

U.S. Department
of Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center
Natural Resource Damage (NRD)
Claims Division

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16480

March 27, 2011

CERTIFIED MAIL Number: 7011 1570 0001 48029334

Tony Penn
NOAA Office of Response and Restoration
SMC4, RM. 10317
1305 East West Highway
Silver Spring, MD 20910

Re: Claim Number N10036-OC06 - *Deepwater Horizon* Oil Spill Assessment

Dear Mr. Penn:

The National Pollution Funds Center (NPFC) has completed its review of the National Oceanic Atmospheric Administration's (NOAA) claim for costs to assess lost human use of natural resources resulting from the *Deepwater Horizon* oil spill (Claim Number N10036-OC06). We have determined that the claimed amount of \$32,980,000 is compensable under the Oil Pollution Act (OPA, 33 U.S.C. 2701 *et seq.*) and the OPA regulations (33 C.F.R. §136 and 15 C.F.R. 990 *et seq.*). The basis of our decision follows.

Summary of the Incident and Claim

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 134.4¹ to 210.0² million gallons of oil into the Gulf of Mexico. The U.S. Coast Guard designated the source of the spill as an offshore facility located on an area leased by BP Exploration & Production, Inc. (BP). BP accepted the designation and advertised its OPA claims process.

Following the spill, NOAA, along with the Department of the Interior and five Gulf Coast states³, acting as natural resource trustees designated under OPA and appropriate

¹ <http://www.bp.com/sectiongenericarticle800.do?categoryId=903674&contentId=7067698>

² "Deepwater Horizon Oil Spill Early Restoration Plan." *Gulf Spill Restoration Publications*. National Oceanic Atmospheric Administration, 1 Dec. 2011. Web. 13 Mar. 2012.
<<http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2011/12/Final-ERP-121311-print-version-update.pdf>>.

³ Louisiana, Mississippi, Alabama, Florida, and Texas

state laws, initiated an assessment of natural resource damages resulting from the discharges and response to discharges of oil. By the August-September 2010 period, the trustees observed over 950 miles of oiled shoreline habitat, 400 oiled sea turtles, and over 1,500 oiled birds⁴; the Unified Command reported 39,885 square miles of Gulf of Mexico federal waters remained closed to fishing⁵; and NOAA identified lost human use opportunities associated with various natural resources, including fishing, swimming, beach-going, and viewing of birds and wildlife⁶. The trustees are working together to develop assessment plans for each of these resources to determine the nature and extent of these losses.

On February 15, 2012, NOAA presented its claim to the NPFC for costs to assess potential lost human use injuries. The claimed amount is \$32,980,000. This determination presents the NPFC's analyses and findings with respect to this claim and the claim requirements under OPA.

Jurisdictional Information

The NPFC first considered whether the claimed damages arose from an incident as defined by OPA. 33 U.S.C. §2701 *et seq.* To be covered, the incident must involve a discharge of oil or a substantial threat of discharge of oil from a vessel or facility into navigable waters of the United States after August 18, 1990. Based on the information provided by NOAA in its claim, and the President's April 29, 2010 designation of this incident as a spill of national significance, the NPFC finds that this claim is for natural resource damages resulting from an OPA incident.

Claimant Eligibility

Natural resource trustees are designated pursuant to OPA, 33 U.S.C. §2706 (b)); specifically, federal trustees are designated by the President. 33 U.S.C. § 2706(b)(2). Federal trustees designated under this section shall assess natural resource damages for natural resources under their trusteeship. 33 U.S.C. § 2706(c)(A). Pursuant to 33 C.F.R. §136.207, natural resource trustees may present claims to the Oil Spill Liability Trust Fund (OSLTF) for uncompensated natural resource damages, which include the reasonable cost of assessing those damages.

This claim for natural resource damage assessment costs was submitted by NOAA. NOAA, under the authority of the Secretary of Commerce, is an appropriate federal natural resource trustees pursuant to the President's designation of federal trustees under OPA, Executive Order 12777 (56 Fed. Reg. 54757, October 22, 1991), and Subpart G of

⁴ *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2012:
<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

⁵ Unified Command for the BP Oil Spill, "The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill," September 9, 2010: <http://www.restorethegulf.gov/release/2010/09/09/ongoing-administration-wide-response-deepwater-bp-oil-spill>

⁶ *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2012:
<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. §300.600).

