approvals under other federal, state, and local regulations.<sup>24</sup>

Review under NOD-20 requires solicitation of comments from other agencies under the National Environmental Policy Act,<sup>25</sup> unless an emergency exemption is justified under that Act’s implementing regulations.<sup>26</sup> Therefore, on May 12, the Corps convened a coordination meeting in New Orleans for all of the state and federal agencies involved in the comment process for CPRA’s NOD-20 application. At least 25 federal and state agency representatives attended the meeting in person, with others dialing-in.<sup>27</sup> During this meeting, the Corps made the determination that the CPRA proposal did not qualify for NOD-20 approval, because it constituted a coastal restoration project exceeding the scope of emergency work authorized under NOD-20.<sup>28</sup>

Three days later, on May 15, CPRA finalized and submitted a revised NOD-20 permit application specifically proposing the construction of oil spill response berms. The new proposal requested approval for 128 miles of berms (with gaps for tidal exchanges) 300 feet wide at the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> In general, the Army Corps permit program requires compliance with the National Environmental Policy Act. 33 C.F.R. § 325.2(a)(4). The National Environmental Policy Act requires an agency to prepare an environmental impact statement or environmental assessment whenever the agency takes an action that significantly affects the quality of the human environment. 42 U.S.C. § 4332(2)(C). Preparation of this statement requires an agency to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.” *Id.* Corps regulations further define specific actions that require consultation with certain specific agencies. See 33 C.F.R. § 325.3(d)(2).

<sup>26</sup> The entity tasked with implementing the National Environmental Policy Act — the White House Council on Environmental Quality — requires an agency to consult with the Council “[w]here emergency circumstances make it necessary to take an action . . . without observing the provisions of these regulations.” 40 C.F.R. § 1506.11. Similarly, Corps regulations require that “[w]hen possible,” the Council on Environmental Quality should be consulted in major emergency actions. 33 C.F.R. § 230.8. The NOD-20 permit, however, authorizes the District Commander to immediately act in a justified emergency situation. See NOD-20 Permit Guidelines.

<sup>27</sup> Attendance Sheet, Emergency Oil Spill Protection Berm Meeting, U.S. Army Corps of Engineers (May 12, 2010) (on file with Commission staff).

<sup>28</sup> Department of the Army, Permit Evaluation and Decision Document (May 27, 2010) (contained within Emergency Permit Documents Compilation) [hereinafter NOD-20 Permit Decision].

water line, 25 feet wide at the top, rising six feet above the water line, and covering 9800 acres.<sup>29</sup> These berms would require approximately 102 million cubic yards of dredge material.<sup>30</sup> The project included nineteen “reaches,” or segments, stretching from the Chandeleur Islands westward to Baptiste Collette Bayou on the east side of the Mississippi River, and from Timbalier Island eastward to Sandy Point on the west side.<sup>31</sup> CPRA Chairman Garret Graves called Colonel Lee to let him know that “this request is at the top of the list for [Louisiana] Governor [Bobby] Jindal.”<sup>32</sup>

On May 18, CPRA submitted another application for an NOD-20 permit to cover three reaches of berms along the Isles Dernieres chain west of the Mississippi River.<sup>33</sup> This project entered a review process similar to the one described for the Chandeleur/Timbalier application.<sup>34</sup>

### C. Agencies Comment

On May 13, 17, and 22, the Corps consulted with agencies including the National Oceanic and Atmospheric Administration (NOAA), its National Marine Fisheries Service, the Environmental Protection Agency (EPA), the Department of the Interior (including the Fish and Wildlife Service and the Minerals Management Service), the Louisiana Department of Wildlife and Fisheries, and the Coast Guard, as well as the Federal On-Scene Coordinator and the National Incident Command.<sup>35</sup> On May 13 and 14, the Corps received written comments from NOAA, EPA, the Fish and Wildlife Service, and the Louisiana Department of Wildlife and Fisheries.<sup>36</sup> Most of these same agencies submitted a second round of written comments on the revised May 15 application between May 17 and May 26.<sup>37</sup> Other entities — including the National Incident Command and Federal On-Scene Coordinator — submitted comments orally.<sup>38</sup> Key concerns raised in the written comments relating to the permit application, as revised on May 15, are summarized below.<sup>39</sup>

#### 1. Construction Time Line

Although at the time Louisiana submitted its NOD-20 application no one knew how long the active spill phase of the Deepwater Horizon disaster would last, the general consensus among

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<sup>29</sup> Executive Summary, Corps Decision on State’s Emergency Permit Request (Undated) (contained within Emergency Permit Documents Compilation).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> E-mail from Colonel Alvin Lee, U.S. Army Corps of Engineers, to Michael Walsh, U.S. Army Corps of Engineers (May 15, 2010) (on file with Commission staff).

<sup>33</sup> On eight separate occasions in 2005, 2006, and 2007, the State of Louisiana had applied for Federal Emergency Management Agency grants ranging from approximately \$4 million to \$10.5 million for Isles Dernieres coastal restoration efforts. See Summary of Ineligible PWs for Barrier Islands; Wells E-mail.

<sup>34</sup> See U.S. Army Corps of Engineers, Isles Dernieres NOD-20 Application Documents Compilation (July 6, 2010), available at <http://www.mvn.usace.army.mil/pao/Isles%20Dernieres%20Packet.pdf>.

<sup>35</sup> NOD-20 Permit Decision.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> The synthesis of these concerns is drawn from the comment letters the agencies submitted. See generally Emergency Permit Documents Compilation.

federal officials was that a relief well, which would stop the flow of oil from the Macondo well, could be completed by September.<sup>40</sup> None of the commenting agencies stated this directly, but the Department of the Interior and EPA, in particular, expressed deep skepticism that the berms would be constructed in time to be effective for oil spill response:

- **Department of the Interior:** “If this project could be completed within a week or two, we would be more willing to consider the risks inherent in the project as appropriate ones. However, the State itself has said this very large and comprehensive project will take six to nine months to complete.”<sup>41</sup>
- **EPA:** “We are concerned about the element of time. Can the proposed project realistically be constructed in time to have a measurable effect on controlling movement of oil into interior estuarine waters and wetlands?”<sup>42</sup>

CPRA responded to these concerns by stating that the time frame for project completion would be “dependent upon the level of commitment by BP to fast-track the operation” and on how many dredges were incorporated into the effort.<sup>43</sup>

## 2. Direct Effects of Dredging on Physical and Biological Resources

Comments from the Department of the Interior, its Minerals Management Service, EPA, NOAA, and its National Marine Fisheries Service highlighted potential adverse impacts of the dredging operations necessary for the berms project:

- **Department of the Interior/Mineral Management Service:** Expressed concern “about oiling of the borrow areas [that is, the areas from which sand would be removed] after they are dredged” and “dredging the borrow area particularly with regard to pipelines and impacts on cultural resources.”<sup>44</sup>
- **EPA:** “[T]here is no specific provision for testing borrow areas for potentially contaminated sediments prior to dredging.”<sup>45</sup>
- **NOAA/National Marine Fisheries Service:** Requested that the state conduct “numerical analyses of wave climate changes that may result from excavation of the

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<sup>40</sup> See, e.g., Transcript, Meet the Press (May 2, 2010) (Secretary of the Interior Ken Salazar estimating that it would take ninety days to drill a relief well); White House Press Briefing by Press Secretary Robert Gibbs (May 3, 2010), available at <http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-532010> (same).

<sup>41</sup> Department of the Interior, Response to Information Received From the Applicant for the Permit to Dredge Sediment to Replenish Barrier Islands in Response to the Deepwater Horizon Spill (May 22, 2010) (contained within Emergency Permit Documents Compilation) [hereinafter Interior Comments].

<sup>42</sup> EPA Review of Revised Berm Proposal (May 26, 2010) (contained within Emergency Permit Documents Compilation) [hereinafter EPA Comments].

<sup>43</sup> OCPR Responses, Barrier Plan Issues Communicated to the State by the Corps (May 21, 2010) (contained within Emergency Permit Documents Compilation) [hereinafter CPRA Responses].

<sup>44</sup> Interior Comments.

<sup>45</sup> EPA Comments.

proposed borrow areas” as well as “potential changes to adjacent shorelines that may result from predicted wave climate changes.”<sup>46</sup>

CPRA stated that it was “currently evaluating all historical data sets for the proposed borrow areas,” and planned to perform geophysical surveys of the areas after initial sampling confirmed that borrow material (*i.e.*, the dredged sand) was contaminant free.<sup>47</sup> Moreover, CPRA explained that the “[m]agnometer and geophysical surveys have been initiated to determine . . . potential hazards in extraction.”<sup>48</sup> Finally, CPRA assured the Corps that it would confirm the quality of the borrow material (specifically, that it was un-contaminated and suitable for berm construction) through two different sampling protocols.<sup>49</sup>

While CPRA thus attempted to address the comments about borrow areas and the quality of the borrow material, it did not address the concern from NOAA and the National Marine Fisheries Service regarding the effects of dredging on adjacent shorelines. CPRA did note that the proposed process, at least west of the Mississippi River, would be “similar to the procedures utilized on the east [coast] of Florida for coastal restoration,”<sup>50</sup> but it did not elaborate on the similarity of the Florida and the Louisiana shorelines that might be affected.

### **3. Release of Oil and Other Contaminants from Dredged Sediments or Eroded Barriers**

Certain commenting agencies expressed concerns about the project’s potential to introduce immediate and long-term oil contamination into the environment near the berms:

- **Department of the Interior:** “Dredging requires the intake of water, which, if contaminated, will mix with the sediment/sand during the dredging/placement process. We are unclear as to how the State can control for this in the construction of the berm. If there is no way to filter the water intake and the water is oiled, they will be placing contaminated sediment into the berm.”<sup>51</sup>
- **EPA:** The project gave “no consideration to either short or longer-term planning, responsibility or costs for removal/remediation of berm sediments that become contaminated from intercepting waterborne oil.”<sup>52</sup>
- **NOAA/National Marine Fisheries Service:** “[N]o contaminated sediments shall be used to construct the barrier berm” and “sediment in the berm that may become contaminated must be removed.”<sup>53</sup>

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<sup>46</sup> NOAA & National Marine Fisheries Service, Comments on Louisiana Barrier Island Berm (Undated) (contained within Emergency Permit Documents Compilation) [hereinafter NOAA/National Marine Fisheries Service Comments].

<sup>47</sup> CPRA Responses.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Interior Comments.

<sup>52</sup> EPA Comments.

<sup>53</sup> NOAA/National Marine Fisheries Service Comments.

As described above, CPRA affirmed that it would test borrow material for contamination during construction of the berms. CPRA also agreed to monitor the berms for the presence of oil, but emphatically stated that oil cleanup was the responsibility of BP and the federal government, not of Louisiana.<sup>54</sup> CPRA further pointed out “that this endeavor is not intended to be a permanent barrier berm,” and that “[t]he protective berm will be reshaped with dozers as needed.”<sup>55</sup> To the extent that contaminated, degraded berm material is harder to recover than floating oil, CPRA did not provide a plan for recovering that material.

#### 4. Alteration of Water, Sediment, and Salinity Flow Patterns

Commenting agencies focused on the effects the berms could have on the circulation of water, sediment, and salinity in the coastal environment:

- **Department of the Interior/Fish and Wildlife Service:** While acknowledging that “the State has offered to work with [the Fish and Wildlife Service] on where the breaches [in the berms] should be to protect tidal inlets,” the Department expressed concern that tidal currents and circulation patterns “could be altered by the construction of the project” and requested further study of these potential impacts.<sup>56</sup> The Fish and Wildlife Service, in particular, commented that “tidal inlets should not be blocked by the berm.”<sup>57</sup>
- **EPA:** “If this plan moves forward, the permit should be conditioned upon the applicant adjusting the ‘containment’ aspect of the berm to a more environmentally beneficial project after the risk of oil contamination has passed. In other words, return the berm to a more studied and beneficial ‘barrier island’ restoration project. Clearly, if the more extensive 80-120 mile proposal were to be advanced, EPA’s concerns about these longer term impacts on salinity, hydrology and sediment would greatly increase.”<sup>58</sup>
- **Louisiana Department of Wildlife and Fisheries:** Asked if “borrow area excavation will increase wave energy and subsequent shoreline erosion, alter littoral currents, or otherwise impact depositional processes.”<sup>59</sup>
- **NOAA/National Marine Fisheries Service:** These agencies were willing to authorize “placement of sand in front of existing islands” but not “complete closure of passes.”<sup>60</sup>

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<sup>54</sup> CPRA Responses.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> U.S. Fish and Wildlife Service, LA Barrier Island Protective Berm — Digested Comments (May 17, 2010) (contained within Emergency Permit Documents Compilation) [hereinafter Fish and Wildlife Service Comments].

<sup>58</sup> EPA Comments.

<sup>59</sup> Letter from Jimmy Anthony, Louisiana Department of Wildlife and Fisheries, to Pete Serio, U.S. Army Corps of Engineers (May 13, 2010) (contained within Emergency Permit Documents Compilation). Note the Louisiana Department of Wildlife and Fisheries submitted its comment letter on May 13, two days before CPRA submitted a revised NOD-20 application to the Corps.

<sup>60</sup> NOAA/National Marine Fisheries Service Comments.

CPRA responded that “it is not our intent to alter the hydrology of tidal passes and other significant water exchange points,” and that “tidal passes are critical hydrological features and we are not proposing these be adversely altered.”<sup>61</sup> CPRA agreed to monitor hydrological impacts and to assess the effects of any deepwater reaches at the time of their construction.<sup>62</sup>

## 5. Effects of Barriers on Endangered and Other Protected Species and Habitats

The Department of Interior, its Fish and Wildlife Service, EPA, NOAA, and its National Marine Fisheries Service expressed concerns about the berms’ effects on endangered and other protected species and habitats:

- **Department of the Interior/Fish and Wildlife Service:** Expressed concerns about impacts on the habitats for the piping plover, royal tern, nesting gulls, black skimmers, and brown pelicans, as well as the impact on seagrasses.<sup>63</sup>
- **EPA:** “It is unclear what specific protective measures this project would implement to avoid and minimize impact to [seagrass beds] from dredged sediments and potentially oil that is pooled in the more sheltered regime created by berms.”<sup>64</sup>
- **NOAA/National Marine Fisheries Service:** Expressed concern that cross-sectional openings of tidal passes would have an effect on fishery resources and oyster-producing areas, and that tracked construction equipment could harm seagrasses.<sup>65</sup>

The agencies sought information about how construction of the berms would affect particular species and their habitats. CPRA did not directly address these questions, providing only the general assurance that it would monitor the area to “provide baseline and with [sic] project information to better assess environmental effects.”<sup>66</sup>

## 6. Funneling and Entrapment of Oil

EPA, in particular, worried that, if the project were only partially completed during the spill, it might worsen rather than improve oil dispersal. To reduce the concerns described above about water, sediment, and salinity circulation, CPRA had designed the project to avoid closing important tidal passes. But EPA argued that these passes could produce a funneling and entrapment effect. According to EPA, if oil were to reach partially-completed berms, the berms could funnel oil at higher than normal velocities into areas where tidal passes were still open. Oil so funneled or otherwise reaching the bayside of the berms could be trapped in that area and wash back onto the bayside shore of the berms and barrier islands.<sup>67</sup> EPA recommended use of

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<sup>61</sup> CPRA Responses.

<sup>62</sup> *Id.*

<sup>63</sup> Interior Comments; Fish and Wildlife Service Comments.

<sup>64</sup> EPA Comments.

<sup>65</sup> NOAA/National Marine Fisheries Service Comments.

<sup>66</sup> CPRA Responses.

