

## National Pollution Funds Center Determination

Claim Number and Name:	N10036-OC27, <i>Deepwater Horizon</i> Oil Spill Assessment
Claimant:	National Oceanic and Atmospheric Administration
Claim Type:	NRDA, Upfront Assessment Costs
Amount Requested:	\$28,994,300
Offer Amount:	\$28,994,300
Determination Date:	03 April 2015
NPFC Claim Manager:	[REDACTED]

### Summary of the Incident and Claim

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 3.19<sup>1</sup> million barrels of oil into the Gulf of Mexico (GOM) until the well was capped on July 15, 2010. Responders to the discharge applied approximately 1.84 million gallons of dispersants<sup>2</sup> to keep, or delay, the oil from reaching sensitive shorelines. 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 claims process pursuant to the Oil Pollution Act (OPA).

Upon notification of the spill, the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), along with the Department of the Interior, Fish and Wildlife Service (FWS), Environmental Protection Agency (EPA), Department of Agriculture (USDA)<sup>3</sup>, and five Gulf Coast states<sup>4</sup>, acting as natural resource trustees designated under OPA and appropriate state laws, initiated an assessment of natural resource damages resulting from the discharges and response to discharges of oil. By September 2010, the trustees observed over 950 miles of oiled shoreline habitat, 400 oiled sea turtles, and 1,500 oiled birds<sup>5</sup>. Numerous other natural resources at risk, including fish, marine mammals, oysters, and aquatic habitats, were identified. The trustees continue to work together to develop and implement plans to assess the nature and extent of these losses and appropriate restoration alternatives.

On January 13, 2015, NOAA presented the National Pollution Funds Center (NPFC) with a claim for costs to implement their assessment and restoration planning activities in 2015. The claim totaled \$28,994,300, presented as the costs with respect to NOAA's Fourth Interim, Partial Claim for Assessment and Restoration Planning (NOAA 2015

<sup>1</sup> In re *Deepwater Horizon*, MDL 2179 (E.D. La., January 15, 2015)

<sup>2</sup> 1.07 million gallons on the surface and 771,000 gallons sub-sea. "The Ongoing Administration-Wide Response to the *Deepwater Horizon* BP Oil Spill." *Deepwater Horizon Incident Joint Information Center*, September 9, 2010.

<sup>3</sup> On September 10, 2012, through Executive Order 13626, the President designated the EPA and USDA as additional natural resource trustees specifically for the *Deepwater Horizon* oil spill. *Federal Register*, Vol. 77, No. 178, Pgs. 56749-56752, September 13, 2012.

<sup>4</sup> The state trustees are Louisiana, Mississippi, Alabama, Florida, and Texas.

<sup>5</sup> *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2010

Assessment Plan or Plan). The Plan describes eight categories of assessment activities, many of which are a continuation of assessment, injury quantification, and restoration planning efforts initiated in 2011, 2012, 2013, or 2014 with funds provided by BP or the Oil Spill Liability Trust Fund (Fund or OSLTF).

This determination presents the NPFC's findings with respect to claimed costs for the eight categories of assessment activities presented in the claim.

### **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, 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 summarized above, the NPFC determined that the activities included and approved in this determination are for natural resource damages resulting from an OPA incident.

### **Claimant Eligibility**

Federal natural resource trustees are designated by the President, pursuant to OPA (33 U.S.C. §2706 (b)(2)), with responsibility to assess damages to natural resources under their trusteeship and develop and implement plans to restore, rehabilitate, replace, or acquire the equivalent of those injured natural resources. 33 U.S.C. §§2706(c)(1)(A) and (C).

This claim for natural resource damage assessment (NRDA) costs was submitted by NOAA. NOAA, under the authority of the Secretary of Commerce, is an appropriate federal natural resource trustee 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 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 NRDA 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 to implement a damage assessment plan to determine the nature and extent of damages to natural resources resulting from the incident and appropriate actions to restore those damages. The assessment was not complete when the claim was received on January 13, 2015; therefore, the claim was received within the period of limitations for claims.