General Claim Presentment Requirements

Claims to the Fund must be presented in writing to the Director, NPFC, within three years after the date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care, or within three years from the date of completion of the natural resource damage assessment under OPA (33 U.S.C. §2706(e)), whichever is later. 33 U.S.C. 2712(h)(2); 33 C.F.R. §136.101(a)(1)(ii). This claim is for costs associated with the development of a damage assessment plan to determine the nature and extent of lost human use of natural resources resulting from the incident. The assessment was not complete when the claim was received on February 15, 2012; therefore, the claim was received within the period of limitations for claims.

Natural resource damage claims presented to the NPFC must be based on a plan that the public has had an opportunity to review. 33 U.S.C. §2706(c)(5). On December 22, 2011, NOAA published its assessment plan for lost human use on the NOAA Gulf Spill Restoration webpage⁷, thereby meeting this requirement.

Claim Presentment to the Responsible Party

With certain exceptions, claims to the NPFC for damages must be presented first to the responsible party (RP). 33 U.S.C. §2713(a). If a claim is presented in accordance with §2713(a) and the claim is not settled by any person by payment within 90 days after the date upon which the claim was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. §2713(c)(2).

NOAA presented its assessment plan and claim for implementation costs to BP on November 9, 2011⁸. The plan identified potential types of human use losses resulting from the incident, the overall approach to assessing and scaling injury, 12 specific Tasks for assessing the potential direct use and total value losses, and costs by quarter for “NOAA Staff”, “Consultants/Contracts” and “Travel” with a total sum certain of \$36,570,000. BP agreed to fund a portion of the direct use “Consultant/Contract” costs associated with aerial imagery (\$3,590,000)⁹ and, on February 6, 2012, requested additional information and established conditions for paying Tasks 1-7¹⁰. On February 8, 2012, BP again responded to NOAA’s request for funding, declining to fund Tasks 8-12 and stating that if NOAA agreed to certain conditions for Tasks 1-7 BP was “prepared to

⁷ <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/Assess-Plan-and-Budget-for-Upfront-Funding.pdf> .

⁸ Letter dated November 9, 2011 from NOAA to BP transmitting their Interim, Partial Claim for Assessment Costs.

⁹ See exhibit 5 in NOAA’s claim (N10036-OC06) to the NPFC “2011 Human Use Aerial Imagery Work Plan” dated 11/14/11; and NOAA Interim, Partial Claim for Assessment Costs page five, paragraph three.

¹⁰ See exhibit 8 in NOAA’s claim (N10036-OC06) to the NPFC “BP’s response to presentment: email.”

discuss possible funding of agreed upon activities”¹¹. The claim was not settled by payment by February 7, 2012.

On February 15, 2012, more than 90 days after providing its assessment plan and claim for implementation costs to BP, NOAA presented a claim to the NPFC for funds to implement its Lost Human Use Assessment Plan. The claim totaled \$32,980,000 to implement the uncompensated Tasks identified in the assessment plan presented to BP on November 9, 2011.

Based on the above facts, the NPFC finds that the claim before the NPFC was properly presented to BP. BP made a partial payment of direct use “Consultant/Contract” costs associated with aerial imagery, explicitly denied Tasks 8-12, and did not fund Tasks 1-7 after 90 days¹².

Claimant's Burden of Proof and Adherence to NRDA Regulations

Under OPA, trustees bear the burden of proving their entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105. Any determination or assessment of damages to natural resources for the purposes of OPA by a trustee in accordance with the regulations at 15 C.F.R. Part 990 shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act. 33 U.S.C. §2706 (e)(2) and 15 C.F.R. §990.13. Trustee determinations made in accordance with 15 C.F.R. 990 *et seq.* are initially presumed correct, but the presumption of correctness may be rebutted if the rebuttal evidence is of sufficient weight.