<sup>67</sup> EPA Comments.

boom in the passes,<sup>68</sup> which CPRA stated it included in its design.<sup>69</sup> Building on this recommendation, CPRA further noted that the project would “allow for the strategic reallocation and concentration of boom and other oil spill reaction mechanisms in the passes.”<sup>70</sup>

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In short, agency comments raised numerous concerns about the efficacy and environmental impacts of the berms project, some of which were addressed by CPRA, and others of which were not. In its Permit Evaluation and Decision Document, the Corps stated that “none of those agencies have submitted a formal objection to the Corps requesting that the NOD-20 emergency permit not be issued.”<sup>71</sup> The Department of the Interior, however, came close, saying: “[W]e do not think the risks inherent in proceeding without more environmental study and knowledge are acceptable.”<sup>72</sup>

#### **D. Pressure Begins to Rise**

By mid-May, criticism of the Corps’ handling of the berms project had become heated. On May 17, Governor Jindal’s office summoned Colonel Lee to the New Orleans Louis Armstrong International Airport for a meeting with a contingent of state and local officials, including three parish presidents, the Chairman of CPRA, the Adjutant General for Louisiana, the Chief of Staff to Governor Jindal, and the Governor himself. The group’s message to Colonel Lee was clear: Approve the berms project, and do it quickly.<sup>73</sup>

The entire Louisiana congressional delegation wrote a letter on May 20 “implor[ing] [the Corps] to immediately approve the emergency authorization request” for the berms.<sup>74</sup> The next day, Governor Jindal proclaimed “[t]here’s no reason not to go ahead and approve this permit, get this done and keep this heavy oil out of the wetlands.”<sup>75</sup> Parish President Nungesser rhetorically asked a reporter, “How can anybody say no, after seeing this [oil in the marsh]?”<sup>76</sup> In a May 21 letter to President Obama, Senator David Vitter of Louisiana asked the President to stop the “tragic bureaucratic stranglehold” and to “make this happen now.”<sup>77</sup>

The Louisiana Attorney General, Buddy Caldwell, entered the fray as well. On May 23, he sent a letter to the Corps arguing that “the federal government does not have the legal

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<sup>68</sup> *Id.*

<sup>69</sup> CPRA Responses.

<sup>70</sup> *Id.*

<sup>71</sup> NOD-20 Permit Decision.

<sup>72</sup> Interior Comments.

<sup>73</sup> See Lee Interview (Oct. 28); Press Release, Governor Jindal & Coastal Parish Leaders Meet with Army Corps of Engineers to Stress Importance of Approving Dredging Plan (May 17, 2010), *available at* <http://emergency.louisiana.gov/Releases/05172010-jindal.html>.

<sup>74</sup> See Letter from Senator Mary Landrieu et al., to Colonel Alvin Lee, U.S. Army Corps of Engineers, and Admiral Thad Allen, U.S. Coast Guard (May 20, 2010) (contained within Emergency Permit Documents Compilation).

<sup>75</sup> Kirkham, *Sand Barrier Faces Bureaucratic Delays, Ecological Questions*.

<sup>76</sup> *Id.*

<sup>77</sup> Letter from Senator David Vitter of Louisiana, to President Barack Obama (May 21, 2010), *available at* [http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=bbb7cd6c-00c1-83cc-6b60-c05663e719f3&Region\\_id=&Issue\\_id=](http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=bbb7cd6c-00c1-83cc-6b60-c05663e719f3&Region_id=&Issue_id=).

authority to deny a state the right to conduct such necessary emergency response actions” and advising the Corps that, if it did not approve the permit, “I will have no choice but to advise the Governor to go forward with our plans to construct the barrier islands.”<sup>78</sup> The theory of Attorney General Caldwell’s legal position was that states, pursuant to the Tenth Amendment, retain traditional authority to conduct their own emergency efforts to prevent or mitigate damages to their natural resources. This authority can only be divested by the federal government, if at all, when Congress (1) acts pursuant to its constitutional powers to (2) clearly manifest its intention to preempt the states. The Attorney General argued that, even assuming Congress has the power to regulate barrier island construction as an oil spill response measure, nothing in the Clean Water Act or any other federal statute constitutes such a “clear statement” of congressional intent to displace state authority. According to Attorney General Caldwell, certain provisions of the statute evidence just the opposite — *i.e.*, that Congress contemplated states exercising their emergency response power unless the President personally declares otherwise and takes over all response efforts.<sup>79</sup>

### **E. Corps Approves NOD-20 Application**

On May 27, the Corps approved issuance of an NOD-20 permit for a 39.5-mile, six-segment portion of the proposed 128-mile Chandeleur/Timbalier project (but not the Isles Dernieres project, for which Louisiana had submitted a separate NOD-20 application on May 18).<sup>80</sup> The Corps had required CPRA to eliminate restoration as a purpose of the response project, and permitted what it considered to be the minimum work necessary to respond to the emergency. It identified the six reaches of the project that it approved as the most critical areas,

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<sup>78</sup> See Letter from James D. “Buddy” Caldwell, Louisiana Attorney General, to Lt. General Robert L. Van Antwerp, U.S. Army Corps of Engineers (May 23, 2010), *available at* [http://media.nola.com/2010\\_gulf\\_oil\\_spill/other/buddy-caldwell-letter-to-corps.pdf](http://media.nola.com/2010_gulf_oil_spill/other/buddy-caldwell-letter-to-corps.pdf).

<sup>79</sup> None of the United States Supreme Court opinions the Caldwell letter cites in support of its theory involve circumstances remotely similar to the Deepwater Horizon context, where federal authority is being asserted over state emergency dredging and placement of massive sand structures in traditional navigable waters. It is beyond question that Congress has the authority to regulate dredging and the placement of structures in navigable waters of the Gulf, whether within or outside state waters. The primary case cited in the Caldwell letter involved the question whether federal legislation reached non-navigable isolated intrastate wetlands, which bears little in common with the context at hand. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). As the Caldwell letter notes, the Clean Water Act does refer to “State . . . actions” in connection with mitigating or preventing the threat of damage from oil discharges.” 33 U.S.C. 1321(c)(2). This provision allows the President, in cases where the discharge poses a threat to national public health or welfare, to direct all federal, state, and private response actions. Attorney General Caldwell asserts that this provision falls short of a “clear statement,” and that in any event the President had not exercised this authority for the Deepwater Horizon spill. On the other hand, the provision also does not appear to preserve or even contemplate the scope of emergency authority Attorney General Caldwell asserts the states possess.

Overall, while it is true that nothing in the Clean Water Act specifically purports to preempt states from exercising their traditional emergency response action authorities to protect their natural resources, it is far from clear (1) what the scope of those traditional state authorities is; (2) the extent to which any such authority allows a state to override traditional federal powers to regulate dredging and placement of massive sand structures in navigable waters clearly subject to federal jurisdiction; and (3) what effect the Clean Water Act would have were the “clear statement” principle to apply to that context.

<sup>80</sup> See NOD-20 Permit Decision; Presentation, New Orleans District Emergency Permit Request Action, U.S. Army Corps of Engineers (June 1, 2010), *available at* <http://www.mvn.usace.army.mil/pao/MVNIPR1June2010Final.pdf> [hereinafter Corps June 1 Presentation].

where the state could achieve “greater immediate benefit” with minimal environmental impact.<sup>81</sup> Corps approval did not eliminate the need for statutorily-required approvals from agencies, such as from the Minerals Management Services for dredging, from the Fish and Wildlife Service for work in wildlife refuges, and from the Louisiana Department of Natural Resources for a Louisiana Coastal Use Permit.<sup>82</sup> To address concerns raised by commenting agencies, the permit included 33 special conditions relating to dredging depths, borrow site location, use of floating equipment, migratory species, endangered species, national wildlife refuges, essential fish habitat, cultural and historic resources, and water quality.<sup>83</sup>

The following timeline summarizes the Corps’ NOD-20 permitting process for the Louisiana berms project, from start to finish:<sup>84</sup>

- **May 11:** Upon receipt of the initial CPRA NOD-20 application, the Corps began National Environmental Policy Act coordination with other resource agencies.
- **May 12:** The Corps hosted a coordination meeting in New Orleans for all of the state and federal agencies involved in the comment process, and notified CPRA that the restoration focus of the project did not qualify for NOD-20.
- **May 12:** The Corps hosted a teleconference with the White House Council on Environmental Quality, the National Incident Command, the Department of the Interior, and EPA to “discuss permit application [National Environmental Policy Act] compliance,”<sup>85</sup> as well as “the state’s proposal and the status of pre-application meetings between the Corps, the applicant, and other federal agencies.”<sup>86</sup>
- **May 13:** The Corps began coordinating through e-mails, telephone calls, meetings, and written communications with federal and state agencies as necessary under federal laws including the Endangered Species Act,<sup>87</sup> National Wildlife Refuge System Improvement Act,<sup>88</sup> Wilderness Act,<sup>89</sup> Magnuson-Stevens Act,<sup>90</sup> Marine Mammal Protection Act,<sup>91</sup>

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<sup>81</sup> NOD-20 Permit Decision.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See generally Emergency Permit Documents Compilation.

<sup>85</sup> Permit Evaluation Timeline.

<sup>86</sup> E-mail from White House Council on Environmental Quality to Commission Staff (Dec. 6, 2010) (on file with Commission staff).

<sup>87</sup> Section 7 of the Endangered Species Act (16 U.S.C. § 1536) requires all federal agencies to consult with the National Marine Fisheries Service or the Fish and Wildlife Service when proposing an action that may affect listed species or their designated habitat. 16 U.S.C. § 1536(a). The Corps consulted with both of these agencies. The Fish and Wildlife Service approved an expedited review of the project. The typical protocol of sending a biological assessment to the Fish and Wildlife Service and the National Marine Fisheries Service, followed by a biological opinion from these two agencies, was conducted informally. The Fish and Wildlife Service and the National Marine Fisheries Service responded to the Corps with detailed recommendations to prevent habitat destruction for all endangered and threatened species in the project area, which were included in the special conditions of the permit. See Emergency Permit Documents Compilation.

<sup>88</sup> In regards to the Breton National Wildlife Refuge, the Corps consulted with the Refuge Manager under the Fish and Wildlife Service to determine if the proposed project constituted a “compatible use” as defined by Section 5 of the National Wildlife Refuge System Improvement Act. A compatible use means a “wildlife-dependent recreational

National Historic Preservation Act,<sup>92</sup> Section 401 of the Clean Water Act,<sup>93</sup> and Coastal Zone Management Act.<sup>94</sup>

- **May 13-14:** Federal and state agencies provided written comments on the initial application.
- **May 14:** CPRA responded to that first round of comments and also submitted a revised application.
- **May 15:** The Corps distributed the revised application to commenting agencies.
- **May 17:** The Corps coordinated with the agencies by teleconference and requested written comments.

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use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” 16 U.S.C. § 668ee(1). The Fish and Wildlife Service provided the Corps with recommendations to ensure consistency with compatible use. Those recommendations were incorporated into the permit along with the condition to that the state must obtain a Special Use Permit for construction activities in Breton National Wildlife Refuge. See Emergency Permit Documents Compilation.

<sup>89</sup> Federal agencies proposing to use a wilderness area are responsible for preserving the wilderness character of the area. 16 U.S.C. § 1133. The Fish and Wildlife Service determined the proposed project met the emergency exception for permitted use. See Emergency Permit Documents Compilation.

<sup>90</sup> The Magnuson-Stevens Act (16 U.S.C. § 1801 *et seq.*) requires measures to conserve and enhance the habitat needed by fish to carry out their life cycles. The act requires the cooperation of federal and state agencies and others in achieving Essential Fish Habitat protection. 50 C.F.R. § 600.815. The National Marine Fisheries Service provided the Corps with recommendations for anticipated Essential Fish Habitat issues, which were incorporated into the permit. See Emergency Permit Documents Compilation.

<sup>91</sup> Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (16 U.S.C. § 1361 *et seq.*) allow the incidental take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region if certain findings are made (*i.e.*, taking will have a negligible impact on the affected species or stock(s) and will not have an adverse impact on the availability of the species or stock(s) for subsistence uses). The Fish and Wildlife Service and the National Marine Fisheries Service responded to the Corps with recommendations regarding potential impact to marine mammals, which were included in the special conditions of the permit. See Emergency Permit Documents Compilation.

<sup>92</sup> National Historic Preservation Act (16 U.S.C. § 470 *et seq.*) requires federal agencies to consult with the State Historic Preservation Office to determine the impacts of their projects on historic properties. 36 C.F.R. pt. 800. The State Historic Preservation Office did not anticipate the project to produce any issues with historic land, but the office recommended the Corps add special conditions to the permit requiring the permittee to contact it for consultation of any dredge and fill activity. The Corps also contacted the Chitimacha Tribal Director. The tribe suggested the proposed project might impact pre-historic tribal campsites, historic plantations forts, and a historic cemetery. See Emergency Permit Documents Compilation.

<sup>93</sup> Any entity that applies for a federal permit for an activity resulting in discharge to navigable waters must obtain a state Section 401 water quality certification to ensure the project will comply with state water quality standards. 33 U.S.C. § 1341. The proposed Corps Section 404 permit is required to conduct a water quality certification for approval. The Louisiana Department of Environmental Quality issued a Water Quality Certification for the proposed project and this limit was added to the permit special conditions. See Emergency Permit Documents Compilation.

<sup>94</sup> A federal development in the coastal zone of a state must consult with the state to insure the project is consistent state coastal management programs. The Corps coordinated with the Louisiana Office of Coastal Management for authorization of construction in the coastal zone. See Emergency Permit Documents Compilation.

- **May 21, 24:** CPRA submitted additional information.
- **May 17-26:** Federal and state agencies provided comments and CPRA provided responses; the Corps and CPRA exchanged technical reviews.
- **May 27:** The Corps approved the NOD-20 application.

On June 1, Louisiana signed the NOD-20 permit acceptance and, on June 3, it forwarded this signed acceptance to the Corps.<sup>95</sup>

Within a sixteen-day time frame, the Corps and other agencies pored over a proposal for an emergency response measure of unprecedented magnitude.<sup>96</sup> The agencies quickly provided the Corps with an extensive basis for reviewing the proposal.<sup>97</sup> The Corps also conducted its own internal review. CPRA had the opportunity to respond to the agencies' comments, in some cases resolving the concerns by agreeing to monitoring, and in other cases disagreeing with the comments on merits. The Corps and CPRA maintained regular contact.

In addition, the Corps and National Incident Command "were in constant contact . . . on the validity of the project."<sup>98</sup> On May 24, three days before the Corps officially approved Louisiana's NOD-20 application, Colonel Lee e-mailed a draft of the permit to Admiral Allen's Chief of Staff, writing: "Please have the NIC Interagency Solutions Group provide comments on the draft permit and Draft Environmental Assessment for the proposed barrier project."<sup>99</sup> "We wanted to cross talk with the Coast Guard so we were not getting out in front of them," Colonel Lee told the Commission staff, "to make sure we were in alignment."<sup>100</sup> According to Colonel

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<sup>95</sup> Permit Evaluation Timeline.

<sup>96</sup> Other projects approved under NOD-20 for the Deepwater Horizon response were miniscule in scale compared to the Louisiana berms project. No other example of emergency approval of a project of the scale and potential effect of the Louisiana berms project could be identified under NOD-20 or any other similar procedure. According to the Corps, the emergency permitting process for "Katrina Cut" at Dauphin Island, Alabama, a berms project on a much smaller scale, took roughly 10 days from start to finish. See Telephone Interview by Commission Staff with Craig Litteken, U.S. Army Corps of Engineers (Oct. 27, 2010). Publicly available Corps statistics show that during the Deepwater Horizon spill response, in all three Gulf of Mexico Coast Guard districts (New Orleans, Mobile, and Jacksonville), 92 emergency permits in total were issued. The vast majority of these permits (73) were issued in 0 to 5 days. 13 permits were issued in 6 to 10 days. 1 permit was issued in 16-20 days (the Louisiana berms project discussed in this paper). 2 permits were issued in 21 to 25 days, and 3 projects took 30 plus days to be permitted. See U.S. Army Corps of Engineers, Gulf Coast District Situation Report, Status of Emergency Permit Requests (Oct. 28, 2010) (on file with Commission staff).