In accordance with OPA, the OSLTF is available to pay claims for uncompensated removal costs and damages. 33 U.S.C. §2712(a)(4). Covered damages include natural

resource damages. 33 U.S.C. §2702(b)(2)(A). Natural resource damages are damages for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs to assess those damages. 33 U.S.C. §2702(b)(2)(B). Costs are determined with respect to plans adopted under 33 U.S.C. §2706(d)(2) that are developed and implemented after adequate public notice, opportunity for a hearing, and consideration of all public comments. 33 U.S.C. §2706(c)(5). NOAA states that the Plan that forms the basis of this claim was published on the NOAA Gulf Spill Restoration website on November 1, 2014, thereby meeting this requirement<sup>6</sup>. NOAA states that they have not received any comments on their plan.

### **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 is not settled by payment by any person 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 Plan and claim for implementation costs to BP on October 3, 2014<sup>7</sup>. The plan identified potential injuries to natural resources resulting from the incident and eight categories of assessment activities. For each of the eight categories, NOAA's Plan describes the assessment or restoration planning activities, need for the activity and how it connects to the NRDA process, deliverables to be produced, level of effort, principal investigators, timeframe<sup>8</sup>, and cost estimates for contractors and NOAA personnel. The cost to implement the activities under the eight categories, as presented to BP, was \$28,994,300. NOAA verified that all costs included in their Plan are separate and distinct from any and all previous funding requests and claims to both BP and the NPFC<sup>9</sup>.

BP did not respond to NOAA<sup>10</sup> and, on January 13, 2015, more than 90 days after presenting its claim to BP for \$28,994,300 to implement its Plan, NOAA presented this claim to the NPFC<sup>11</sup>. The NPFC notified BP on January 21, 2015 that this claim had been received<sup>12</sup>.

Based on the above facts, the NPFC finds that NOAA's claim to the NPFC for 2015 assessment costs was presented to the RP in accordance with OPA.

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<sup>6</sup> January 13, 2015 letter from NOAA to NPFC

<sup>7</sup> October 3, 2014 letter from NOAA to BP transmitting their Fourth Interim, Partial Claim for Assessment Costs.

<sup>8</sup> NOAA states in their plan that they will use deliverables from 2014 plan to complete work in this claim.

<sup>9</sup> January 13, 2015 letter from NOAA to NPFC and 2015 Assessment Plan, page 7.

<sup>10</sup> March 10, 2015 email from NOAA to NPFC providing response from Transocean and Anadarko and stating that BP did not respond to their claim.

<sup>11</sup> January 13, 2015 letter from NOAA to NPFC

<sup>12</sup> January 21, 2015 RP notification letter from NPFC to BP

## 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(a).

After reviewing the claim and supporting documents, the NPFC finds that NOAA is following 15 C.F.R. Part 990 in carrying out the NRDA for this incident. Specifically, they are coordinating actions with other trustees to ensure no double recovery of damages<sup>13</sup>, issued a notice of intent to conduct restoration planning<sup>14</sup>, invited BP to participate in the NRDA<sup>15</sup>, prepared plans that the public was given an opportunity to review<sup>16</sup>, and are maintaining an administrative record that is available for public review<sup>17</sup>. The NPFC determines that NOAA has proven entitlement to the claimed amount.

## NPFC Review of Claim Activities and Associated Costs

NOAA's Plan and claim identify the following eight resource categories for which the cost to conduct injury assessment activities in 2015 are claimed: water column, marine mammals, shoreline, oysters, sample management and archive, carcass storage and disposal, total value, and restoration planning. The total cost claimed to implement these activities is \$28,994,300.

In general, for each resource category, NOAA seeks funding to: (1) review technical reports generated by 2014 assessment activities<sup>18</sup> and begin to write the draft damage assessment and restoration plan (DARP) for certain resources for which NOAA has the lead responsibility; (2) coordinate NOAA's injury assessment information with the cotrustees and respond to cotrustee comments; (3) maintain and update NOAA's data management systems, which integrate environmental data for natural resource impacts, injuries, and restoration projects and provides access to cotrustees, and (4) carry out administrative tasks, which include contract management and updating the Administrative Record for which NOAA has trustee responsibility.