After careful review of the claim and supporting documents, the NPFC finds that NOAA followed 15 C.F.R. 990 *et seq.* Specifically, they coordinated actions with other trustees to ensure no double recovery of damages, issued a notice of intent to conduct restoration planning, prepared a plan that was reviewed by the public, and are maintaining an administrative record that is available for public review.

NPFC Review of Claim and Associated Costs

Following the spill, NOAA-led surveys of recreation activities identified lost human use opportunities associated with fishing closures and various natural resources in the Gulf region, including fishing, swimming, beach-going, and viewing of birds and wildlife¹³.

¹¹ See exhibit 9 in NOAA’s claim (N10036-OC06) to the NPFC “BP’s response to presentment letter.”

¹² BP did offer to discuss possible funding of Tasks 1-7 if the trustees agreed to share data and other conditions (see exhibit 9, “BP’s response to presentment letter”). OPA assigns trustees the authority to assess and restore natural resource damages for which the RP is liable (33 U.S.C. §2706(c)), and to determine the scope of RP participation in injury assessment and restoration planning activities (15 C.F.R. §990.14 (c)(4)). Accordingly, the NPFC defers to the trustees in balancing the benefits of fully cooperative efforts where all data is shared with the need to conduct a timely assessment and hold the RP liable for damages resulting from their spill.

¹³ *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2012: <http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

NOAA's Lost Human Use Assessment Plan that forms the basis of this claim seeks to quantify the nature and extent of these losses.

NOAA's assessment plan describes specific Tasks for assessing the lost direct use/recreational¹⁴ and total value¹⁵ of human use loss over a 15-month period from October 1, 2011 through December 31, 2012. Plan direct use/recreational Tasks describe generally accepted assessment methods that involve on-site sampling and surveys to determine the number and value of lost and/or diminished value trips resulting from the spill. Plan total value assessment Tasks describe efforts to develop a survey¹⁶ for assessing the total value of lost human use of natural resources using stated preference methods¹⁷. NOAA states that the trustees settled on this valuation approach after determining that that resource-to-resource and service-to-service approaches were not appropriate, as required under OPA (15 C.F.R. §990.53); specifically, that such approaches have not been used in the past for spills of this size, potential magnitude of passive use losses are likely to be large, and valuation of replacement natural resources and/or services would impose unrealistic time and/or cost requirements^{18,19}.

In reviewing the proposed assessment approach involving both direct and total value assessment, the NPFC requested that NOAA clarify the relationship between the different assessment approaches²⁰. NOAA responded that they are complimentary, whereby total value determines the monetary amount of the total injury and what is required to compensate the public for those losses, while the direct assessment will be used to inform part of the injury scenario for the total value survey.

After reviewing all of the claim information, including the response to the NPFC request for further information, the NPFC finds that the proposed assessment procedures comply with the requirements for assessment procedures at 15 C.F.R. §990.27²¹. The NPFC notes, however, that the scope of this claim is limited to survey development and, if NOAA submits a subsequent claim for the costs to implement the survey, the NPFC will adjudicate the second claim on its merits and independent of this determination.

¹⁴ Direct/recreational use losses include boating and boat-based fishing, shoreline fishing and shoreline use.

¹⁵ Total value losses include direct/recreation losses, as well as the value that people place on natural resources that they never actually use, sometimes referred to as non-use or existence values.

¹⁶ Claimed costs are for survey development. It is expected that additional funds will be needed to implement the survey once completed.

¹⁷ Stated preference methods may include conjoint analyses, contingent valuation and stated choice techniques.

¹⁸ NOAA claim section 3.2 GENERAL APPROACH TO THE STUDY

¹⁹ March 1, 2012 memo from Mr. Fredy Hernandez (NPFC Claims Manager) to Mr. Tony Penn (NOAA claimant)

²⁰ March 1, 2012 memo from Mr. Fredy Hernandez (NPFC Claims Manager) to Mr. Tony Penn (NOAA claimant)

²¹ The NPFC is aware that use of survey-based techniques to determine the total value of lost human use has been subject to debate among economists and injury assessment practitioners, which NOAA acknowledges (<http://www.darrp.noaa.gov/economics/tools.html>). Such survey-based valuation methods are valid and may be reasonable for use in damage assessments under both NOAA's damage assessment regulations, 15 CFR Part 990, (15 C.F.R. §990.53) and the Department of the Interior's Damage Assessment Regulations, 43 CFR Part 11.