<sup>97</sup> The Commission staff has heard that EPA officials in Washington, D.C., rather than regional and local EPA officials per the norm, weighed in on that agency's comments on the NOD-20 application. Telephone Interview by Commission Staff with Pete Serio & Martin Mayer, U.S. Army Corps of Engineers (Oct. 27, 2010); Lee Interview (Oct. 28, 2010); Telephone Interview by Commission Staff with Government Official (Oct. 28, 2010). The New Orleans-based EPA official ran all agency comments through a special assistant to the EPA Deputy Administrator. See Interview with Government Official.

<sup>98</sup> Telephone Interview by Commission Staff with Former Aide to National Incident Commander (Nov. 2, 2010).

<sup>99</sup> E-mail from Colonel Alvin Lee, U.S. Army Corps of Engineers, to Mark Clark, U.S. Army Corps of Engineers & Captain Peter Gautier, U.S. Coast Guard (May 24, 2010) (on file with Commission staff).

<sup>100</sup> Lee Interview (Oct. 28, 2010).

Lee, the Corps could have issued the NOD-20 permit five days earlier had it not sought to “align” with the National Incident Command.<sup>101</sup>

While coordination with the National Incident Command may have resulted in a few days’ delay, it appears to have been appropriate. The National Incident Command was conducting its own evaluation of the berms project, though against a different set of criteria (described below). The Corps coordinated with — although it did not take direction from — the National Incident Command because, as the Corps put it, the project had a “great[] potential for controversy” and “the scope of this event transcended many jurisdictions.”<sup>102</sup> Indeed, “it was critical that communication occurred across the board in support of the comprehensive Federal response.”<sup>103</sup> The Corps’ NOD-20 permit review process seems to have been diligent and thorough.<sup>104</sup>

## II. The National Incident Command Review

That the Corps issued a permit for a modified version of the State of Louisiana’s berms project did not mean that construction on the approved 39.5-mile, six-segment project could immediately begin. The NOD-20 permit authorized Louisiana to begin construction “at its own expense.”<sup>105</sup> The permit did not “address the applicability of the proposed project to the spill response effort, which is a decision to be made by the National Incident Commander in consultation with Federal On-Scene Coordinator.”<sup>106</sup> The state needed the National Incident Command’s authorization “to integrate a section of the project with the federal oil spill response — and therefore potential funding by BP, as the responsible party.”<sup>107</sup> The Corps had “approved the feasibility and environmental impacts” of the berms, but deciding whether the berms were “effective[] . . . in combating the oil spill” fell to Admiral Allen.<sup>108</sup> The NOD-20 permit process only included a “look at the proposed purpose” of the berms, not “a technical analysis of the effectiveness of” the berms as an oil spill response measure.<sup>109</sup>

The idea to use berms as an oil spill response measure on the scale proposed by Louisiana had not been contemplated in any spill response plan, or by any federal agency.<sup>110</sup> Of the two

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<sup>101</sup> *Id.*

<sup>102</sup> E-mail from Martin Mayer, U.S. Army Corps of Engineers, to Commission Staff (Nov. 18, 2010) (on file with Commission staff).

<sup>103</sup> *Id.*

<sup>104</sup> *See, e.g.*, Interview with Government Official.

<sup>105</sup> *See* Press Release, Deepwater Horizon Incident Joint Information Center, Admiral Allen Approves One Section of Louisiana Barrier Island Project Proposal as Part of Federal Oil Spill Response (May 27, 2010), *available at* <http://www.restorethegulf.gov/release/2010/05/27/admiral-allen-approves-one-section-louisiana-barrier-island-project-proposal-part> [hereinafter May 27 Release].

<sup>106</sup> NOD-20 Permit Decision.

<sup>107</sup> May 27 Release.

<sup>108</sup> Press Briefing by National Incident Commander (June 2, 2010), *available at* <http://www.restorethegulf.gov/release/2010/06/08/transcript-press-briefing-national-incident-commander-june-2-2010> [hereinafter June 2 Transcript].

<sup>109</sup> E-mail from Max Wilson, U.S. Army Corps of Engineers, to Commission Staff (Nov. 2, 2010).

<sup>110</sup> CPRA has claimed that “NOAA confirms the use of sand berms for oil spills.” Presentation, Barrier Island Berm Meeting, State of Louisiana/CPRA (June 1, 2010), *available at* [http://www.lacpra.org/assets/docs/NIC\\_Sandbarrier\\_Garret\\_Graves\\_Presentation.pdf](http://www.lacpra.org/assets/docs/NIC_Sandbarrier_Garret_Graves_Presentation.pdf) [hereinafter CPRA June 1

applicable Coast Guard approved spill response plans for Louisiana, the Southeast Louisiana Area Contingency Plan only describes in general terms the small-scale use of berms in response to a spill,<sup>111</sup> while the New Orleans Area Contingency Plan does not mention berms in any context.<sup>112</sup>

In an attempt to ensure a smooth federal review of this novel spill response measure, soon after Louisiana filed its NOD-20 permit application in mid-May, a group composed of officials from the White House Council on Environmental Quality and agency officials at the deputy secretary level determined that evaluation of the berms project would occur on two, seemingly separate tracks:

- (1) The Corps' review for "engineering and environmental feasibility"; and
- (2) "Once the proposal review [by the Corps] is complete, the [Federal On-Scene Coordinator] or the [National Incident Commander], with input from BP as the responsible party, will assess the proposal's effectiveness in mitigating oil damages and decide whether to go forward with the proposal."<sup>113</sup>

In a June 2 press conference, Admiral Allen re-emphasized the distinct roles of the Corps and the National Incident Command in reviewing Louisiana's novel proposal:

The Corps permits approved the feasibility and the environmental impact of the barriers and the berms. What they don't establish is whether they are effective in combating the oil spill. Most of these projects are looked at in terms of "what is the source of the sand?", "how will it be done?", "what are the design characteristics of the berms in the barrier islands and what are the environmental issues associated with that?" If all of that is consistent with the fact there is no harm to the environment, then the Corps of

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Presentation]. NOAA, however, disputes this assertion. See E-mail from Christine Blackburn, National Oceanic and Atmospheric Administration, to Commission Staff (Dec. 1, 2010) (on file with Commission staff) ("The statement 'NOAA confirms the use of sand berms for oil spills' is not consistent with the general guidance.").

<sup>111</sup> Southeast Louisiana Area Contingency Plan § 4530.8 (2003) ("Generally, sediment berms, dikes and dams will most often be used to protect small coastal inlets or perhaps tidal channels . . . . Dikes and dams are not practical when currents are great, waters are deep and waves are large. Also, beaches with abundant sand are generally the most suitable for building dikes and dams. Berms can be built above the active beach face to prevent oil contamination of high beach during spring tides."). This description of berms from the Southeast Louisiana Plan seems to contemplate the use of small inlet barriers and beach berms like those constructed in Florida during the spill. For example, in early June, the Florida Department of Environmental Protection issued a permit to Bay County authorizing a small-scale sand inlet, temporary barrier at the relatively narrow Phillips inlet to Lake Powell, a coastal dune lake. See Florida Department of Environmental Protection Permit No. 7000010-BA (June 4, 2010), available at [http://www.dep.state.fl.us/deepwaterhorizon/files/permits/powell\\_060710.pdf](http://www.dep.state.fl.us/deepwaterhorizon/files/permits/powell_060710.pdf). In late June, the Florida Department of Environmental Protection issued several permits for "emergency sand dikes," or beach berms, including a permit issued for Walton County authorizing 19 miles of three-foot-high beach berms. See Florida Department of Environmental Protection Permit No. WL-1089 E (June 25, 2010), available at [http://www.dep.state.fl.us/deepwaterhorizon/files/permits/walton\\_062510.pdf](http://www.dep.state.fl.us/deepwaterhorizon/files/permits/walton_062510.pdf). The Southeast Louisiana Area Contingency Plan does not appear to contemplate the large offshore barrier berms constructed in Louisiana.

<sup>112</sup> Sector New Orleans Geographic Response Plan (Aug. 2009). But see CPRA June 1 Presentation (claiming that "sand berms are also pre-approved in the area contingency plan for oil spill response").

<sup>113</sup> NIC Decision Support Document Regarding Barrier Island Proposal Based Upon Interagency Solutions Group Discussion and Army Corps of Engineers NOD 20 Permit Discussions (May 17, 2010) (on file with Commission staff) [hereinafter May 17 Interagency Solutions Group Berms Guidance].

Engineers proffers a permit back to the state which they can accept. The question of doing this as part of an oil spill response is novel and has never been done before. So we are vetting the issues associated with the proposal in terms of the effectiveness they would have in combating the oil spill. Because if that is the case, we can direct that to be done by British Petroleum and that's a novelty issue.<sup>114</sup>

As Admiral Allen told the Commission staff, the Corps' process was "agnostic to efficaciousness of berms on spill response."<sup>115</sup> The Corps' decision on the berms provided a "foundation" for the National Incident Command,<sup>116</sup> but the National Incident Command, not the Corps, had the "final call" on whether BP would fund the berms as part of the response.<sup>117</sup>

Colonel Lee also distinguished between the role of the Corps and the National Incident Command in reviewing the berms project. Recounting a conversation with CPRA Chairman Garret Graves, Colonel Lee wrote in a May 15 e-mail that the National Incident Command "has to review the project to determine if it will be approved as part of the spill response plan. I informed him [Mr. Graves] that we have no role in that decision making . . . ."<sup>118</sup>

Separate from assessing whether berms would effectively guard the Louisiana coastline from oil, Admiral Allen's responsibilities included addressing the concerns of federal, state, and local leaders. The National Incident Command, as envisioned by Admiral Allen, functioned as a coordination and communications center that handled high-level political demands as well as response strategy.<sup>119</sup> An August 10 version of the National Incident Command's Draft Strategy Implementation — an evolving spill strategy blueprint — suggests that "political considerations" influenced the Command's posture toward the Louisiana berms project.<sup>120</sup> The politics of berms, not just the science of berms, would impact the National Incident Command's decision-making.

## **A. Initial Opposition**

As soon as CPRA filed its NOD-20 application with the Corps on May 11, berms emerged on the radar of the National Incident Command and Federal On-Scene Coordinator. In an e-mail to Federal On-Scene Coordinator Rear Admiral Mary Landry dated May 11, a Coast Guard captain listed Louisiana's berms project as the first of nine "issues from yesterday": "Dredging plan to create a barrier against worst case discharge oil from reaching inland marshes.

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<sup>114</sup> See June 2 Transcript.

<sup>115</sup> Allen Interview.

<sup>116</sup> National Incident Commander Aide Interview (Nov. 2, 2010).

<sup>117</sup> Allen Interview.

<sup>118</sup> Lee E-mail (May 15, 2010).

<sup>119</sup> Interview with Coast Guard Admiral (Sept. 2, 2010); Interview with Coast Guard Rear Admiral (Aug. 31, 2010).

<sup>120</sup> Draft Manuscript from National Incident Commander, NIC Strategy Implementation 42-43 (Aug. 10, 2010) (on file with the Commission staff) [hereinafter NIC Draft Strategy Implementation] (Under a heading entitled "Local, Community & Political Considerations," noting the following: "Constituents of elected officials, including the office of the Governor of LA, are being pressured to respond, by any means necessary, to respond aggressively to this crisis. It has been purported in various correspondence that the strategic decisions made by local and state officials may be motivated by industries that may be benefactors of said decisions, such as local dredging and construction companies.")

Federal agencies ([Corps] and [Department of the Interior]) in favor; State in favor; would provide protection against worst case spill; would probably offset BP's [Natural Resource Damage Assessment] costs; would be a significant PR boon to BP."<sup>121</sup> Admiral Allen publicly stated that he was not waiting until the Corps "produce[d] a plan that we react to; we're trying to understand it, analyze it, and take a look at the interaction of those barrier islands or berms, if you will, in relation to how we're trying to prosecute this oil spill."<sup>122</sup>

The National Incident Command and the Unified Command were initially skeptical of, if not opposed to, the berms project, as the following stinging e-mail from a Coast Guard officer to Admiral Allen's Chief of Staff indicates:

I think that RADM Landry is on board for those berming and diking "projects" that are quickly employed and that the LA National Guard has been accomplishing. The Guard has been taking action and the [Corps] has been approving them after the fact. Do not get this confused with the coastal restoration project that the state is trying to get the Federal government to do. My understanding is that this project will cost over \$350M. I seriously doubt that BP would consider it. We have been working with the state to employ their plan as submitted by the Parish presidents . . . I guess their plan has not worked so now they want us to buy their dredge project that has been in process for over 10 years as a part of the coastal restoration project? Give me a break . . .<sup>123</sup>

One of Admiral Allen's aides told the Commission staff that "[w]e all shared the belief that this was probably, in the long term, not something that would substantially benefit the response."<sup>124</sup> In an e-mail to Admiral Allen on May 18, Rear Admiral James Watson, who would take over for Rear Admiral Mary Landry as Federal On-Scene Coordinator in June, made clear that he did not believe the berms represented a "spill response activity."<sup>125</sup>

Evidence available to the Commission staff suggests that the White House Council on Environmental Quality had also engaged on the berms issue by mid-May,<sup>126</sup> and that it may have shared the skepticism of Admiral Allen and others that the Louisiana berms were an appropriate spill response measure.<sup>127</sup> According to an e-mail from the Council, it "contacted academic scientists on May 20 to ask their views on the project."<sup>128</sup> One of the scientists contacted by a Council official on that day told the Commission staff that, according to the official, the federal

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<sup>121</sup> E-mail from Captain Edwin Stanton, U.S. Coast Guard, to Rear Admiral Mary Landry, U.S. Coast Guard (May 11, 2010) (on file with Commission staff).

<sup>122</sup> Teleconference by Admiral Thad Allen (May 21, 2010), *available at* <http://www.restorethegulf.gov/release/2010/05/24/teleconference-allen-may-21>.

<sup>123</sup> E-mail from Captain James Hanzalik, U.S. Coast Guard, to Captain Peter Gautier, U.S. Coast Guard (May 23, 2010) (on file with Commission staff).

<sup>124</sup> National Incident Commander Aide Interview (Nov. 2, 2010).

<sup>125</sup> E-mail from Rear Admiral James Watson, U.S. Coast Guard, to Admiral Thad Allen, U.S. Coast Guard (May 18, 2010) (on file with Commission staff).

<sup>126</sup> Council on Environmental Quality E-mail.

<sup>127</sup> Non-Public E-mail from Scientist.

<sup>128</sup> Council on Environmental Quality E-mail.

government (presumably, the National Incident Command<sup>129</sup>) expected to notify the State of Louisiana that afternoon that it did not consider the berms to be an effective oil spill response measure.<sup>130</sup>

## **B. Interagency Solutions Group Provides Feedback**

The National Incident Command did not call the State of Louisiana to deny approval of the berms project on May 20.<sup>131</sup> Its review of the berms as an oil spill response measure moved ahead.

The National Incident Command asked for feedback on berms from the Interagency Solutions Group, which was comprised of subject-matter experts from various federal agencies participating in the response, including the Corps.<sup>132</sup> Admiral Allen had established the group in early May to advise the National Incident Command on a host of issues — everything from fisheries closures, to mental health issues, to berms.