The NPFC reviewed NOAA's 2015 Plan and, on January 27, 2015, requested additional information from NOAA. Specifically, the NPFC requested that NOAA provide: (1) an accounting of funds received for all claimed assessment activities that were initiated prior

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<sup>13</sup> NOAA 2015 Assessment Plan, page 9

<sup>14</sup> "Notice of Intent to Conduct Restoration Planning" *Gulf Spill Restoration Publications*. National Oceanic Atmospheric Administration. Accessed November 12, 2013. <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2011/02/Deepwater-Horizon-Final-NOI-Fully-Executed.pdf>

<sup>15</sup> "Invitation to Participate in Natural Resource Damage Assessment" *Deepwater Horizon Administrative Record*. Department of the Interior, September 27, 2012. Accessed November 12, 2013. [http://www.doi.gov/deepwaterhorizon/adminrecord/upload/NRDA-Invitation-Letter-w-NOI-attachment-9\\_27\\_10.pdf](http://www.doi.gov/deepwaterhorizon/adminrecord/upload/NRDA-Invitation-Letter-w-NOI-attachment-9_27_10.pdf)

<sup>16</sup> NOAA 2015 Assessment Plan, page 13

<sup>17</sup> NOAA 2015 Assessment Plan, page 13

<sup>18</sup> These assessment activities were approved and funded by the NPFC through claim N10036-OC18.

to this claim, (2) a timeline with key past and future milestones for the overall assessment, (3) a description of the amount(s) claimed for early restoration projects<sup>19</sup>, and (4) information about the additional costs of cotrustee participation necessary to implement the Plan submitted in support of this claim.

NOAA responded on February 27, 2015, providing (1) an accounting of funds provided to NOAA for the claimed activities from both BP and the NPFC starting in 2012, (2) a description of milestones for each claimed activity and the source of funding, (3) a statement that claimed costs for early restoration projects are limited to project planning efforts conducted prior to reaching agreement with BP for funding as an early restoration project (i.e., efforts prior to reaching a stipulation agreement), and (4) an estimate of \$4,100,000 for other trustee (e.g., EPA, USDA, FWS, state trustee) costs to participate in the assessment and restoration planning activities described in NOAA's 2015 Plan.

Below are the NPFC's findings.

### Water Column

Since the spill, NOAA has implemented several assessment studies to assess the nature and extent of injuries to water column resources using research vessels, remotely operated underwater vehicles, aircrafts, and satellites<sup>20</sup>. The resources and habitat assessed include all of the aquatic natural resources with the nearly 700 kilometers of surface, deep sea, and shoreline waters in the northern GOM that were exposed to oil from the *Deepwater Horizon* incident. These assessment studies, and the large amounts of data that they produced, are described in draft technical reports.

NOAA's 2015 Plan describes efforts to quantify injury to water column resources based on the data and other information presented in the draft technical reports. This work, and its outcome, will be described in a section of a DARP specific to water column injury. Once drafted, NOAA will share the draft DARP with the cotrustees for review and comment, which may lead to additional analysis by contractors, data managers, and cotrustees. NOAA claims \$2,205,800 for this activity, which includes \$410,000 for NOAA's efforts to coordinate review of the water column injury findings presented in the draft DARP, \$1,018,000 for NOAA to respond to cotrustees comments and conduct any further analysis, \$696,400 for data management, and \$81,400 for administrative tasks.

After reviewing NOAA's 2015 Plan and the additional claim information, the NPFC finds that the: (1) water column assessment activity described above is reasonable and appropriate in the context of quantifying injury to water column resources resulting from this spill, and (2) costs claimed for this activity are reasonable for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling,

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<sup>19</sup> In April 2011, the trustees and BP reached an agreement to begin restoring the Gulf of Mexico prior to completion of the natural resource damage assessment (commonly referred to as early restoration), based on BP's commitment to make \$1 billion available. The early restoration projects are distinct from the activities presented to the OSLTF for funding.

<sup>20</sup> NOAA 2015 Assessment Plan, page 15

geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$2,205,800 for the claimed water column assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52.

### Marine Mammals

In 2010, NOAA began assessing both live and dead marine mammals to quantify injury resulting from the *Deepwater Horizon* incident and scale appropriate restoration. Specifically, NOAA has collected data from health assessments, longitudinal, reproductive, and aerial surveys, stranding counts, remote biopsies, satellite tagging, and genetic tests. In 2014, NOAA completed its final health assessment, where they reported continued poor overall body condition and lung disease in some animals, although at a lower prevalence than found in 2011<sup>21</sup>. These studies are documented in draft technical reports produced with funds provided by the NPFC in 2014.