Following acceptance of the proposed assessment approach, NPFC reviewed the submission to determine how the costs claimed were determined with respect to the work proposed to be performed.

The cost to implement NOAA's Lost Human Use Assessment Plan is \$36,570,000. NOAA's sum certain for this claim is \$32,980,000, which reflects BP's decision to fund a portion (\$3,590,000) of the direct loss consultants/contracts budget item for aerial imagery.

After reviewing cost information provided with the claim, the NPFC requested that NOAA clarify (1) budget information by providing the total cost of each of the 12 Tasks by quarter for "NOAA staff", "Consultants/Contracts", and "Travel", (2) the roles of NOAA staff and contractors, and (3) claimed travel costs. NOAA responded with the additional budget information, that the assessment will be conducted by the consultants/contractors, with NOAA staff facilitating, coordinating, and managing the work, and that the travel amount claim reflects the magnitude and spatial extent of the spill, as well as the number and location of consultant/contractors that will be involved in this assessment²².

Accordingly, after reviewing the claimed activity, costs, and additional information provided, the NPFC finds that currently there is not sufficient evidence to rebut the trustee's determination that the proposed survey-based methodology, which is allowed under 15 C.F.R. §990.53 and (2) claimed costs of \$32,980,000 are reasonable and appropriate for the proposed work to be performed, given the scale and complexity of the incident, magnitude of potential, and need for assessment. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

Revolving Trust Fund and Return of Unused Funds to the OSLTF

As established by OPA (33 U.S.C. §2706(f)) and NRDA regulations (15 C.F.R. §990.65), sums recovered by trustees for natural resource damages must be retained by the trustees in a revolving trust account. All other sums must be used to implement the Lost Use Assessment Plan, as approved by this determination. For purposes of this claim, the NPFC will deposit funds into the Damage Assessment Restoration and Revolving Fund Account managed by NOAA.

All unused funds, including interest earned, shall be returned to the OSLTF in a timely basis and no later than six months from the completion of the assessment as described in this determination in accordance with 15 C.F.R. §990.65.

²² NOAA's March 5, 2012, letter in response to NPFC's request for additional information dated March 1, 2012.

Cost Documentation, Progress Reporting, and Final Report

As the claimant, NOAA shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the Lost Human Use Assessment Plan as approved in this determination. Any funds not spent or appropriately documented shall be returned to the Fund.

One year from the date of this determination, and annually thereafter, NOAA shall provide the NPFC with a report on the status of implementation and expenditures. These annual progress reports should include:

1. Certification by NOAA that all assessment activities have been conducted in accordance with the Lost Human Use Assessment Plan as approved in this determination;
2. A progress report that includes a description of work accomplished, timeline for future activities, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (i.e., labor, consultant/contractors, and travel); and
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress for the year. Enough detail should be included to determine reasonableness of costs for each employee when cost documentation is received with the final report.

In addition to annual reports NOAA shall submit a final progress report within 120 days of the date that plan implementation is complete. This report should include:

1. Certification by NOAA that all expenditures of OSLTF funds (including interest earned) were in accordance with the plan as approved by the NPFC;
2. A summary of findings;
3. Copies of final reports and/or studies;
4. Documentation of OSLTF funds remaining in the Revolving Trust Fund for this claim, including account balance and interest earned; and
5. Documentation of all expenditures as follows:
 - a. Labor: For each employee –
 - i. A narrative description of the work accomplished by each individual and how that work fit into the plan. Enough detail should be included to determine reasonableness of costs; and
 - ii. The number of hours worked, labor rate, and indirect rate. An explanation of indirect rate expenditures, if any, will be necessary;
 - b. Travel: Paid travel reimbursement vouchers and receipts;
 - c. Contract: Activities undertaken, lists of deliverables, and contract invoices and receipts;
 - d. Purchases/Expendables: Invoices and receipts, along with an explanation of costs; and
 - e. Government Equipment: Documentation of costs, including the rate (i.e. hourly, weekly) and time for all equipment used for which costs were incurred.