Draft summaries of findings on the berms project show that the National Incident Command and the Interagency Solutions Group initially had extensive reservations about the project. Over a twelve day period in mid-May, the group's perspective on the berms evolved:

- **May 13:** “[T]his would be an enormous undertaking under emergency authorities of the Federal On-Scene Coordinator using a technique that is not a planned response technique and may not achieve the desired results in a sufficiently timely manner.”<sup>133</sup>
- **May 17:** “This paper from the NIC, as advised by the NIC Interagency Solutions Working Group, does not recommend this project as a spill response technique for multiple reasons; including fund issues, project timeliness, oil/fill material intermingling potential, spill response effectiveness, effort v. benefit, hurricane season impacts, and project durability and longevity . . . Responders in the Unified Area Command and members of the NIC Interagency Solutions Group, do not find the proposal appropriate as an oil spill response tactic at this incident.”<sup>134</sup>

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<sup>129</sup> *Id.* (When asked by the Commission staff whether “CEQ, or the NIC, or the Corps expect[ed] to notify Louisiana on May 20 that it did not consider the berms to be an effective spill response measure,” the Council on Environmental Quality responded that “[c]onsistent with the National Contingency Plan, the expectation was that the NIC would notify the State once it had made a determination about whether or not the project qualified as a response project”).

<sup>130</sup> Non-Public E-mail from Scientist.

<sup>131</sup> The Commission staff asked the Council on Environmental Quality why the State of Louisiana was not notified on May 20 that its request for approval of the berms project would be denied, as one of the scientists contacted had been told would occur. The Council responded that it “does not have any information by which it can answer this question.” Council on Environmental Quality E-mail.

<sup>132</sup> See May 27 Release.

<sup>133</sup> E-mail from Commander Tim Tobiasz, U.S. Coast Guard, to Captain Michael White, U.S. Coast Guard, Juliette Kayyem, Department of Homeland Security, et al. (May 13, 2010) (on file with Commission staff) (outlining “NIC Interagency Solutions Workgroup (IASG) 5/13 bullets”).

<sup>134</sup> May 17 Interagency Solutions Group Berms Guidance.

- **May 19:** “The NIC has monitored the progression of this proposal through the [Corps] emergency permitting process, and with advice from an interagency expert team, has determined that the proposal is not appropriate for construction as a spill response countermeasure for several key reasons including: spill response effectiveness and timeliness, potential for oil and fill material intermingling during construction, project durability and longevity, and project cost versus per incident cap under the Oil Spill Liability Trust Fund.”<sup>135</sup>
- **May 25:** “The NIC Interagency Solutions Group (IASG) does not recommend the modified Louisiana berm proposal involving barrier islands around the Mississippi Delta as a spill response technique primarily due to the inability to construct these berms in a timely manner.”<sup>136</sup>

During this period, the State of Louisiana’s proposal underwent significant revisions as well. By May 25, most concerns about the berms seemed to have been addressed. But the National Incident Command and Interagency Solutions Group remained opposed to the project because they did not believe the berms could be constructed quickly enough to fight the Deepwater Horizon spill.

### C. The Prototype Decision

On May 22, Admiral Allen sent the following e-mail to his Chief of Staff and the Deputy National Incident Commander:

What are the chances we could pick a couple of no brainer projects and call them prototypes to give us some trade space on the larger issue and give that to Jindal this weekend? S-1 is going down Monday.<sup>137</sup>

The Interagency Solutions Group had advised the National Incident Command that the Louisiana berms project would not effectively fight the spill, but pressure from state and local officials was unyielding.<sup>138</sup> There was also “general extreme demand to do something.”<sup>139</sup> A letter to the editor of the *Baton Rouge Advocate* from a retired federal health care worker in Abita Springs gives a flavor of what seems to have been common public sentiment in Louisiana: “Complaints by our governor and the local leaders and our congressional representatives continue” while the “plan to build miles of sand berm that will supposedly shield our coast is stalled . . . . Stop the

<sup>135</sup> U.S. Department of Homeland Security, *Berm Construction and Spill Response* (May 19, 2010) (draft manuscript) (on file with Commission staff).

<sup>136</sup> U.S. Department of Homeland Security, *Berm Construction and Spill Response* (May 25, 2010) (on file with Commission staff) [hereinafter May 25 Interagency Solutions Group Berms Guidance].

<sup>137</sup> E-mail from Admiral Thad Allen, U.S. Coast Guard, to Captain Michael White, U.S. Coast Guard (May 22, 2010) (on file with Commission staff).

<sup>138</sup> As former Assistant Secretary for Intergovernmental Affairs at the Department of Homeland Security Juliette Kayyem put it to the Commission staff, Governor Jindal was a “drumbeat” on the berms project from May 1 onward. Telephone Interview by Commission Staff with Juliette Kayyem, U.S. Department of Homeland Security (Dec. 6, 2010).

<sup>139</sup> National Incident Commander Aide Interview (Nov. 2, 2010).

whining and get it done.”<sup>140</sup> “If there was something that we could try,” a senior Coast Guard officer told the Commission staff, it was “considered to be a good thing.”<sup>141</sup>

Admiral Allen conceived of a solution: If the National Incident Command approved only one prototype berm segment, that gesture could potentially appease Governor Jindal and satisfy “the public outcry to do something”<sup>142</sup> while not offending the consensus within the National Incident Command that the berms project would not aid the response. Secretary of the Interior Ken Salazar and Secretary of Homeland Security Janet Napolitano (“S-1”) were scheduled to visit the Gulf Coast on May 24.<sup>143</sup> As Admiral Allen’s Chief of Staff put it in a subsequent e-mail, Secretaries Salazar and Napolitano would view Admiral Allen’s prototype solution to the berms problem as a “big win.”<sup>144</sup>

The berms issue had not been settled by the time Secretaries Salazar and Napolitano traveled to Louisiana on May 24. At a news conference in Galliano, Secretary Napolitano appeared to “pour[] cold water on Louisiana’s berm plan” when she said the Administration was looking into “alternatives that might be as effective or more effective” as berms without the environmental risks.<sup>145</sup> According to one news report, Governor Jindal — standing next to Secretary Napolitano — “didn’t disguise his frustration.”<sup>146</sup> “We know we have to take action and take matters into our own hands if we are going to win this fight to protect our coast,” Governor Jindal said.<sup>147</sup> At the same news conference, Senator Vitter argued that delay in approving the berms project showed that President Obama “was breaking his pledge to ‘act in a timely manner and do whatever it takes’ to protect Louisiana and the Gulf coast.”<sup>148</sup> At a White House press briefing on the afternoon of May 24, however, Admiral Allen stated: “We need to understand . . . that building a set of barrier islands and berms that large is going to take a very, very long time even by the state’s own estimate — six to nine months in some cases — and a significant amount of resources associated with that that might be applied elsewhere.”<sup>149</sup>

On May 26, the Interagency Solutions Group, which had concluded the day before that it did “not recommend the modified Louisiana berm proposal involving barrier islands around the Mississippi Delta as a spill response technique primarily due to the inability to construct these

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<sup>140</sup> Letter to the Editor, *La. Leaders Waste Time as Oil Spreads*, The Advocate (May 28, 2010).

<sup>141</sup> National Incident Commander Aide Interview (Nov. 2, 2010).

<sup>142</sup> Telephone Interview by Commission Staff with Former Aide to National Incident Commander (Nov. 11, 2010).

<sup>143</sup> E-mail from Captain Michael White, U.S. Coast Guard, to Colonel Alvin Lee, U.S. Army Corps of Engineers (May 22, 2010) (on file with Commission staff).

<sup>144</sup> *Id.*

<sup>145</sup> Jeffrey Ball & Jonathan Weisman, *Slippery Start: U.S. Response to Spill Falters*, Wall St. J. (June 16, 2010); Paul Rioux, *Calling Gulf of Mexico Oil Spill ‘America’s Problem,’ Federal Officials Say Disaster Response is Largest in Nation’s History*, Times-Picayune (May 24, 2010); Chris Kirkham, *Frustration Over Sand Barriers Boils in Louisiana as Federal Government Offers Few Answers*, Times-Picayune (May 24, 2010).

<sup>146</sup> Ball & Jonathan, *Slippery Start: U.S. Response to Spill Falters*.

<sup>147</sup> *Id.*

<sup>148</sup> Rioux, *Calling Gulf of Mexico Oil Spill ‘America’s Problem,’ Federal Officials Say Disaster Response is Largest in Nation’s History*.

<sup>149</sup> Press Briefing by Press Secretary Robert Gibbs, Admiral Thad Allen, and Assistant to the President for Energy and Climate Change Carol Browner (May 24, 2010), available at <http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-admiral-thad-allen-and-assistant-presid> [hereinafter May 24 Press Briefing].

berms in a timely manner,”<sup>150</sup> revised its guidance: “The NIC-Interagency Solutions Group (IASG) recommends supporting Louisiana’s implementation of one of the reaches of Louisiana’s proposed berm project as a spill response prototype.”<sup>151</sup>

On May 27, the same day the Corps proffered its NOD-20 permit, Admiral Allen announced a decision: The National Incident Command would approve construction of one of the six sand berm reaches authorized by the Corps as a prototype. The plan called for a single berm to be constructed near Scofield Island west of the Mississippi at an estimated cost of \$16 million.<sup>152</sup> According to the press release, the National Incident Command balanced three major considerations in reaching its decision: (1) “the imperative to protect vulnerable Louisiana coastlines”; (2) “the need for any construction to contribute to the overall response effort”; and (3) “the extensive time needed to implement such a strategy.”<sup>153</sup> Construction on the other five reaches approved by the Corps, not to mention the thirteen additional reaches the state wanted to build, would have to wait until the prototype reach had been built and analyzed. The release stated that, if evaluation of the one prototype berm section’s “effectiveness and environmental impact show a net environmental benefit, additional areas may be considered by the National Incident Commander as part of the oil spill response moving forward.”<sup>154</sup> “There are a lot of doubts whether this is a valid oil spill response technique, given the length of construction and so forth,” Admiral Allen said, “[b]ut we’re not averse to attempting this as a prototype.”<sup>155</sup>

Governor Jindal praised the prototype plan but pushed for approval of the “entire plan.” “[H]ad we been given approval earlier, we could have built nearly 10 miles of barriers 6 feet high already,” he said.<sup>156</sup> Senator Mary Landrieu of Louisiana “declared the decision by Allen an interim first step that needs to be followed by a federal commitment to major funding of” coastal restoration.<sup>157</sup> Senator Vitter said the prototype decision showed President Obama “doesn’t have a clue,” and “[h]is decision on the emergency dredging barrier plan is a thinly veiled ‘no.’”<sup>158</sup> “Approving 2 percent of the request and kicking the rest months down the road is outrageous, absolutely outrageous,” the Senator concluded.<sup>159</sup>

One of Admiral Allen’s aides told the Commission staff that the May 27 approval of a prototype was an effort to “take some of the focus off of that option [*i.e.*, the berms project] and look at what we knew to be decent mitigation strategies.”<sup>160</sup> The National Incident Command “didn’t want to shoot the whole kitty at something we didn’t know would work.”<sup>161</sup> It hoped that

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<sup>150</sup> May 25 Interagency Solutions Group Berms Guidance.

<sup>151</sup> U.S. Department of Homeland Security, Berm Construction and Spill Response (May 26, 2010) (draft manuscript) (on file with Commission staff).

<sup>152</sup> Mark Schleifstein, *Sand Berm to Protect Barataria Bay Wetlands Gets Federal OK*, Times-Picayune (May 27, 2010).

<sup>153</sup> May 27 Release.

<sup>154</sup> *Id.*

<sup>155</sup> Schleifstein, *Sand Berm To Protect Barataria Bay Wetlands Gets Federal OK*.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Telephone Interview by Commission Staff with Former Aide to National Incident Commander (Nov. 9, 2010).

<sup>161</sup> *Id.*

the prototype plan would extinguish the firestorm surrounding Louisiana's berms proposal and allow responders to focus on other, more effective response measures and efforts. Replying to a suggestion to "establish a Coast Guard cell" to monitor the just-approved prototype project, Federal On-Scene Coordinator Rear Admiral Landry advised one Coast Guard officer to "[s]teer clear of [Coast Guard] involvement."<sup>162</sup>

#### **D. The Grand Isle Meeting**

The events of May 28 forced the National Incident Command to change course.

By late May, the competence and effectiveness of the federal government's response to the Deepwater Horizon disaster was under assault. Polls showed that 60 percent of adults thought that the government was doing a poor job of handling the spill.<sup>163</sup> On May 27, President Obama held his first formal news conference since the rig explosion on April 20. Responding to a question from an Associated Press reporter, President Obama noted that "when it comes to what's happening on the surface, we've been much more involved in the . . . berms, in the skimming."<sup>164</sup>

The next day, the President traveled to Louisiana, where he visited Port Fourchon and then Grand Isle.<sup>165</sup> A group of about a dozen elected officials including Parish President Nungesser,<sup>166</sup> Governor Jindal, New Orleans Mayor Mitch Landrieu, Alabama Governor Bob Riley, Florida Governor Charlie Crist, and Admiral Allen assembled around a small table in a cramped conference room at the Coast Guard station in Grand Isle for a two-hour private discussion with President Obama.<sup>167</sup>

The President made a short opening statement. He then asked each of the elected officials to tell him "what they were upset about and what they wanted government to do."<sup>168</sup>

Parish President Nungesser, sitting to President Obama's immediate left, went first.<sup>169</sup> According to one witness, he was "very adamant" that the entire berms project — not just one prototype — should be approved.<sup>170</sup> Governor Jindal, sitting to Parish President Nungesser's

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<sup>162</sup> E-mail Exchange Between Commander Dan Lauer, Rear Admiral Mary Landry, and Admiral Thad Allen, U.S. Coast Guard (May 28, 2010) (on file with Commission staff).

<sup>163</sup> Mimi Hall et al., *Is Oil Spill Becoming Obama's Katrina?*, USA Today (May 27, 2010) (reporting results of USA Today/Gallup poll).

<sup>164</sup> Press Conference, President Barack Obama, Gulf Oil Spill, ABC News (May 27, 2010).

<sup>165</sup> Paul Rioux, *President Barack Obama in Grand Isle After Touring Beach in Port Fourchon*, Times-Picayune (May 28, 2010).

<sup>166</sup> In one news account, Parish President Nungesser claimed that he had not been invited to the meeting but had attended anyway. See Frank McCormack, *Privateer Perfection*, Plaquemines Gazette (June 7, 2010). One of Admiral Allen's aides told the Commission staff that Parish President Nungesser had, in fact, been invited to the Grand Isle meeting. See Telephone Interview by Commission Staff with Former Aide to National Incident Commander (Nov. 12, 2010).

<sup>167</sup> Paul Rioux, *President Barack Obama Promises No Retreat from Gulf of Mexico Oil Spill Response*, Times-Picayune (May 28, 2010).

<sup>168</sup> National Incident Commander Aide Interview (Nov. 12, 2010).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

immediate left, spoke next, and also emphasized to President Obama that the “big thing were the berms.”<sup>171</sup> As one news report put it, President Obama “got an earful” on the berms project from Governor Jindal and Parish President Nungesser.<sup>172</sup>

President Obama was non-committal.<sup>173</sup> He told Governor Jindal and Parish President Nungesser that he needed independent validation that the berms project constituted a proper spill response strategy.<sup>174</sup> He then turned to Admiral Allen and, in front of the assembled governors and other leaders, asked the National Incident Commander to assemble a group of experts to examine the berms project.<sup>175</sup> Admiral Allen replied that this might take some time.<sup>176</sup> It was the Friday afternoon before Memorial Day weekend. But President Obama pushed: “Can you do it next week?”<sup>177</sup> In the words of one Coast Guard officer present at the meeting, the President put Admiral Allen “on the spot.”<sup>178</sup>

At a news conference directly following the Grand Isle meeting, President Obama made the following statement:

Admiral Allen announced yesterday, for example, that after a bunch of back-and-forth between State and Federal experts, he is prepared to authorize moving forward with a portion of the idea for a barrier island that may stop some of the oil from coming ashore. We had an extensive conversation about this and to see whether additional steps can be taken on this barrier island idea. And what I told the parish president, what I told the Governor is that if there is an idea that can be shown to work, then we should move forward on it, and they deserve quick answers. But I also reminded everybody that we’ve got to make sure that whatever we do is actually going to work, particularly because we’re going to have not unlimited resources, at least not right now.<sup>179</sup>

Despite the President’s caution, Parish President Nungesser and Governor Jindal interpreted his public and private comments as a commitment to build the berms. That night, Parish President Nungesser told *CNN* that “[t]he President committed by early next week, we will have an answer and I believe that he’s going to task BP. As long as it — the group agrees that it will protect us from the oil getting in the marshes, which everyone does.”<sup>180</sup> Governor Jindal put out a press release emphasizing the President’s “promised sand-boom plan progress in days.”<sup>181</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> Ball & Weisman, *Slippery Start: U.S. Response to Spill Falters*.