NOAA plans to use the data collected from the previous assessment studies presented in the draft technical reports to assess the extent of marine mammal injury with respect to mortality, fecundity, site fidelity, and movements<sup>22</sup>. This work will be described in the draft DARP that will be presented to the cotrustees for review and comment, which may lead to additional analysis by contractors, data managers, and cotrustees. NOAA claims \$1,926,900 for this activity, which includes \$313,500 to facilitate trustees' coordination and review, \$835,200 to respond to cotrustees comments and conduct any further analysis, \$696,500 for data management, and \$81,700 for administrative tasks.

In reviewing this claim, the NPFC learned that NOAA was planning to present BP with a separate claim that included the cost to collect additional data on potential injuries to marine mammals and oysters<sup>23</sup>. On January 27, 2015, the NPFC requested that NOAA provide a rationale for drafting technical reports to assess the extent of marine mammal and oyster injuries when additional data collection is anticipated. NOAA responded stating, "Additional field data on reproductive success in Barataria Bay dolphins proposed to be collected in spring of 2015 will be used to update these analyses and conclusions that we are making regarding the temporal duration and severity of reproductive impacts to dolphins." The NPFC understands that costs claimed for this activity are for NOAA to produce a draft DARP section for marine mammals ready for cotrustee review, which may need to be updated with the additional information collected in 2015.

After reviewing NOAA's 2015 Assessment Plan and the additional claim information, the NPFC finds that the: (1) marine mammal assessment activity described above is appropriate and will lead to injury quantification, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of

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<sup>21</sup> NOAA 2015 Assessment Plan, page 17

<sup>22</sup> NOAA 2015 Assessment Plan, page 16

<sup>23</sup> January 13, 2015 claim letter from NOAA to NPFC

natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$1,926,900 for the marine mammal assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52.

### Shoreline

NOAA has completed studies at more than 200 shoreline sites across the GOM involving field observations and measurements of the nature and extent of oiling, condition of vegetation (e.g., percent live and dead vegetation, canopy height, chlorophyll content, and rate of erosion due to lack of vegetation), and animal life<sup>24</sup>. NOAA uses the results from the assessment studies to draft technical reports that describe the studies and findings.

With this claimed assessment activity, NOAA plans to use the information presented in the technical reports to determine and quantify injury to shoreline habitat. This work will be described in the draft DARP that will be presented to the cotrustees for review and comment, which may lead to additional analysis by contractors, data managers, and cotrustees. NOAA claims \$2,163,800 for this activity, which includes \$409,600 to facilitate trustee coordination and review, \$976,000 to respond to cotrustees comments and conduct any further analysis, \$696,500 for data management, and \$81,700 for administrative tasks.

After reviewing NOAA's 2015 Assessment Plan and additional claim information provided by NOAA, the NPFC finds that the: (1) shoreline assessment activity described above is appropriate and will lead to injury quantification, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$2,163,800 for the shoreline assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52.

### Oysters

NOAA has completed assessment studies to quantify potential injuries to oysters by measuring abundance and biomass, evaluating reproductive condition, and estimating larval recruitment in nearshore and subtidal waters affected by *Deepwater Horizon* oil. NOAA states that these efforts, which began in 2010 and continued through 2014, have shown reduced adult and juvenile oyster abundance and spat recruitment across the full spatial footprint of the *Deepwater Horizon* oiling area<sup>25</sup>. NOAA has also undertaken laboratory assessment of oil toxicity, which has shown that very low concentrations of oil kill oyster larvae, prevent normal fertilization from occurring, and produce developmental abnormalities in embryos and free-swimming larvae that ultimately lead to death.

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<sup>24</sup> 2014 Assessment Plan, page 104

<sup>25</sup> NOAA 2015 Assessment Plan, page 22-23

NOAA's injury assessment acknowledges that some oysters that were exposed to *Deepwater Horizon* oil were also exposed to low salinities due to large volumes of freshwater runoff and the opening of floodwater diversion structures during storm events. NOAA acknowledges that low salinity can be a source of mortality to oysters, but states that "the continued lack of recovery extends well beyond what would be expected following a significant freshwater event. The persistence of low recruitment and abundance several years after the *Deepwater Horizon* Incident is unlikely due solely to impacts of freshwater exposure<sup>26</sup>. GOM oyster populations have historically been subject to natural disasters or flood control actions, and typically rebound within 18 to 24 months<sup>27</sup>."

