

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
National Pollution Funds Center

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16480

December 5, 2011

*CERTIFIED MAIL* Number: 7011 1570 0001 4802 7910

Cindy Dohner  
Regional Director, USFWS Southeast Region  
1875 Century Blvd., Suite 400  
Atlanta, GA 30345

RE: Claim Number: N10036-OI03 – *Deepwater Horizon* Oil Spill Assessment

Dear Ms. Dohner:

The National Pollution Funds Center (NPFC) has reviewed the U.S. Department of the Interior's (DOI) claim for \$891,250 (\$775,000 in assessment and \$116,250 in contingency costs) to quantify avian injuries resulting from the *Deepwater Horizon* oil spill. We have determined that \$775,000 is compensable and have approved up to \$116,250 for contingency costs subject to NPFC review and approval of DOI's justification and past expenditures. This determination was made in accordance with the Oil Pollution Act (OPA) and the OPA claims regulations. 33 U.S.C. §2701 *et seq.*; 33 C.F.R. Part 136. The basis of our determination follows.

### **Summary of Claim**

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging a significant amount of oil into the Gulf of Mexico (the spill). 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, DOI, along with NOAA and Gulf Coast states<sup>1</sup>, acting as natural resource trustees designated under OPA, initiated an assessment of natural resource damages resulting from the discharges and response to discharges of oil. Based on initial assessment findings, DOI developed a comprehensive assessment plan that identifies 25 separate studies to assess injuries specific to birds, endangered and threatened fish and mammals, and sea turtles under their jurisdiction.

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<sup>1</sup> Louisiana, Mississippi, Alabama, Florida, and Texas

On August 4, 2011, the NPFC received a claim<sup>2</sup> from DOI, seeking the costs to implement four studies identified in DOI's July 1, 2011 Damage Assessment Plan. DOI subsequently amended its claim on September 7, 2011, to add an additional study, and, on September 21, 2011, the NPFC approved and paid \$1,455,464 to fund the implementation of the five studies<sup>3</sup>.

DOI submitted a second claim to the NPFC for upfront assessment costs on October 13, 2011. This claim seeks \$775,000 for technical assistance to quantify avian injuries, and \$116,250 for contingency costs, as described in the DOI July 1, 2011 Damage Assessment Plan. NPFC reviewed claim information and on October 18, 2011 and November 9, 2011, requested additional information about the claimed assessment activities from DOI. DOI responded to these requests on October 25, 2011 and November 16, 2011 respectively, allowing the NPFC to complete adjudication of this claim.

As detailed in the NPFC's September 21, 2011 determination with respect to the *Deepwater Horizon* oil spill the NPFC has previously determined that:

1. The *Deepwater Horizon* oil spill occurred after OPA's date of enactment (August 18, 1990) and is an OPA incident for which natural resource damages may be claimed. 33 U.S.C. §§2702(b)(2)(A) and 2712(a)(4);
2. DOI is a designated natural resource trustee eligible to present a claim for natural resource damages. 33 U.S.C. §2706(b)(2) and 33 C.F.R. §136.207;
3. DOI determined that there is jurisdiction to pursue restoration for this incident under OPA. 15 C.F.R. 990.41;
4. DOI is conducting an injury assessment pursuant to 15 C.F.R. 990.51; and
5. Trustees bear the burden of proving their entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105.

This determination adopts these findings, and provides the following additional findings with respect to the claim submitted on October 13, 2011.

### **Claim Presentation**

Claims to the NPFC 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 resources damage assessment under section 1006(e) of OPA (33 U.S.C. §2706(e)), whichever is later. 33 C.F.R. §136.101(a)(1)(ii). The assessment was not complete when the claim was received on October 13, 2011. Therefore, the claim was received within the statute of limitation period.

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<sup>2</sup> Previously, DOI and the NPFC agreed that DOI would submit one claim - N10036-OI02 for \$67,510,774 - with subparts (all of which are under the umbrella of the Damage Assessment Plan), but, on November 1, 2011, the NPFC and DOI agreed to subdivide the \$67,510,774 claim into individual claims. Therefore, this determination is for the new claim - N10036-OI03 - submitted October 13, 2011, rather than a subpart of N10036-OI02.

<sup>3</sup> Avian Toxicity, Marsh Bird Study #19 (Marsh Edge Carcass Persistence, Marsh Edge Searcher Efficiency, Wildlife Ops), and Gulf Sturgeon Study

Natural resource damage claims presented to the NPFC shall be based on a plan that the public has had an opportunity to review. 33 U.S.C. §2706(c)(5). On July 18, 2011, DOI adopted and posted on its website the Interim, Partial Claim for Assessment Costs for the 20 April 2010 Deepwater Horizon (MC252) Spill, which included its Damage Assessment Plan. The Plan included the technical assistance activity subject to this claim, thereby meeting these requirements.

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).

The claim administrative record indicates that DOI presented BP with its assessment plan and claim for implementation costs on July 5, 2011<sup>4</sup>. BP did not settle the portion of the claim for avian injury technical support subject to this claim to the NPFC within 90 days; therefore, DOI's claim meets the presentment requirements under OPA and the claims regulations.