<sup>173</sup> National Incident Commander Aide Interview (Nov. 12, 2010).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> President Barack Obama, Remarks Following a Briefing on the Oil Spill in the Gulf of Mexico and an Exchange With Reporters in Grand Isle, Louisiana (May 28, 2010), *available at* <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000429.htm>.

<sup>180</sup> Transcript, Anderson Cooper 360 (May 28, 2010).

<sup>181</sup> Press Release, Governor Jindal: President Promised Sand-Boom Plan Progress in Days, Need Swift Action (May 28, 2010), *available at* <http://emergency.louisiana.gov/Releases/05282010-progress.html>.

According to Admiral Allen, President Obama had “hamstrung” him.<sup>182</sup> As a result of the Grand Isle meeting, even though the National Incident Command had received multiple analyses from its Interagency Solutions Group and publicly announced a decision to approve only one prototype berm the day before, Admiral Allen had to assemble a panel of experts to analyze the berms project again, and quickly. As Admiral Allen told the Commission staff, after the Grand Isle meeting he “was trying to give effect to [President Obama’s] commitment.”<sup>183</sup>

Although the facts suggest that the White House Council on Environmental Quality had engaged on the berms issue by mid-May,<sup>184</sup> whether the President had been briefed on, or was otherwise aware of, Admiral Allen’s newly-announced prototype decision before he visited Grand Isle is unclear to the Commission staff.<sup>185</sup> It is also unclear whether the President knew the National Incident Command had already vetted the berms project with the Interagency Solutions Group when he pushed Admiral Allen to assemble a group of experts to vet the project again. What is clear to the staff is that the President’s Grand Isle visit would set in motion a chain of events that, only a few days later, led to the National Incident Command’s approval of all six berm reaches for which Governor Jindal and Parish President Nungesser had aggressively lobbied.

#### **E. The June 1 Summit**

To answer the questions the President posed at Grand Isle on May 28, Admiral Allen convened a summit at the Port of New Orleans Administration Building Auditorium on Tuesday, June 1 — the day after Memorial Day.<sup>186</sup> About 100 people were in attendance,<sup>187</sup> including CPRA and Corps officials, officials and scientists from various federal and state agencies, two full-time academics from Louisiana State University and the University of New Orleans (which is part of the Louisiana State University System), parish presidents, the Mayor of New Orleans, and Governor Jindal.<sup>188</sup> Admiral Allen asked the assembled experts to “[d]evelop a final position” on four questions:

- (1) “The feasibility of this intervention” (*i.e.*, the Corps-permitted berms project);
- (2) “Whether this construction is a bona fide element of spill response and recovery”;

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<sup>182</sup> Allen Interview.

<sup>183</sup> *Id.*

<sup>184</sup> Council on Environmental Quality E-mail.

<sup>185</sup> The Commission staff asked the Council on Environmental Quality whether “the President was aware before his meeting with various elected officials at Grand Isle on May 28 that, on May 27, Admiral Allen had publicly announced that only one prototype berm would be approved.” The Council responded that it “does not have any information by which it can answer this question.” The Council further stated that none of its officials attended or helped brief the President for the May 28 meeting. Council on Environmental Quality E-mail. Heather Zichal, Deputy Assistant to the President for Energy and Climate, also told the Commission staff that she did not know whether the President was aware that Admiral Allen had approved only one prototype berm before the meeting at Grand Isle. See Interview by Commission Staff with Heather Zichal, Deputy Assistant to the President for Energy and Climate, in Washington, D.C. (Nov. 22, 2010).

<sup>186</sup> Allen Interview; Summary of NIC Barrier Island Berm Meeting (June 1, 2010) [hereinafter June 1 Meeting Minutes].

<sup>187</sup> See Telephone Interview by Commission Staff with Coast Guard Official (Nov. 3, 2010).

<sup>188</sup> June 1 Meeting Minutes.

- (3) “A recommended course of action for the remaining segments approved by the Corps”; and
- (4) “The applicability of these decisions on other potential berm projects in areas threatened by the spill.”<sup>189</sup>

According to the official National Incident Command minutes, Admiral Allen opened the meeting at 1:00 p.m. by “summarizing the President’s direction and the intent of the meeting to gather scientific and technical information relating to the spill response factors associated with the berm proposal.”<sup>190</sup> He said he had committed to getting the President a recommendation on berms within 24 hours, and offered to “provide an open docket [on the Deepwater Horizon website] for twenty-four hours so that any opinions could be provided before he made a recommendation.”<sup>191</sup>

Admiral Allen then turned the floor over to a moderator, and spent the rest of the meeting listening and taking notes.<sup>192</sup> Admiral Allen, the moderator, and the panelists sat together on the lighted auditorium stage.<sup>193</sup> Governor Jindal and his entourage arrived shortly after the meeting began, and sat in the darkened auditorium, along with most of the parish presidents, “about a third of the way up . . . in the middle section, pretty much all together in a row.”<sup>194</sup>

After Admiral Allen’s introduction, CPRA gave a presentation in support of its berms proposal.<sup>195</sup> Colonel Lee of the Corps then “provided an overview of the permit process, their review, the conditions, and the engineering perspective.”<sup>196</sup>

Next, a panel of academics, state officials, and federal officials addressed the “feasibility of intervention” — specifically, construction factors and considerations; how quickly and how much protection would be afforded to the marshes; and how interactions between oil, borrow material, and fill material would be managed.<sup>197</sup>

A second panel of academics, state officials, and federal officials tasked with examining “spill response bona fides” followed. This panel attempted to address how the berms compared to other oil response techniques, whether construction would affect other response activities, and the benefits and impacts to other natural resources.<sup>198</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Telephone Interview by Commission Staff with William Holt, U.S. Coast Guard (ret.) (Nov. 12, 2010); Telephone Interview by Commission Staff with Dr. Denise Reed, University of New Orleans (Nov. 16, 2010) (stating that Admiral Allen listened during the summit).

<sup>193</sup> Reed Interview.

<sup>194</sup> Holt Interview; E-mail to Commission Staff from William Holt, U.S. Coast Guard (ret.) (Nov. 15, 2010) (on file with Commission staff).

<sup>195</sup> June 1 Meeting Minutes; CPRA June 1 Presentation.

<sup>196</sup> June 1 Meeting Minutes; Corps June 1 Presentation.

<sup>197</sup> June 1 Meeting Minutes.

<sup>198</sup> *Id.*

Admiral Allen then put the “net benefit question” — that is, all things considered, would the berms be a net positive for the spill response and the environment — to both panels. Following is a summary of all responses recorded in the meeting minutes:

- **Dr. Denise Reed, University of New Orleans:** “Keep this strategic. Elements of the plan are promising . . . look at the low spots in the island, and move out quickly. Don’t put all your eggs in one universal basket, and combine with booming and [skimming].”<sup>199</sup>
- **Kyle Graham, CPRA:** “Move forward on multiple fronts. Not all the answers are in these papers. Put together a [council] on what the dredges should do. Move the resources now and figure out the details.”<sup>200</sup>
- **Jane Lyder, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior:** “You have makings of a solution, but it’s not simple. Have people at the table to make solution, and don’t harm the system in the long term.”<sup>201</sup>
- **Dr. Robert Twilley, Louisiana State University:** “All agree barrier system is the better place to fight the spill. Move forward with a strategy that makes the most benefit from the limited resources that we have. Lots of challenges, lots of risk. Consider the ratio of wetlands protected to amount filled.”<sup>202</sup>
- **Bruce Terrell, Chief, Corps Construction Division:** “This can be done, but there are lots of unknowns and lots of risk. The weather is the scariest factor.”<sup>203</sup>
- **Dr. Larry Robinson, NOAA:** “Use pilot/incremental/adaptive management approach. Don’t do research, but learn from the process. Know the impacts on the tidal passes and water quality.”<sup>204</sup>
- **Dr. Jacquelin Michel, NOAA:** “Target the low places and make it happen right away. The whole plan is too ambitious.”<sup>205</sup>
- **Karolien Debusschere, Louisiana Oil Spill Coordinator’s Office:** “We make risk decisions every day with incomplete information. There is lots of local knowledge, use the Louisiana resources. Urge everyone not to wait forever — don’t have time to wait.”<sup>206</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

Most of the comments on the “net benefit question” seem to suggest guarded support for the berms project, at least in some form.

The June 1 summit finished with comments from the “political attendees.”<sup>207</sup> Governor Jindal first reminded the gathering that his “push” with President Obama led to the summit and then emphasized that the “single criterion is yes or no. Please make BP pay . . . this will be a success with all six reaches.”<sup>208</sup> Parish President Nungesser had walked out for a time, calling the summit a “Dog and Pony Show,”<sup>209</sup> only to return to speak at the end of the meeting. He, along with other parish presidents and the Mayor of New Orleans, pushed the group to approve the berms.<sup>210</sup>

Finally, Admiral Allen reemphasized his commitment to providing the President with an answer in 24 hours, and reiterated that the group and the public could provide additional comments on the berms for another 24 hours.<sup>211</sup> He closed the summit, three-and-one-half hours after it had begun.<sup>212</sup>

According to Admiral Allen’s public account of the summit, the academics and agency representatives argued for the need to “make sure that in constructing those barriers and berms that we’re not doing harm to the environment by changing the water — the direction of the tidal and the ocean currents and other environmental impacts.”<sup>213</sup> The discussion, though, “focused on the fact that the barrier islands and berms have the potential to protect a far greater area of marshland behind them.”<sup>214</sup> Admiral Allen told the Commission staff that berms received “not a unanimous response but a positive response to the guidelines set by the President.”<sup>215</sup>

Other attendees offered more blunt assessments. According to the summit moderator, “you could tell most of [the experts] were not keen on the idea,” but when Admiral Allen posed the “net benefit question” at the end of the meeting, the panelists “were tired of getting beat up”<sup>216</sup> by the project’s proponents and “hedged their bets.”<sup>217</sup> None of the panelists was willing to say that the berms “were going to be worse than the oil going ashore.”<sup>218</sup>

A Coast Guard officer present at the summit offered a similar assessment to the Commission staff. According to that officer, the experts “all said it’s pretty crummy” and offered no “glowing endorsements” of berms as a spill response measure.<sup>219</sup> None of the

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Bigad Shaban, *Upset Nungesser Walks Out on Coast Guard Meeting*, [wwwlvtv.com](http://wwwlvtv.com) (June 1, 2010).

<sup>210</sup> June 1 Meeting Minutes.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> June 2 Transcript.

<sup>214</sup> *Id.*

<sup>215</sup> Allen Interview.

<sup>216</sup> Holt Interview.

<sup>217</sup> Holt Interview; *see also* Reed Interview.

<sup>218</sup> Holt Interview.

<sup>219</sup> National Incident Commander Aide Interview (Nov. 12, 2010).

experts, however, “could conclusively say that [the berms project] would cause harm to the environment . . . . None of them said it.”<sup>220</sup>

Dr. Denise Reed of the University of New Orleans, one of the experts on the first panel, told the Commission staff that the question posed was essentially “thumbs up or thumbs down.”<sup>221</sup> The purpose of the summit was not to create new solutions.<sup>222</sup> According to Dr. Reed, there was “no way anyone could have taken the thumbs up message out of those two panels,” and Admiral Allen’s summary at the end of the summit did not imply a “thumbs up.”<sup>223</sup> But the absence of a “no” may have been interpreted as a “yes.”<sup>224</sup> As Dr. Reed pointed out, the downsides were “a bad use of sand resources and a waste of money — but it wasn’t our money anyway.”<sup>225</sup>

According to the Coast Guard official who kept the meeting minutes, while a “mixed message” came out of the summit, the “environmental people” “were not able to say that building the berms would create environmental damage.”<sup>226</sup> That the full six-berm project would take many months to construct<sup>227</sup> — a fact that had been dispositive to the Interagency Solutions Group’s analysis — did not trump the pressure to “do something.” The National Incident Command appears to have interpreted the President’s guidance from May 28, fairly or not, to mean that the berms should be built unless experts affirmatively stated that the project “was a terrible thing to do.”<sup>228</sup> This proved to be a too heavy a burden for the skeptics at the June 1 meeting to carry.

## F. Six-Segment Project Approval

A couple of hours after the berms summit ended, Admiral Allen and BP CEO Tony Hayward met for dinner in New Orleans.<sup>229</sup> According to Admiral Allen, he passed on the message to Mr. Hayward, over pasta and Gulf shrimp, that the full six-reach project — not just one prototype berm — would be approved, and that BP would be asked to pay for it.<sup>230</sup> The National Incident Command could support “in concept” the six berms the Corps had permitted because a “preponderance of opinion” at the summit was that the berms would be effective.<sup>231</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> Reed Interview.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See Interview with Coast Guard Official.

<sup>227</sup> See, e.g., May 24 Press Briefing.

<sup>228</sup> National Incident Commander Aide Interview (Nov. 12, 2010).

<sup>229</sup> Glenn Thrush, *Carville Doesn’t Regret Ripping W.H.*, Politico (June 2, 2010); see also Allen Interview.

<sup>230</sup> Allen Interview. In a footnote that Admiral described to the Commission staff as “either historical or hysterical,” *id.*, James Carville, “the rail-thin Democratic operative who ha[d] come to embody the growing popular disgust at BP and the federal government,” Thrush, *Carville Doesn’t Regret Ripping W.H.*, coincidentally walked into the same restaurant and joined Admiral Allen and Mr. Hayward for a drink during their dinner, *id.*

<sup>231</sup> Allen Interview; see also National Incident Commander Aide Interview (Nov. 12, 2010); Reed Interview.

The next morning, Admiral Allen briefed “cabinet officials” on the berms project.<sup>232</sup> At 2:00 p.m. on June 2, Admiral Allen held a press conference at which he stated, “we’re looking to try to get a decision later on today” on “the feasibility of constructing the proposed barriers and berms and number two, are they effective as far as this oil spill response.”<sup>233</sup> At 4:00 p.m., Admiral Allen issued a short press release that gave a green light to the entire berms project approved by the Corps — all six reaches.<sup>234</sup>

Admiral Allen told the Commission staff that, notwithstanding the President’s guidance at Grand Isle, “responsibility rest[ed]” with him for the approval of the Louisiana berms project.<sup>235</sup> Whether Admiral Allen’s stated expectation that the National Incident Command would “get,” as opposed to make, a decision on the berms, coupled with his statement that he had briefed cabinet officials about the project on the morning of June 2, evidences Administration involvement in the berms decision-making is unclear. What is clear is that, in mid-May, the White House Council on Environmental Quality had helped determine that the Corps and the National Incident Command would review the Louisiana berms project on two separate tracks<sup>236</sup> and, on May 20, the Council had contacted scientists to solicit their views on the project and indicated to one of those scientists that the federal government expected to notify the State of Louisiana shortly that it did not consider the berms to be an effective oil spill response measure.<sup>237</sup> The White House, however, described Admiral Allen as the “sole decision-maker.”<sup>238</sup> A White House official further said, “If you are asking if anybody from the White House called [Admiral Allen] and told him to green-light it, the answer is no.”<sup>239</sup>

### III. Post-Approval Developments

The day after his June 2 announcement, Admiral Allen had dinner at the Governor’s Mansion in Baton Rouge with Governor Jindal and Mr. Graves of CPRA, among others.<sup>240</sup> He told the Governor that, in his view, the berms project was “not a clean sweep” but a “borderline call,” and requested that the State of Louisiana “work it out with BP.”<sup>241</sup>

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<sup>232</sup> June 2 Transcript.