In 2014, NOAA completed interpretive technical reports for oysters using funds provided by the NPFC<sup>28</sup>. NOAA now plans to use the completed technical reports to determine and quantify injury to oysters. This work will be described in the draft DARP that will be presented to the cotrustees for review and comment, which may lead to additional analysis by contractors, data managers, and cotrustees. NOAA claims \$2,035,500 for this activity, which includes \$409,500 to facilitate trustee coordination and review, \$847,800 to respond to cotrustees comments and conduct any further analysis, \$696,500 for data management, and \$81,700 for administrative tasks.

After reviewing NOAA's 2015 Assessment Plan and additional claim information provided by NOAA, the NPFC finds that the: (1) oyster assessment activity described above is appropriate and will lead to injury quantification, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$2,035,500 for the oyster assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52

#### Chemistry (Long Term Sample Management and Archive)

NOAA claims \$3,612,400 to maintain the large quantities of chemistry and oil samples collected during past NRDA studies for the *Deepwater Horizon* oil spill. Specifically, NOAA requests \$3,000,000 as direct costs for analytical chemistry labs to store, track, and manage samples and \$612,400 as contract labor to coordinate these efforts and consolidate samples to a long-term storage facility.

On January 27, 2015, the NPFC requested NOAA: (1) confirm that NOAA is storing samples for NRDA purposes only and not for litigation or enforcement, and (2) identify what costs BP pays and how they are distinct from those claimed here and those previously paid by the NPFC. NOAA responded by: (1) confirming that stored samples are "retained to support the ongoing damage assessment process and will continue to

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<sup>26</sup> NOAA 2015 Assessment Plan, page 22

<sup>27</sup> February 7, 2014, email from NOAA to NPFC

<sup>28</sup> Claim N10036-OC18

serve this purpose until completion of a final DARP . . .”, and (2) identifying costs BP has paid for and explaining that they are separate from those claimed for this activity<sup>29</sup>.

After reviewing NOAA’s 2015 Assessment Plan and additional claim information provided by NOAA, the NPFC finds that the: (1) chemistry assessment activity described above is appropriate in the context of ongoing efforts to quantify and prove injury, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$3,612,400 for the chemistry assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52.

#### Carcass Storage and Carcass Disposal

Since 2010, NOAA has collected sea turtle and marine mammal carcasses to assess potential for incident-caused injury. NOAA now requests funds to continue to store certain carcasses and dispose of specific turtle carcasses that BP and the trustees have approved for disposal. Disposal may occur by incinerating or moving carcasses to landfills<sup>30</sup>.” NOAA claims \$49,800 for this activity, \$24,800 for sea turtle sample and carcass storage and \$25,000 for sea turtle carcass disposal.

After reviewing NOAA’s 2015 Assessment Plan and additional claim information provided by NOAA, the NPFC finds that the: (1) Carcass Storage and Carcass Disposal assessment activity described above is appropriate in the context of ongoing efforts to quantify and prove injury, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$49,800 for the Carcass Storage and Disposal assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52.

#### Lost Human Use (Total Value)

NOAA claims \$1,000,100 to continue its assessment of lost human use of natural resources injured by the Deepwater Horizon incident.

NOAA is leading trustee efforts to assess potential lost human use of natural resources injured by the spill, which includes disruptions in recreational boating, fishing, beach activities, bird watching, and passive losses<sup>31,32</sup>. Over 39,885 square miles of GOM

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<sup>29</sup> February 27, 2015 email from NOAA to NPFC

<sup>30</sup> NOAA 2015 Assessment Plan, page 25

<sup>31</sup> Passive or non-use losses are estimates of the value of lost passive and direct use of the injured natural resources.

<sup>32</sup> *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2010:  
<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

federal waters were closed to fishing<sup>33</sup>, with NOAA reporting that residents and non-residents of Gulf States make more than 150 million recreational trips to the GOM each year, and, in 2009, approximately 23 million of these recreational trips were individual fishing trips<sup>34,35</sup>.