### **NPFC Review of Claim and Associated Costs**

#### *Avian Injury Quantification Technical Support*

DOI and the co-trustees have collected a large amount of data from the spill, including the species composition and abundance throughout the spill area and nature and extent of avian exposure to spilled oil. The purpose of this claimed activity is to enable DOI to review and use this data to quantify avian injuries using the Beached Bird (BBM) and Live Oiled Bird Models (LOBM). The BBM, an established model that has been used in other spills to assess avian injury<sup>5</sup>, determines the total number of birds killed based on the number of dead birds recovered during the response. The LOBM determines the total injury from the number of birds present in spill-affected areas, the percentage of birds oiled, and oiled bird survival rates. DOI claims \$343,700 and \$363,320 to run the BBM and LOBM, respectively, and \$67,980 to review and reconcile model outputs and determine total injury.

After reviewing the claim, the NPFC requested that DOI provide additional information on where, or how, the LOBM has been used to assess avian injury in prior oil spills<sup>6</sup>. DOI responded that variations of the LOBM have been used in past avian injury assessments<sup>7</sup>, but on a much smaller scale. Through this assessment activity, the model will be further enhanced and employed to determine injury.

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<sup>4</sup> Letter from DOI to BP Transmitting Interim, Partial Claim for Natural Resource Damage Assessment Costs Pursuant to 33 U.S.C. §2713

<sup>5</sup> Prior spills using the BBM include; Kure, Cosco Busan, Luckenbach, New Carissa and Stuyvesant.

<sup>6</sup> Email from NPFC to DOI, remitted on October 18, 2011

<sup>7</sup> Email response from DOI to NPFC, received on October 25, 2011, indicates that variations of the LOBM have been used previously (Nestucca: shorebirds, Kure: pelicans, Cosco Busan: shorebirds, New Carissa: shorebirds)

NPFC also requested additional information from DOI about the potential for overlap between the BBM and LOBM and, to the extent that the two models do overlap, the basis for using the two models. DOI responded that the LOBM and BBM will both provide estimates of total avian injury during the spill response period, but that the LOBM will quantify additional injury associated with (1) delayed mortality (beyond the response period) and (2) exposure to sub-lethal concentrations of oil. Further, the BBM injury estimate will be used with the intent to validate the LOBM injury estimate during the period of overlap (i.e., spill response period).

The NPFC acknowledges the role and expertise of the trustees in determining how to assess avian injuries from the spill. In reviewing the avian assessment approach involving the two models, the NPFC finds that the model-based approach complies with the requirements for assessment procedures at 15 C.F.R. §990.27. Specifically, the procedure involving the two models is reasonably reliable and valid for the incident and capable of providing assessment information to determine the type and scale of restoration appropriate for the injury. The NPFC also finds that the additional cost of applying the BBM with the intent to validate the LOBM is reasonable and appropriate related to the expected increased quality of information (particularly given the magnitude of the spill and subsequent potential injury<sup>8</sup>). The NPFC makes this finding based on the explicit understanding that the trustees bear the burden of demonstrating there is no double counting or double recovery of injury from this assessment approach, as prohibited by OPA. 33 U.S.C. §2706(d)(3).

Accordingly, after reviewing the claimed activity, costs, and additional information provided, the NPFC finds that (1) DOI's use of the BBM and LOBM to assess avian injury meets the standards for assessment procedures under 15 C.F.R. §990.27, and (2) claimed costs of \$775,000 are reasonable, given the scale and complexity of the incident and subsequent assessment, and the amount of data available for review. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

## **Contingency**

DOI claims \$116,250, or 15 percent of total claimed amount (\$775,000), for contingency costs associated with implementation of the Avian Injury Quantification Technical Support study. The NPFC recognizes the uncertainties inherent in the cost estimates of the approved assessment activities and that costs may unexpectedly increase, and/or that new and unforeseeable costs may surface in the future. Accordingly, the NPFC has determined that the OSLTF will remain available for contingency costs not to exceed \$116,250.

Contingency funding will be made available in accordance with the NPFC Contingency Policy (enclosed) when and if needed, and when supported by appropriate justification and documentation of costs incurred to date. If the need for contingency funds arises, DOI should make a formal request to the NPFC. Such a request can be made through the annual cost and progress reporting described below, and must include a justification for

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<sup>8</sup> More than 75,000 birds were observed to be oiled but alive during the observation timeframe.

the additional funds and documentation of past expenditures. In a rare case additional contingency may be granted if adequate documentation and rationale are provided.

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

As established by OPA and NRDA regulations, sums recovered by trustees for natural resource damages must be retained by the trustees in a revolving trust account without further appropriation for use only to reimburse or pay costs incurred by the trustee with respect to the damages natural resources. 33 U.S.C. §2706(f); 15 C.F.R. §990.65. For purposes of this claim, the NPFC will deposit funds into the Natural Resource Damage Assessment and Restoration Fund managed by the Department of the Interior.