<sup>233</sup> *Id.*

<sup>234</sup> See June 2 Release; *Jindal: Plan to Build Sand Berms Approved*, Associated Press (June 2, 2010); Mark Kaufman, *BP Says More La. Barrier Island Berms Will Cost \$360 Million*, Wash. Post. (June 3, 2010).

<sup>235</sup> Allen Interview.

<sup>236</sup> May 17 Interagency Solutions Group Berms Guidance.

<sup>237</sup> Council on Environmental Quality E-mail; Non-Public E-mail from Scientist.

<sup>238</sup> Zichal Interview. The Commission staff asked the Council on Environmental Quality “[w]hat role generally did CEQ play in the NIC decision-making process on the berms?” The Council replied as follows: “CEQ’s role was to ensure that, if the NIC determined that the activity qualified as a response project, the agencies with permitting authority related to this proposal were providing the necessary information to the NIC. CEQ did not have a direct role in the NIC decision-making process on the berms.” The staff also asked the Council whether it had “an understanding of why the NIC’s stance on the berms project changed between May 27 — when the NIC announced that only one prototype would be approved — and June 2, when the NIC approved the full six-segment berms project.” The Council responded, “No, but we did ensure agencies had an opportunity to weigh in on environmental effects.” Council on Environmental Quality E-mail.

<sup>239</sup> Zichal Interview.

<sup>240</sup> E-mail from Coast Guard Officer to Commission Staff (Dec. 6, 2010) (on file with Commission staff); Allen Interview.

<sup>241</sup> Allen Interview.

On June 4, the Federal On-Scene Coordinator sent a letter to BP stating that “the expense of this project is an appropriate removal cost under the Oil Pollution Act of 1990.”<sup>242</sup> On June 7, BP wrote to Governor Jindal to confirm its responsibility to pay for the berms as a removal cost, and to state its intention to make “block payments of \$60 million to the State at intervals reflecting incremental progress of 20% of actual completion of the project as certified by the chairman of the Coastal Protection and Restoration Authority of Louisiana, Garret Graves, or his designee.”<sup>243</sup>

BP estimated the cost of the berms to be \$360 million, double the amount it had spent up to that point in “helping the region respond to the oil spill,” according to one source.<sup>244</sup> The Corps estimated the project would cost \$424 million.<sup>245</sup>

### A. Construction Begins

The State of Louisiana awarded the contract for the berms to the Shaw Group, a diversified Baton Rouge-based engineering, construction, and environmental services firm,<sup>246</sup> and C.F. Bean LLC, a Plaquemines Parish-based dredging contractor.<sup>247</sup> On June 11, Governor Jindal issued Executive Order BJ 10-11 governing access to lands necessary for the project.<sup>248</sup> Dredging for and construction on the six approved berm reaches began soon thereafter.<sup>249</sup>

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<sup>242</sup> Letter from Rear Admiral James A. Watson, U.S. Coast Guard, to Doug Suttles, BP (June 4, 2010) (on file with Commission staff).

<sup>243</sup> Letter from Bob Dudley, BP, to Governor Bobby Jindal of Louisiana (June 7, 2010) (on file with Commission staff).

<sup>244</sup> Kaufman, *BP Says More La. Barrier Island Berms Will Cost \$360 Million*.

<sup>245</sup> E-mail from William Grawe, U.S. Coast Guard, to Admiral Thad Allen, U.S. Coast Guard, et al. (June 2, 2010) (on file with Commission staff).

<sup>246</sup> Shaw Group did not respond to the Commission’s repeated requests for an interview on the Louisiana berms project.

<sup>247</sup> *Shaw Group Wins Contract to Build Barrier Island Temporary Berms*, Times-Picayune (June 4, 2010); Chris Kirkham, *State Now Faces Hurdles in Constructing Berms*, Times-Picayune (June 4, 2010). Why Louisiana did not include the Deltares/Van Oord group that originally proposed the Louisiana berms project in the construction contract is unclear. CPRA told the Commission staff that the Shaw Group offered to “front the money” for the project, while the Dutch group did not. See Graves Interview. Other sources have told Commission staff that the Jones Act indirectly blocked Dutch participation. See Non-Public Telephone Interview. Because the Dutch berms plan involved mobilization of the Dutch dredging fleet, the plan required a waiver of the Jones Act, a law that generally prevents foreign vessels from transporting merchandise between two U.S. ports but may be waived “in the interest of national defense.” See 46 U.S.C. § 501(a). Although some evidence suggests that CPRA at least contacted the relevant federal agencies about the possibility of obtaining a Jones Act waiver for Deltares/Van Oord (see E-mail from Jim Sartucci, K&L Gates LLP, to Unknown Recipients (May 28, 2010) (on file with Commission staff)), the Shaw Group and C.F. Bean LLC represented to CPRA that the U.S. dredging fleet had the capacity to perform the berms project on-schedule without Dutch dredges (see Graves Interview; see also Jeffrey Ball, *Accusations Fly in Sand-Berm Project*, Wall St. J. (Oct. 12, 2010)). CPRA did not request a Jones Act waiver for Deltares/Van Oord. See E-mail from Melinda Jones, U.S. Coast Guard, to Commission Staff (Oct. 29, 2010) (on file with Commission staff).

<sup>248</sup> See Executive Order BJ 10-11, Bobby Jindal, Governor of Louisiana (June 11, 2010), available at <http://doa.louisiana.gov/osr/other/bj10-11.htm>.

<sup>249</sup> See Shaw’s Environmental & Infrastructure Group, Shaw Barrier Berm Project — Daily Report Day 43 (July 14, 2010), available at <http://www.mvn.usace.army.mil/pao/139551-PMD-043-S.pdf> (indicating that dredging began on June 16 and construction of one berm reach began on June 14).

The National Incident Command had estimated that the construction time for all six berm reaches would be six to nine months.<sup>250</sup> As the following table illustrates, Shaw initially estimated that five of the six berm reaches would be completed by November 1, and that the sixth reach would be completed by the end of November 2010.<sup>251</sup>

| Berm Segment | Island      | Estimated Start Date | Estimated End Date |
|--------------|-------------|----------------------|--------------------|
| E3           | Curlew      | July 28              | October 21         |
| E4           | Chandeleur  | June 14              | November 1         |
| W8           | Shell       | August 21            | November 28        |
| W9           | Pelican     | July 21              | August 27          |
| W10          | Scofield    | August 8             | September 21       |
| W11          | Sandy Point | September 28         | November 1         |

Almost from the beginning, however, delays plagued the project. During the last week of June, the Corps ordered a week-long halt to dredging operations in one location because sand was being removed from what the Corps believed to be an improper location.<sup>252</sup> Local officials sharply criticized this delay.<sup>253</sup> In response to an e-mail from Deputy Assistant Secretary for Fish and Wildlife and Parks Jane Lyder to various Louisiana officials suggesting that state and federal agencies should “round up volunteers” to “help lay the pipe” necessary to pump sand for the berms, Parish President Nungesser issued the following blistering statement:

You don’t move sediment pumping pipe with volunteers. This is the lady that Thad Allen and President Obama are allowing [to] hold up dredging to save our wetlands — God help us. What planet is this lady from? In the conference today Lyder was worried about the pelican nesting grounds. Obviously, she hasn’t been out there to see the birds, covered in oil, just like the other people who make ridiculous comments. Maybe she should go sailing on a yacht in England with Tony Hayward, it would be a great place to send her on vacation. I’ll pay her way.<sup>254</sup>

The week after this Corps-ordered shutdown, Hurricane Alex forced another construction delay of a few days.<sup>255</sup>

By the time BP capped the well on July 15 — day 44 of construction — Shaw estimated that it had completed ten percent of one reach, representing 7.32 percent of total dredging and less than six percent of the total project as approved in the emergency permit.<sup>256</sup>

<sup>250</sup> See, e.g., E-mail from Sean Smith, Department of Homeland Security, to Juliette Kayyem, Department of Homeland Security, et al. (May 27, 2010) (on file with Commission staff).

<sup>251</sup> See Shaw Daily Report Day 43.

<sup>252</sup> See News Release, U.S. Army Corps of Engineers, Team New Orleans, State of Louisiana to Dredge From Approved Borrow Location (June 24, 2010), available at <http://www.mvn.usace.army.mil/news/view.asp?ID=351>.

<sup>253</sup> See Paul Quinlan, *La., Obama Admin Square Off Over Sand Barriers*, Greenwire (June 24, 2010).

<sup>254</sup> Nungesser Dredge Statement (June 23, 2010), available at <https://secure.systememerge.com/preview-8503-41dc19a1.html>.

<sup>255</sup> See, e.g., Amy Wold, *Sand Berms Partially Political*, The Advocate (July 11, 2010); Serio & Mayer Interview.

<sup>256</sup> See Shaw’s Environmental & Infrastructure Group, Shaw Barrier Berm Project — Daily Report Day 44 (July 15, 2010), available at <http://www.mvn.usace.army.mil/pao/139551-PMD-044-S.pdf>.

As construction continued, the efficacy and impacts of the berms became the subject of criticism by the scientific community. The Horizon-Science and Engineering Review Team, created in May to advise CPRA on a variety of response-related issues, expressed concerns about environmental risks associated with the project. Certain members of this advisory group felt their concerns were ignored.<sup>257</sup> Later in July, a large group of private and academic coastal scientists sent an open letter to Admiral Allen criticizing the berms: “It is time to put a halt to the numerous coastal engineering projects that are both underway and planned as a response to the Deepwater Horizon spill. In summary, these projects will do little, if any, good. At the same time, they have a great potential to change the nature of the Gulf Coast in ways that have not been investigated and are likely to be more harmful than helpful.”<sup>258</sup>

## B. The Barataria Rock Dikes

In July, the controversy over the offshore barrier berms project briefly subsided, but, as the *Times-Picayune* put it, “another showdown is in full force over a proposal to build rock dams near Grand Isle to stop the Gulf oil spill from reaching deep into Barataria Bay.”<sup>259</sup>

The use of small-scale inlet barriers as a relatively low-cost spill response measure with limited environmental impact appears to have been contemplated in the Southeast Louisiana Area Contingency Plan.<sup>260</sup> The Corps had approved several small-scale inlet barriers made of sand bags<sup>261</sup> or sheet piling<sup>262</sup> to close shoreline breaches caused by prior storms and to protect inland wetlands and marshes. But in early June, Jefferson Parish requested an NOD-20 permit for an inlet barrier on a grander scale — a two-mile-long barrier to protect Barataria Bay from oil intrusion.<sup>263</sup> The proposal called for 100,000 tons of rock to close several major inlets.<sup>264</sup> The Shaw Group, the contractor for the offshore sand berms, would lead the construction effort.<sup>265</sup>

Governor Jindal and Parish President Nungesser pushed the Corps to approve the Barataria Bay rock dikes. On June 30, for example, Parish President Nungesser e-mailed Colonel Lee: “The [Corps] has still not approved the emergency rock permit for [Barataria Bay].

<sup>257</sup> Wold, *Sand Berms Partially Political*; Telephone Interview by Commission Staff with Scientist (Oct. 20, 2010); Telephone Interview by Commission Staff with Scientist (Oct. 29, 2010).

<sup>258</sup> Erik Stokstad, *Scientists to Thad Allen: Stop ‘Massive Re-Engineering’ of Gulf Coast*, Sci. Insider (July 21, 2010).

<sup>259</sup> See Chris Kirkham, *Jindal, Jefferson Parish Officials Keep Pushing Jetty Project Despite Scientists’ Concerns*, Times-Picayune (July 7, 2010).

<sup>260</sup> See *supra* note 111.

<sup>261</sup> See Letter from Pete Serio, U.S. Army Corps of Engineers, to Jerome Zeringue, Louisiana Dept. of Natural Resources (May 14, 2010), available at <http://www.mvn.usace.army.mil/pao/May%2014,%202010-Permit.pdf>.

<sup>262</sup> Letter from Pete Serio, Army Corps of Engineers, to Rebecca Broussard, Vermilion Parish Office of Homeland Security & Emergency Preparedness (June 25, 2010), available at <http://www.mvn.usace.army.mil/pao/DEEPWATER%20HORIZON%202010-1442-WB.pdf>.

<sup>263</sup> See Richard Rainey, *Corps Denies Jefferson Parish’s Requests to Use Rocks to Block Oil from Barataria Bay*, Times-Picayune (July 3, 2010); John Collins Rudolf, *Louisiana and Scientists Spar Over How to Stop Oil*, N.Y. Times (July 6, 2010); Mark Strassman, *The Fight Over Keeping Oil Out of Barataria Bay*, CBS News (July 7, 2010).

<sup>264</sup> Rudolf, *Louisiana and Scientists Spar Over How to Stop Oil*.

<sup>265</sup> See Kirkham, *Jindal, Jefferson Parish Officials Keep Pushing Jetty Project Despite Scientists’ Concerns*.

Please approve the emergency permit for the rocks immediately.”<sup>266</sup> EPA, NOAA, and an independent group of scientists, however, expressed concerns about substantial adverse environmental impacts — in particular, tidal modification risks — from the project.<sup>267</sup> On July 3, the Corps denied Jefferson a permit on those grounds as well as for insufficient plans for mitigation, restoration, and safety.<sup>268</sup> State and local officials were “outraged.”<sup>269</sup> Governor Jindal’s spokesman said, “Only a government bureaucrat would say rocks are more harmful to our water and marshes than oil. The Corps took weeks to review the plan only to reject it today — and this denial is another unfortunate example of the federal government’s lack of urgency in this war to protect our coast.”<sup>270</sup> But the Corps held its ground.<sup>271</sup>

### C. CPRA Applies for a Standard Permit

Focus turned back to the state’s offshore barrier berms. Because the Corps’ NOD-20 permit had only a 30-day lifespan, on July 1, CPRA submitted an application to the Corps for a standard permit covering its Chandeleur/Timbalier berms project.<sup>272</sup> The application sought approval to complete the six reaches approved in the emergency permit and to construct the remaining thirteen reaches specified, but not approved, in the state’s revised emergency application of May 15. The total length of the project would be 101 miles. The Corps issued a public notice soliciting comments on the standard permit application and initiating inter-agency

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<sup>266</sup> E-mail from Billy Nungesser, Plaquemines Parish President, to Colonel Alvin Lee, U.S. Army Corps of Engineers (June 30, 2010) (contained within Barataria Barrier NOD-20 Permit Application Documents Compilation, available at <http://www.mvn.usace.army.mil/pao/jprdstatuspacketjuly3.pdf>).

<sup>267</sup> *Id.*

<sup>268</sup> See Letter from Colonel Alvin Lee, U.S. Army Corps of Engineers, to Marnie Winter, Jefferson Parish, Department of Environmental Affairs (July 3, 2010), available at <http://images.bimedia.net/images/070310corps.jpg>.

<sup>269</sup> See Scott Satchfield, *Denial of Rock Barrier Plan Sparks Outrage*, WWTN.com (July 4, 2010).