To assess damages to lost human use, the trustees adopted a three-phased approach to assess the total lost value of natural resources resulting from this spill. In phase 1, NOAA put together their team of experts in the fields of environmental and natural resources economics, survey research, econometrics, and other social sciences, and began to define the tasks for their assessment<sup>36</sup>. In phase 2, NOAA further developed the total value assessment by training surveyors and conducting focus groups, one-on-one interviews, pre-tests of citizens, and data validation efforts<sup>37</sup>. In phase 3, NOAA refined and administered the final survey using up to date injury information and results from pre-tests, and conducted extensive quality assurance/ quality control on completed work to date. Phase 3 is still ongoing and will be completed when the draft DARP section for lost human use is finalized and ready for public review.

On January 27, 2015, after reviewing the claim, the NPFC requested that NOAA provide a more detailed summary of work completed to date and the need and rationale for additional work that is similar to work claimed in prior claims<sup>38</sup>. NOAA responded by providing a clear description of work completed and stating that claimed costs are to further evaluate and interpret responses and other survey data and produce the draft DARP section for lost human use that will be presented to the cotrustees for review and comment, which may lead to additional analysis by contractors, data managers, and cotrustees. Once NOAA has completed its evaluation and interpretation of responses and other survey data it will draft technical memos, which will be completed by the third quarter of calendar year 2015<sup>39</sup>. NOAA plans to use the completed technical memos to write the draft DARP section for lost human use and present it to the cotrustees for review and comment<sup>40</sup>.

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<sup>33</sup> 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>

<sup>34</sup> Natural Resource Damage Assessment, April 2012 Status Update for the *Deepwater Horizon Oil Spill* [http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL\\_NRDA\\_StatusUpdate\\_April2012.pdf](http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL_NRDA_StatusUpdate_April2012.pdf)

<sup>35</sup> NOAA National Marine Fisheries Service. 2010. Fisheries of the United States 2009. <http://www.st.nmfs.noaa.gov/st1/fus/fus09/index.html>

<sup>36</sup> Claim to NPFC N10036-OC14 (\$3,846,347.56)

<sup>37</sup> Claim to NPFC N10036-OC06 (\$32,980,000)

<sup>38</sup> Claims N10036-OC06 and N10036-OC15

<sup>39</sup> February 27, 2015 email from NOAA to NPFC

<sup>40</sup> On March 6, 2015, NOAA notified the NPFC that they might have additional costs in the future related to finalizing and preparing the draft DARP section for public review. Additional work may include administrative and analytical support, additional analyses of survey data, further coordination with cotrustees, writing of additional technical memos as needed, and further editing of existing ones' See March 6, 2015 e-mail from NOAA to NPFC.

After reviewing NOAA's 2015 Assessment Plan and additional claim information provided by NOAA, the NPFC finds that the: (1) lost human use assessment activity described above is appropriate and will lead to injury quantification, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$1,000,100 for the lost human use assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51 and 990.52.

### Restoration Planning

NOAA's 2015 Assessment Plan identifies \$16,000,000 (\$8,595,000 for contract and \$7,405,000 for agency costs) to continue planning restoration of incident-caused injuries. The Plan identifies the following five cost categories: Leadership, Management and Oversight, Finance, Damage Assessment and Restoration Plan, Programmatic Environmental Impact Statement, and Associated Regulatory Compliance, Data Management, and Communications. All of these claim costs are specific to NOAA's efforts to: (1) plan Early Restoration projects prior to stipulation agreements with the RP, and (2) identify a reasonable range of restorations alternatives that will be presented to the public in the trustees DARP.

*Leadership, Management and Oversight* (\$1,262,300): NOAA requests \$1,262,300 for senior NOAA personnel (\$890,400 for labor and \$221,700 for travel) and contractors (\$150,200) that will be providing overall direction to NOAA staff, and communicating status of ongoing restoration planning efforts with cotrustees, members of the public, and Members of Congress. These funds will also be used for NOAA to work with the cotrustees to develop a long-term governance structure for implementing restoration projects, which will require protocols, internal controls, and periodic audits. The NPFC determines that \$1,262,300 is compensable from the Fund.