With the final report(s), the NPFC will reconcile costs and all remaining funds and/or inadequately documented costs will be returned to the OSLTF.

The NPFC has prepared a standardized template with detailed instructions to facilitate annual progress and final cost reporting. These templates are provided on the compact disc included with this determination.

Conclusion

The NPFC has reviewed the claim submitted by NOAA for costs to assess lost human use of natural resource resulting from the *Deepwater Horizon* incident in accordance with OPA (33 U.S.C. 2701 *et seq.*) and its implementing regulations (15 C.F.R. 990 *et seq.* and 33 C.F.R. §136). We have determined that \$32,980,000 is compensable to fund activities in the Lost Human Use Assessment Plan. This offer constitutes full and final payment for costs associated with this damage assessment plan.

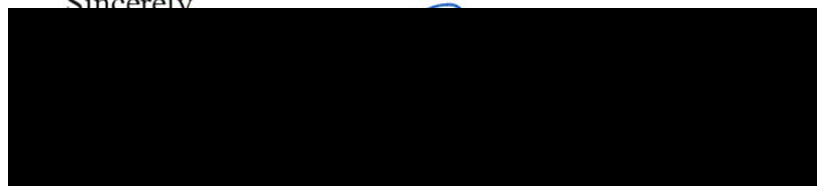
If you accept this offer, please complete the enclosed Acceptance/Release Form and return to:

Director (cn)
National Pollution Funds Center
U.S. Coast Guard Stop 7100
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the offer is void. If the settlement is accepted, your payment will be mailed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds to your trustee account when you submit the Release Form.

If you have any questions regarding this determination, please feel free to contact me at 202-493-6623.

Sincerely,



FREDY HERNANDEZ
Claims Manager
Natural Resource Damage Claims Division

- Encl: (1) Acceptance/Release Form
(2) Compact Disc with standardize template and instructions to facilitate annual progress and final cost reporting

U.S. Department
of Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

U.S. Coast Guard Stop 7100
National Pollution Funds Center
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Claim Number: N10036-OC06	Claimant Name: National Oceanic Atmospheric Administration
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NOAA, the undersigned, accepts the determination of \$32,980,000 as compensation for the claim listed above.

On February 15, 2011, the NOAA presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$32,980,000 for upfront costs to lost human use of natural resources resulting from the discharge of oil on or about April 20, 2010, from an area of land leased by BP (the *Deepwater Horizon* incident).

The NOAA accepts the settlement offer of \$32,980,000 as full compensation for the cost to assess lost human use damages as described in the March 27, 2012 determination (N10036-OC06).

NOAA agrees to provide annual and final reports to the NPFC as directed in the determination. NOAA agrees to comply with 33 U.S.C. §2706(f) and 33 C.F.R. §136.211 by depositing into a revolving trust account the amounts awarded in the March 27, 2012 determination and any amounts in excess of those required for these reimbursements to accomplish the assessment studies approved in the determination shall be deposited to the OSLTF.

NOAA hereby assigns, transfers, and subrogates to the United States all rights, claims, interest and rights of action, that it may have against any party, person, firm or corporation that may be liable for the loss. NOAA authorizes the United States to sue compromise or settle in the name of NOAA and that the NPFC be fully substituted for NOAA and subrogated to all NOAA rights arising from the March 27, 2012 determination.

NOAA acknowledges that the United States has pending legal actions associated with the *Deepwater Horizon* incident in federal district court but warrants that no settlement will be made by any person on behalf of the NOAA with any other party for costs that are the subject of the claim against the OSLTF and NOAA will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the OSLTF. The cooperation shall include but not be limited to, immediately reimbursing the OSLTF any compensation received from any other source

for the same claim, and providing any documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person.

NOAA certifies that to the best of its knowledge and belief the information contained in this claim represents all material facts and is true, and understands that misrepresentation of facts is subject to prosecution under federal law, including but not limited to 18 U.S.C. §§287 and 1001.

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Tony Penn
NOAA Office of Response and Restoration

Date