<sup>270</sup> *Id.*

<sup>271</sup> At Dauphin Island in Alabama, the Mobile District of the Corps issued an emergency permit for a rock inlet barrier to close the “Katrina Cut,” a 7,300 foot (1.4 mile) gap created by Hurricane Katrina in that barrier island. See Compilation of Dauphin Island Application, U.S. Army Corps of Engineers (July 6, 2010), available at <http://www.sam.usace.army.mil/pa/permits/SAM-2010-00822-JBE.pdf>. The gap in the island was an inlet only in the sense that it allowed water to flow between the open Gulf and the open bay — i.e., it was not an inlet into a dune lake or estuarine wetland. *Id.* Agencies and scientists raised concerns about the project’s environmental impacts (see Ryan Dezember, *Massive Berm Project Goes up on Dauphin Island, Draws Criticism*, Press-Register (July 20, 2010)), but on June 9, the Corps approved the Katrina Cut barrier. Mobile, Alabama-based Thompson Engineering received the \$13 million construction contract. Casandra Andrews, *Dauphin Island ‘Katrina Cut’ Project Progressing Even Though Deepwater Horizon Oil Well is Plugged*, Press-Register (Sept. 11, 2010). By mid-August, a month after the Macondo well had been capped, the project “[wa]sn’t even half completed.” Editorial, *Let’s Pause to Rethink the Katrina Cut Project*, Press-Register (Aug. 18, 2010). The Corps expects the project to be completed in early January 2011. E-mail to Commission Staff from Craig Litteken, U.S. Army Corps of Engineers (Dec. 14, 2010) (on file with Commission staff). Alabama or Thompson will have to request a standard construction permit or remove the barrier by June 9. See Katherine Sayre, *Dauphin Island’s Katrina Cut Could be Filled by Thanksgiving Week*, Press-Register (Nov. 12, 2010); see also Litteken Interview.

<sup>272</sup> See Joint Public Notice, U.S. Army Corps of Engineers, New Orleans District, and State of Louisiana, Department of Environmental Quality, Construction of a Barrier Berm Within St. Bernard, Plaquemines & Jefferson Parishes, Louisiana (July 19, 2010), available at <http://www.mvn.usace.army.mil/ops/regulatory/pdf/Barrier%20Berm%202010-1066%20PN.pdf>.

coordination procedures under applicable federal statutes, including the Endangered Species Act and the Magnuson-Stevens Act.<sup>273</sup>

Five days after CPRA applied for a permanent permit for the Chandeleur/Timbalier project, the Corps notified CPRA that it had denied the NOD-20 permit application for the Isles Dernieres berms west of the river (which had been submitted on May 18).<sup>274</sup> The principal reason the Corps gave for this denial was greater tide-energy dynamics than in the areas where it had approved berm construction.<sup>275</sup>

The intense debate over the already-permitted portion of the state's berms project continued, as the Corps began to receive written comments on the standard permit application.<sup>276</sup> On August 18, the Fish and Wildlife Service submitted comments stating: "Any large-scale threat to the Louisiana coast from the Deepwater Horizon oil will likely have dissipated long before the completion of the berm barrier project . . . . In light of the fact that much of the oil is dissipating and it is highly unlikely that the berm can be constructed within a time frame that will meet the stated objective (i.e., trapping oil), the Service questions the need for continuation of the barrier berm project."<sup>277</sup> Also on August 18, BP submitted a comment letter contending that "the reasonably foreseeable benefits of the Proposed Berms are substantially outweighed by the detriments, and that the application to construct the berms should be denied because it does not meet applicable legal requirements," namely, "the project does not meet the criteria for an emergency exemption from [the National Environmental Policy Act] because it is not 'necessary to control the immediate impacts' of the Deepwater Horizon incident."<sup>278</sup> Other agencies, as well as outside scientists and academics, expressed similar doubts about the need for continued construction on the berms project.<sup>279</sup>

Although, by September, the Macondo well had long since been capped, CPRA argued that the remnants of subsurface oil in the Gulf, in plumes or in bottom layers, continued to threaten the coast. Berms "may be our only line of defense against submerged oil," Governor Jindal said in early September.<sup>280</sup> According to the governor, berms could guard the coastline from "about 1 million barrels [that] could be unseen under the water's surface."<sup>281</sup> Mr. Graves similarly pointed to estimates that three million barrels of oil could still be in the Gulf as justification for the berms in an interview with the Commission staff.<sup>282</sup>

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<sup>273</sup> See *id.*

<sup>274</sup> See Letter from Colonel Alvin Lee, U.S. Army Corps of Engineers, to Kristi Cantu, Coastal Protection and Restoration Authority of Louisiana (July 6, 2010), *available at* <http://www.mvn.usace.army.mil/pao/Isles%20Dernieres%20Packet.pdf>.

<sup>275</sup> *Id.*

<sup>276</sup> A compilation of comments for CPRA's standard permit application is available at <http://media.2theadvocate.com/documents/BERMS+Agency+Comments+compressed.pdf> [hereinafter Standard Permit Comments Compilation].

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See *id.*; see also U.S. Geological Survey, Effects of Building a Sand Barrier Berm to Mitigate the Effects of the Deepwater Horizon Spill on Louisiana Marshes, *available at* <http://pubs.usgs.gov/of/2010/1108/>.

<sup>280</sup> Mark Ballard & Amy Wold, *Berm Controversy Rises*, The Advocate (Sept. 5, 2010).

<sup>281</sup> *Id.*

<sup>282</sup> Graves Interview.

On September 7, EPA provided the Corps its comments on the state's standard permit application.<sup>283</sup> First, it questioned the berms as an oil response strategy, noting that the berms had "received only light oiling."<sup>284</sup> Second, it expressed concern about environmental impacts, including problems for sea turtles, birds, seagrass beds, navigation, water quality, and the natural flow of sediment along the coast.<sup>285</sup> EPA said it would be willing to work with the Corps and the state toward a proposal more consistent with barrier island restoration.<sup>286</sup>

CPRA responded to EPA's letter with sharp criticism. Mr. Graves said opponents of the berms "have very, very little understanding" and described concerns about ecological impacts as "irresponsible."<sup>287</sup> According to Mr. Graves, "some [of] the heaviest oiling on Louisiana's coast" had occurred on the berms.<sup>288</sup> Mr. Graves also argued that birds had been attracted to the berms, which "appear to actually increase bird habitat."<sup>289</sup>

On September 16, the Corps submitted a letter to CPRA summarizing its standard permit processing and review steps to date.<sup>290</sup> The letter summarized the comments of four resource agencies — NOAA, EPA, the Fish and Wildlife Service, and the Louisiana Department of Wildlife and Fisheries — from late August and early September, and informed CPRA of the following:

- The project required inter-agency consultation with NOAA under Section 7 of the Endangered Species Act for several listed species.
- The project required evaluation with NOAA of impacts to Essential Fish Habitat under the Magnuson-Stevens Act.
- A full environmental impact statement under the National Environmental Policy Act would likely be necessary, and the Corps would compile this statement through a third party contractor process paid for by the applicant.
- Given that the spill had stopped and that responders had not recovered any significant amount of oil in over a month, and given the strong objections to the project by NOAA, EPA, the Fish and Wildlife Service, and a number of commenters from the environmental and academic communities, CPRA should provide a detailed discussion defending the purpose of and need for the project.

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<sup>283</sup> See Letter from Miguel Flores, Environmental Protection Agency, to Colonel Edward Fleming, U.S. Army Corps of Engineers (Sept. 7, 2010) (contained within Standard Permit Comments Compilation).

<sup>284</sup> *Id.* EPA's letter did not provide substantiation for its "light oiling" description. See *id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See Ballard & Wold, *Berm Controversy Rises*.

<sup>288</sup> See Cain Burdeau, *EPA: Louisiana's Sand Berms Not Stopping Much Oil*, Associated Press (Sept. 10, 2010).

<sup>289</sup> *Id.*

<sup>290</sup> Letter from Pete Serio, Army Corps of Engineers, to Charlie Hess, Louisiana Office of Coastal Protection and Restoration (Sept. 16, 2010), available at <http://media.2theadvocate.com/documents/Corps+Berm+Letter+0916+2010.pdf>.

The letter gave CPRA seven days to notify the Corps if it wished to continue seeking a standard permit for the six reaches authorized under the NOD-20 emergency permit and for the other thirteen reaches proposed by the state but not authorized by the Corps.

By the time of the Corps' request — day 107 of construction — 20.4 percent of the linear feet of one reach (E4) and 67.4 percent of another reach (W9) had been completed, representing just over fourteen percent of the total linear feet of the six reaches approved by the NOD-20 emergency permit.<sup>291</sup> Reports were that over \$120 million, or one-third of the \$360 million cost estimate, had been spent.<sup>292</sup> CPRA estimated that 700 barrels had been recovered from the berms on the west side of the Mississippi River and 1,500 pounds of oil and debris had been recovered from the east side berms,<sup>293</sup> and, later, that at least 1,000 barrels of oil in total had been collected by the berms.<sup>294</sup>

On October 4, CPRA sent a letter to the Corps requesting an extension of the NOD-20 permit with respect to the six segments authorized on May 27, but not the other thirteen reaches contemplated in the application for a standard permit.<sup>295</sup> CPRA also altered its original proposal for the six permitted reaches, allowing for gaps between the six segments that would reduce the total number of miles built from the originally-permitted 39.5 to 25 miles, according to the Corps.<sup>296</sup> Other sources stated that, following the October 4 revisions, only 22 miles of berms would be built.<sup>297</sup>

Three days later, the Corps responded to CPRA with a letter requesting a revised application for a standard permit “that exclusively show[s] the footprint and scope of the modified project” — that is, a new standard permit application including “only the [six] reaches you intend to construct and complete.”<sup>298</sup> CPRA submitted a revised standard permit application to the Corps on October 26.<sup>299</sup>

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<sup>291</sup> Shaw's Environmental & Infrastructure Group, Shaw Barrier Berm Project — Daily Report Day 107 (Sept. 16, 2010), available at <http://www.mvn.usace.army.mil/pao/139551-PMD-107-S.pdf>.

<sup>292</sup> See Robert Travis Scott, *Construction of Sand Berms Continues on Louisiana Coast*, Times-Picayune (Aug. 5, 2010).

<sup>293</sup> Mark Ballard, *EPA Opposes La. Berms*, The Advocate (Sept. 9, 2010); John Maginnis, *Louisiana's Sand Berms Challenged*, Times-Picayune (Sept. 15, 2010). Note that, according to the federal government's Oil Budget Calculator, with “no estimates . . . of the percentage of oil in [] debris . . . it is not possible to give a reliable estimate of this amount. Based upon past spills, the oil content of collected debris mass is only a few percent.” Federal Interagency Solutions Group, Oil Budget Calculator Science and Engineering Team, Oil Budget Calculator, Deepwater Horizon, Technical Documentation 34 (Nov. 2010), available at [http://www.restorethegulf.gov/sites/default/files/documents/pdf/OilBudgetCalc\\_Full\\_HQ-Print\\_111110.pdf](http://www.restorethegulf.gov/sites/default/files/documents/pdf/OilBudgetCalc_Full_HQ-Print_111110.pdf) [hereinafter Oil Budget Calculator]. Note also that CPRA's estimates for the amount of oil collected by the berms presumably do not account for any oil that may have infiltrated the berm sands.

<sup>294</sup> See Interview with Louisiana Official (Sept. 22, 2010) (“We estimated that we had over 1,000 barrels of oil collected by the berms.”).

<sup>295</sup> Letter from Steve Mathies, Louisiana Office of Coastal Protection and Restoration, to Pete Serio, U.S. Army Corps of Engineers (Oct. 4, 2010) (on file with Commission staff).

<sup>296</sup> E-mail from Pete Serio, U.S. Army Corps of Engineers, to Commission Staff (Oct. 27, 2010) (on file with Commission staff).

<sup>297</sup> John Collins Rudolf, *Louisiana Builds Barriers Even as Oil Disperses*, N.Y. Times (Oct. 21, 2010).

<sup>298</sup> Letter from Pete Serio, U.S. Army Corps of Engineers, to Steve Mathies, Louisiana Office of Coastal Protection and Restoration (Oct. 7, 2010) (on file with Commission staff).

<sup>299</sup> Telephone Interview by Commission Staff with Pete Serio, U.S. Army Corps of Engineers (Nov. 16, 2010).

#### D. Pivot From Response to Restoration

Although the State of Louisiana continued to defend berms as an oil spill response mechanism, state officials did not hide their view that the berms would benefit future coastal restoration efforts. In early September, for example, Mr. Graves argued that, because pipes and dredges were already in place, the cost of pivoting the berms from response to restoration “would be less now than reorganizing down the road.”<sup>300</sup> As Mr. Graves described it, “the plan would be to fill in the areas behind the berms to create a marsh, which would serve as a platform for the additional vegetation and other restoration that would help build up the barrier islands.”<sup>301</sup>

On November 1, Governor Jindal announced an agreement with BP to commit “up to \$100 million of the remaining berm funds . . . to support the long-term restoration and sustainability of Louisiana’s barrier islands.”<sup>302</sup> Five months into construction, “10 miles of sand berm have been built and two more berms segments (W8 and W10) are scheduled to be completed within the next two weeks.”<sup>303</sup> Louisiana has shifted the purpose of its berms, on which BP has spent approximately \$220 million, from response to coastal restoration, which will require “transforming the rapidly built berms into permanent barrier islands that can withstand the strong storms and tides of coastal Louisiana.”<sup>304</sup> Specifically, the response-to-restoration pivot will involve “fortifying” the berms by dredging and pumping “sand on both the front and back sides of the berms and vegetation to support the long-term restoration and sustainability of Louisiana’s barrier islands.”<sup>305</sup> The governor’s November 1 press release also indicated that Louisiana had not given up on the berms as an oil spill response measure: “[F]ortifying these sand berms for oil protection by building them into barrier islands is especially important now that today (Nov. 1) marks the end of the hurricane season and there is time to strengthen these berm projects to protect Louisiana against the threat of submerged oil before the next hurricane season.”<sup>306</sup>

According to the Corps, as of early December, the state is winding down construction on the berms project under the current spill response design.<sup>307</sup> Once construction ceases, the Corps will make a determination on CPRA’s standard permit application for the berms completed at that point.<sup>308</sup> CPRA will have to apply separately for standard permits for the berm reaches it wishes to transition from oil spill response to coastal restoration.<sup>309</sup> Of the \$140 million in remaining BP funds, \$40 million will be used to complete work on the Chandeleur Islands berms segment (E-4) east of the Mississippi, and \$100 million will go toward the restoration of at least

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<sup>300</sup> Ballard & Wold, *Berm Controversy Rises*.

<sup>301</sup> *Id.*

<sup>302</sup> Nov. 1 Release; see also Ball, *Accusations Fly in Sand-Berm Project*.

<sup>303</sup> Nov. 1 Release.

<sup>304</sup> John Collins Rudolf, *Louisiana Rethinks Its Sand Berms*, N.Y. Times (Nov. 4, 2010).

<sup>305</sup> Nov. 1 Release.

<sup>306</sup> *Id.*

<sup>307</sup> E-mail from Pete Serio, U.S. Army Corps of Engineers, to Commission Staff (Dec. 7, 2010) (on file with Commission staff).

<sup>308</sup> Serio Interview.

<sup>309</sup> *Id.*

two barrier islands west of the Mississippi<sup>310</sup> — Scofield Island (the location of the W-10 berm segment, and the proposed location of Admiral Allen’s prototype) and Pelican Island (the location of the W-9 berm segment).<sup>311</sup>

#### IV. Conclusions

It is not within the purview of the Commission staff to judge, let alone claim to know with certainty, the motives of the various actors in the Deepwater Horizon spill response. It is, however, within the staff’s charge in support of the Commission’s investigation to evaluate the efficacy of different aspects of the spill response and to draw lessons that will improve future responses. With these boundaries in mind, the staff believes that the story of the Louisiana berms project supports the following conclusions.

##### A. The Louisiana berms were not a success.

With the benefit of hindsight, the evidence available to the Commission staff suggests the Louisiana berms were not an effective spill response measure. In his book *Leadership and Crisis*, Governor Jindal claims that berms “proved to be one of the most effective protection measures . . . . Indeed, time and time again, [berms] stopped the oil that got past the skimmers and boom.”<sup>312</sup> Similarly, appearing recently on *Meet the Press*, Governor Jindal argued “[t]he sand berms were a great success.”<sup>313</sup> We disagree. From a long-term coastal restoration perspective, the berms may indeed be a “significant step forward,”<sup>314</sup> as Governor Jindal has claimed, but they were not successful for oil spill response.