*Finance* (\$514,900): NOAA requests \$514,900 NOAA labor (\$220,000) and contracts (\$294,900) to plan, execute, track, and document expenditures and manage contracts for the restoration planning efforts. This Activity also includes funding for an accounting firm to provide independent review of cost documentation and provide audit services. The NPFC determines that \$514,900 is compensable from the Fund.

*Damage Assessment and Restoration Plan, Programmatic Environmental Impact Statement, and Associated Regulatory Compliance* (\$12,410,700): NOAA requests \$12,410,700 for NOAA labor (\$5,860,800) and contracts (\$6,549,900) to complete the draft Programmatic Environmental Impact Statement (PEIS)/ DARP that will be made available for trustee review prior to publishing for public comment. This involves compiling information from numerous injury reports prepared by the technical teams, identifying restoration alternatives for those injuries, scaling preferred restoration alternatives to the injury to ensure appropriate compensation of losses, and evaluating preferred restoration alternatives (including consideration of requirements under a range

of environmental statuses). The NPFC determines that \$12,410,700 is compensable from the Fund.

*Data Management* (\$1,547,100): NOAA requests \$1,547,100 to fund a data management team that maintains repositories and access to all of the injury assessment and potential restoration projects that have been collected and identified to date. The team is also maintaining a SharePoint database of all documents relevant to restoration planning efforts. The overall effort involves developing business rules, workflows, and protocols for entry and access to data and documents. The NPFC determines that \$1,547,100 is compensable from the Fund.

*Communications* (\$265,000): These claimed costs are for a communications team that provides information to the public and manages its social media and the Gulf Spill Restoration website regarding restoration projects. The website is the centerpiece of this effort, as it provides avenues for the public to submit restoration project ideas; view/map all projects submitted for consideration; review and comment on the restoration planning documents; and explore the natural resource injuries that drive restoration planning decisions. Costs also include \$80,000 for graphic design, printing, and translation services costs for posters, fact sheets and other outreach materials. The NPFC determines that \$265,000 is compensable from the Fund.

After reviewing NOAA's 2015 Assessment Plan and additional claim information provided by NOAA, the NPFC finds that the: (1) Restoration Planning assessment activity described above is appropriate and supports NOAA's effort to quantify injury and plan appropriate restoration, and (2) costs claimed for this activity are reasonable for the proposed level of effort given the complexity of the incident relating the nature and extent of oiling, geographic extent of exposure of natural resources to oil, and magnitude of potential injury. Therefore, claimed costs of \$16,000,000 for the Restoration Planning assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.53 and 990.55.

## **Summary**

The NPFC has reviewed the claim submitted by NOAA for costs to implement its Plan for the *Deepwater Horizon* incident in accordance with OPA (33 U.S.C. §2701 *et seq.*) and associated regulations (15 C.F.R. Part 990 and 33 C.F.R. Part 136). Through this determination, the NPFC offers \$28,994,300 to implement approved activities detailed in NOAA's Assessment Plan.

This offer constitutes full and final payment for the activities addressed in this determination.

## **Revolving Trust Fund and Return of Unused Funds to the OSLTF**

As established by OPA (33 U.S.C. §2706(f)) and the NRDA regulations (15 C.F.R. §990.65), sums recovered by trustees for natural resource damages must be retained in a

non-appropriated revolving trust account for use only to implement the nine activities addressed in this determination in accordance with the Plan. For this claim, the NPFC will deposit \$28,994,300 into NOAA's Damage Assessment Restoration and Revolving Fund Account, which NOAA has demonstrated<sup>41</sup> to be a non-appropriated, revolving trust fund. NOAA shall reimburse the Fund for any amounts received from the Fund in excess of that amount required to accomplish the activities for which the claim was paid. 33 CFR 136.211(b).

### **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 Plan for the activities approved in this determination. NOAA shall reimburse the Fund for any amounts received from the Fund in excess of that amount required to accomplish the activities for which the claim was paid. 33 U.S.C. §2706(f); 33 CFR 136.211(b).

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 approved in this determination have been conducted in accordance with the Plan;
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 of the work 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.

NOAA shall submit a final progress report within 120 days from the date an approved activity is complete. This report should include:

1. Certification by NOAA that all expenditures of OSLTF funds 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

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<sup>41</sup> October 15, 2013 email from NOAA to NPFC