The Louisiana berms project does not survive a rigorous cost-benefit analysis, even without taking yet unquantified environmental impacts into account. The value of the berms as an oil spill response measure depends on how much oil they trapped. Estimates vary, and no precise figures are available, but no estimates of how much oil the berms captured are much greater than 1,000 total barrels.<sup>315</sup> In comparison, according to peer-reviewed government estimates released in November, burning, skimming, and chemical dispersion addressed a total of between 890,000 and 1.85 million barrels spilled from the Macondo well.<sup>316</sup> To be sure, had the berms been constructed sooner and more extensively, had weather and other factors pushed more oil toward the Louisiana coast, had other response measures been less effective, and had

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<sup>310</sup> Mark Schleifstein, *At Least Two Barrier Islands to Be Rebuilt with \$100 million in BP Money*, Times-Picayune (Dec. 8, 2010).

<sup>311</sup> As of December 7, 2010, the State of Louisiana had submitted a permit application for its response-to-restoration project at Scofield Island, but not for its Pelican Island restoration project. Serio E-mail (Dec. 7, 2010).

<sup>312</sup> Bobby Jindal, *Leadership and Crisis* 6 (2010).

<sup>313</sup> Transcript, *Meet the Press* (Nov. 21, 2010).

<sup>314</sup> *Id.*

<sup>315</sup> See *supra* notes 293-94; see also Nov. 21 Meet the Press Transcript (Governor Jindal stating “[w]e’ve collected thousands of pounds of oily debris off these berms”) and Oil Budget Calculator at 34. Note that an independent analysis of “[e]-mails, internal reports and a log of oil sightings” obtained by the Associated Press from the State of Louisiana through a public records request “confirm[s] that very little” oil “has been seen on or recovered from the berms.” Cain Burdeau and Harry R. Weber, *Almost No Oil Recovered from Sand Berms*, Associated Press (Dec. 17, 2010).

<sup>316</sup> See Oil Budget Calculator at 39.

the spill lasted longer, perhaps the berms would have trapped more oil. But not much more than 1,000 barrels, in the context of a spill in which nearly five million barrels of oil were released, and approximately four million barrels entered the ocean, is “very little”<sup>317</sup> oil by any measure.

On the cost side of the equation, according to the state, as of November 1, five months after the Corps and National Incident Command approved the project, “10 miles of sand berm have been built and two more berms segments . . . are scheduled to be completed within the next two weeks” at a cost of about \$220 million.<sup>318</sup> To put this dollar figure in perspective, according to BP’s estimates, it has paid approximately \$581 million to the federal government, \$65 million to Florida, \$62 million to Alabama, \$77 million to Mississippi, and \$293 million (including the cost of the berms) to Louisiana for “response and removal.”<sup>319</sup> BP’s expenditure on berms is about three times greater than its expenditures for all other response and removal activities in Louisiana.<sup>320</sup> The \$220 million BP has spent on the berms to date, along with the additional \$140 million BP has committed to the project, represents about one-third of the total amount BP has paid to the federal government and the states for oil response and removal in the Gulf of Mexico.<sup>321</sup>

Admittedly, the cost-benefit question is to some extent inapposite to an emergency response effort where some measures are designed to respond to worst-case contingencies. And the cost-benefit equation is certainly different for the State of Louisiana, which does not have to pay for the berms. From the perspective of the Commission staff, however, \$220 million for a spill response measure that trapped not much more than 1,000 barrels of oil is not a compelling cost-benefit tradeoff.

#### **B. Berms like the Louisiana project are not a viable oil spill response measure.**

More generally, evidence available to the Commission staff reveals two main concerns that counsel against employing offshore barrier berms as a spill response measure in the future.

*First* and foremost, the length of time and cost to build only a fraction of the proposed project shows that, even with advance planning and preparation, and rapid review of proposed actions, it is unlikely that offshore barrier berms could ever be constructed to any effective scale during an emergency. In late May, a few weeks after CPRA filed its initial permit application with the Corps, Governor Jindal complained that “[w]e could have built 10 miles of sand [berms] already if [the feds] would have approved our permit when we originally requested it.”<sup>322</sup> But by November 1, five months after the Corps and National Incident Command had approved the

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<sup>317</sup> Burdeau and Weber, *Almost No Oil Recovered from Sand Berms* (stating that an Associated Press analysis of key documents confirmed that the berms captured “very little” oil).

<sup>318</sup> Nov. 1 Release.

<sup>319</sup> BP Claims and Government Payments Gulf of Mexico Oil Spill Public Report (Dec. 9, 2010), *available at* [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/Public\\_Report\\_12.9.10.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Public_Report_12.9.10.pdf).

<sup>320</sup> *See id.*

<sup>321</sup> *See* Nov. 1 Release.

<sup>322</sup> Padgett, *Dredge, Baby, Dredge* (some brackets in original).

project, only ten miles of berms had been constructed.<sup>323</sup> While there were unforeseen delays, even the rosiest construction time frame estimates plainly stated that five of the six berm reaches would not be completed until November 1 and the sixth reach would not be completed until the end of November, months after a relief well would have stopped the flow of oil.<sup>324</sup> Indeed, by the time the well was capped, less than six percent of the berms project had been completed.<sup>325</sup> If the pace of construction for the Louisiana berms is even within the general range of what can be expected for similar projects in the future, offshore barrier berms cannot be constructed quickly enough to protect coastlines from oil spills.

To the extent that construction of offshore barrier berms continues after a spill ends, to guard against residual oil intrusion or lingering subsurface plumes, the design of such berms as “sacrificial” poses similar concerns. To ensure that the berms do not degrade for however long the threat of oil remains latent (to the extent that can even be determined), the berms would have to be: (1) designed to be permanent, which would slow down construction and thus reduce effectiveness during the emergency active spill phase; (2) constantly maintained in a sacrificial state for as long as the residual oil threat persists; or (3) built initially as sacrificial structures and later converted to permanent structures. Under any of these scenarios, there are serious questions about whether offshore barrier berms could ever be constructed in time to be effective, especially since, as EPA argued, partial construction during the emergency period could result in oil washing onto the bayside shore of the berms and barrier islands, making matters worse from an environmental perspective.<sup>326</sup>

*Second*, as a response measure, offshore barrier berms may exceed the capacity of oil spill planning and emergency response infrastructure to adequately assess feasibility and environmental impacts. The marine environments within which berms projects would be located are highly variable and dynamic, limiting the opportunity for advance planning and complicating design and execution at the time of an emergency. Sources of sand shift; existing barrier islands and other coastal features evolve; tidal and weather conditions change. Any plan for rapid construction of offshore barrier berms would have to be continually revised. Moreover, different locations for the emergency placement of berms can involve vastly different environmental impacts from dredging and filling. Conditions along the Gulf Coast, in particular, vary widely and are in constant flux. Many of the environmental impact questions asked of the Louisiana berms thus would potentially need to be asked, researched, and answered anew a few years hence even for a project in the same location, and even more so for a project in a different location. There is also the underlying concern that appropriate sand and sediment is at a premium in some marine environments, particularly off the Louisiana coast. Consequently, there may not be enough borrow material in appropriate dredging locations to complete a project in a timely fashion, and the use of what material there is may severely affect the ecological integrity of the dredged areas.

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<sup>323</sup> Nov. 1 Release; *see also* Nov. 21 Meet the Press Transcript (Governor Jindal stating “[w]e’ve now built over 12 miles”).

<sup>324</sup> *See* Shaw Daily Report Day 43.

<sup>325</sup> *See* Shaw Daily Report Day 44.

<sup>326</sup> EPA Comments.

In short, massive offshore barrier berms are not a viable oil spill response measure. There is little evidence to suggest that the concerns summarized above could be resolved for such a project in the future, particularly one in the Gulf of Mexico, given the inherent limits of construction feasibility and time, and the significant constraints on acquiring knowledge necessary for sound design and impact assessment.

**C. The Grand Isle meeting set in motion a chain of events that led to approval of the six-segment berms project.**

The Louisiana berms project stands out as the most expensive and perhaps most controversial response measure deployed during the Deepwater Horizon spill. Louisiana's request to build massive offshore sand barriers to guard its coastline from approaching oil was unprecedented. The State of Louisiana championed this project, and the Corps and the National Incident Command decided to approve it, in the context of intense political pressure and public attention, not to mention a dangerous and constantly-evolving emergency situation. Any effort to evaluate actions by the State of Louisiana, the Corps, the National Incident Command, or the White House must recognize that these actions occurred not in a vacuum but during the response to an oil spill of epic proportions.

The Commission staff can comfortably conclude that the decision to green-light the underwhelmingly effective, overwhelmingly expensive Louisiana berms project was flawed. But whether it was flawed at the time, or only flawed in retrospect, with the benefit of hindsight, is not a question this paper seeks to answer. That said, based on over two dozen interviews with knowledgeable government officials and many key contemporaneous documents, the staff can offer a few observations on the decision-making process surrounding the Louisiana berms:

*First*, the Corps' review was not only "cautious and deliberate,"<sup>327</sup> but also as expeditious as could reasonably be expected given the scale, complexity, and potential impacts of the berms. State and local pressure surrounding the project did not unduly influence the Corps. Although it would probably be naïve to conclude that the intense interest from Louisiana elected officials, the public outcry to "do something," and the unprecedented circumstances surrounding the Deepwater Horizon disaster had *no* influence on the Corps' process, none of the many sources interviewed by the Commission staff have said anything to contradict the Corps' insistence that its decision was not politically motivated. The Corps refused the Louisiana berms project as originally submitted because it constituted a coastal restoration project exceeding the scope of NOD-20 authority. The portion of the berms project that the Corps did permit under NOD-20 constituted a much scaled-back version of what the state had requested. And the Corps refused to permit the Barataria Bay rock dikes,<sup>328</sup> despite loud complaints from the State of Louisiana and local officials. Corps officials involved in review of the berms project told the Commission staff that they felt political pressure but were not affected by it, and the staff has seen no evidence to suggest that the Corps' decision-making was anything other than "objective."<sup>329</sup>

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<sup>327</sup> NIC Draft Strategy Implementation.

<sup>328</sup> Dr. Denise Reed of the University of New Orleans, one of the panelists at the June 1 science summit, told the Commission staff that when the Corps turned down the Barataria dike project "that gave me some faith in the process." See Reed Interview.

<sup>329</sup> National Incident Commander Aide Interview (Nov. 2, 2010).

That the Corps and National Incident Command ran parallel, but connected, review processes did slow the Corps' review. The Corps would have issued the NOD-20 permit five days sooner but for coordination with the National Incident Command, as Colonel Lee told the Commission staff.<sup>330</sup> This procedural issue aside, the evidence available to the staff indicates that the Corps did not take direction from the National Incident Command. For example, on Saturday, May 22, Admiral Allen's Chief of Staff sent Colonel Lee an e-mail in which he seemed to request that the Corps immediately permit one or two prototype berm segments: "If there's any chance we can point out a section or two to Gov[ernor] Jindal in advance of Secretary Napolitano or Secretary Salazar's visit Monday, we could have a big win. The rest of the permitting process may still be a challenge, but it's something."<sup>331</sup> The Corps did proffer a permit for all six berm reaches requested by CPRA — but not for another five days. Although the Corps' process may not have been wholly independent of the National Incident Command's, the Commission staff has learned nothing to suggest that the Command influenced the Corps' substantive decision-making. Considering the magnitude of the berms project and the "abutting of jurisdictions"<sup>332</sup> of the Corps and the National Incident Command, it seems entirely appropriate that the two entities maintained contact.

*Second*, the National Incident Command green-lighted the berms project in response to the concerns of federal, state, and local leaders. The decision did not result from a conviction that berms were an effective oil spill response measure worthy of their cost. Admiral Allen intended for the National Incident Command to shield front-line personnel from the politics of the response. In analyzing whether the berms would be effective, the National Incident Command sought to balance science with the demands of elected officials. Ultimately, pressure to build the berms overwhelmed the analysis. The Command tried to keep the Interagency Solutions Group "immune"<sup>333</sup> from non-scientific considerations, but the Group does not seem to have been fully insulated. Despite its initial opposition to the berms project, it fell in line with the prototype idea conceived by Admiral Allen. Although many of the experts at the hastily-organized berms summit on June 1 were independent and objective, as one scientist in attendance put it, "politics got ahead of the science."<sup>334</sup> None of the assembled experts, speaking before the Louisiana politicians who had campaigned aggressively for the project, affirmatively opposed the berms. A "preponderance of opinion" at the summit suggested the berms "might not be a terrible thing to do."<sup>335</sup> As a result of the surrounding context, the bar for approval of the project was set low, and the State of Louisiana cleared it.

*Third*, although the White House has told the Commission staff that Admiral Allen was the "sole decision-maker"<sup>336</sup> on the berms project, we believe the facts show that the White House influenced the National Incident Command's June 2 decision. The June 1 summit arose from the exchange between President Obama, Governor Jindal, Parish President Nungesser, and

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<sup>330</sup> Lee Interview (Oct. 28, 2010).

<sup>331</sup> White E-mail.

<sup>332</sup> NIC Draft Strategy Implementation.

<sup>333</sup> Kayyem Interview.

<sup>334</sup> Reed Interview.

<sup>335</sup> Allen Interview; National Incident Commander Aide Interview (Nov. 12, 2010).

<sup>336</sup> Zichal Interview.

Admiral Allen at Grand Isle. The day before the Grand Isle meeting, Admiral Allen had announced a decision to approve only one \$16 million prototype berm. But on May 28, sitting around a conference room table at the Grand Isle Coast Guard station, Governor Jindal and Parish President Nungesser gave President Obama an “earful”<sup>337</sup> on the berms. President Obama then put Admiral Allen “on the spot”<sup>338</sup> to quickly organize a meeting of experts to analyze the project — which the Interagency Solutions Group had already analyzed and mostly rejected. The request from the President “hamstrung”<sup>339</sup> the Admiral, forcing him to re-open the berms debate. The summit took place a few days later, and the day after the summit the National Incident Command announced that it would approve the full six-segment project.

When asked for an explanation of the National Incident Command’s about-face, a White House official told the Commission staff simply that the response to the spill was “dynamic.”<sup>340</sup> No doubt, the spill response evolved on a day-to-day basis, but this broad truism does not explain why the National Incident Command’s stance on the berms project changed dramatically in a matter of days. We do not doubt Admiral Allen’s statement that responsibility for the decision rested with him.<sup>341</sup> We do, however, believe the facts show that the President’s “direction”<sup>342</sup> to Admiral Allen at Grand Isle set off a chain of events that led to the National Incident Command’s approval of the full six-segment project — six days after it had made a very different decision.

During spills of national significance, there will always be understandable pressures to provide as many resources as possible for response and coastal protection, and a wide variety of opinions and suggestions about the best way to deploy those resources. One way to address these demands is to consider as many spill response options as possible ahead of time and set guidelines in advance — which is why this staff working paper proposes establishing that offshore barrier berms are not a viable response measure. During a major event, however, novel and costly proposals like Louisiana’s berms project will inevitably emerge. Consistent with his responsibilities as National Incident Commander, Admiral Allen tried to balance expert advice with the concerns of leaders in Washington and Louisiana. For the future, the Commission may wish to recommend use of an independent process or group — perhaps separated from the National Incident Command — to provide decision-makers with a rigorous, scientific analysis of the effectiveness of large-scale and previously unstudied spill response measures like the Louisiana berms project.

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<sup>337</sup> Ball & Weisman, *Slippery Start: U.S. Response to Spill Falters*.

<sup>338</sup> National Incident Commander Aide Interview (Nov. 12, 2010).

<sup>339</sup> Allen Interview.

<sup>340</sup> Zichal Interview.

<sup>341</sup> Allen Interview.

<sup>342</sup> June 1 Meeting Minutes.