Sums provided under this determination may only be used to implement the activities approved in this determination. 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 each individual project as described in this determination in accordance with 33 U.S.C. §2706(f) and 15 C.F.R. §990.65(f).

### **Cost Documentation, Progress Reporting, and Final Report**

As the claimant, DOI shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the Damage Assessment Plan for the activities approved by 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, DOI shall provide the NPFC with a report on the status of project implementation and expenditures. These annual progress reports should include the following for each funded project:

1. Certification by DOI that all assessment activities have been conducted in accordance with the Damage Assessment Plan as approved in this determination;
2. A progress report that includes a description of work accomplished, a timeline for future activities, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (i.e., labor, contracts, purchases/expendables, travel, and government equipment);
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress of the project 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;
5. An accounting, including the source and value, of any additional compensation received for the studies approved in this determination.

In addition to the annual reporting requirements, DOI shall submit a final progress report for each of the approved studies within 120 days of the date the funded assessment activity is completed. This report should include the following:

1. Certification by DOI that all expenditures of OSLTF funds were in accordance with the Plan as approved by the NPFC;
2. A summary of assessment study findings;
3. Copies of final reports and/or studies;
4. Documentation of OSLTF funds remaining in the Revolving Trust Fund established for this claim, including account balance and interest earned;
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 project. 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, work plans, 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.
6. An accounting, including the source and value, of any additional compensation received for the studies approved in this determination.

With the final report(s), the NPFC will reconcile costs. 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 each individual project as described in this determination in accordance with 15 C.F.R. §990.65(f).

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.

## **Summary**

The NPFC has reviewed the claim submitted by DOI for the costs to implement the Avian Injury Quantification Technical Support study in accordance with OPA and its implementing regulations. 33 U.S.C. §2701 *et seq.* and 33 C.F.R. Part 136. We have determined that \$775,000 is compensable. We have also approved up to \$116,250 for potential contingency costs for this project, subject to DOI providing the NPFC with appropriate justification and documentation of past expenditures.

This offer constitutes full and final payment of DOI assessment costs for the Avian Injury Quantification Technical Support study associated with the *Deepwater Horizon* incident. If you accept this offer, please sign the enclosed Acceptance/Release Form where indicated and return to:

Director (Cn)  
U.S. Coast Guard, Stop 7100  
National Pollution Funds Center  
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 form. Please provide account information including Agency Locator Codes (ALC) with matching addresses, Treasury Accounting Symbol (TAS) number, and instruction for the transfer of funds to trustee accounts when you submit the Release Form.

If you have any questions about this determination, you may write me at the above address or contact me by phone at (202) 493-6623.

Sincerely,



FREDY HERNANDEZ  
Claims Manager  
Natural Resource Damage Claims Division

Enclosures: Acceptance/ Release Form  
CD with Annual and Final Reporting Forms and Instructions  
NPFC-CN Policy Document "NRD Contingency Payments"

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
National Pollution Funds Center

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E-mail: [REDACTED]@uscg.mil

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Claim Number: N10036-OI03	Claimant Name: The U.S. Department of the Interior
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On August 4, 2011, the U.S. Department of the Interior (DOI) presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$67,510,774 for upfront costs to assess natural resource injuries 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 NPFC initially considered DOI's claim presentation to the NPFC to be a single claim for \$67,510,774 to implement 25 studies consistent with the DOI Damage Assessment Plan made available for public review and adopted by DOI. The claim's sum certain was subsequently amended to \$66,013,771 on September 7, 2011 to include 23 studies.

On November 2, 2011, the NPFC and DOI agreed to subdivide the \$66,013,771 million claim that was presented to the RP into smaller claims as they are presented to the NPFC for adjudication and payment. The NPFC thus re-identified DOI's first two adjudication requests (August 4, 2011 and August 17, 2011) in the amount of \$1,673,784 (N10036-OI02) under the \$66,013,771 claim. A release for that claim was executed by DOI on September 22, 2011.

The Department of the Interior accepts the settlement offer of \$775,000 as full compensation for the Avian Injury Quantification Technical Support study as described in the December 5, 2011 determination (N10036-OI03). The settlement includes an additional \$116,250 in contingency funding that may be available from the OSLTF under the terms and conditions provided in the December 5, 2011 determination.

This settlement represents full and final release and satisfaction of all damage assessment costs described in the December 5, 2011 determination.

This release waives any right DOI may have to dispute the contingency awards in the NPFC December 5, 2011 determination. Although this settlement and release does not pay the contingency awards detailed in that determination, DOI acknowledges that any future contingency payments will be limited to the amount awarded for the study as detailed in the determination. The NPFC will only authorize actual payment of these contingency awards from the OSLTF if and when a permissible contingency occurs and the request is fully documented and complies with the NPFC policy for Natural Resource Damage Contingency Payments.



DOI agrees to provide annual and final reports for the study to the NPFC as directed in the determination. DOI 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 December 5, 2011 determination and any amounts in excess of those required for these reimbursements to accomplish the assessment activities approved in the determination shall be deposited to the OSLTF.

DOI hereby assigns, transfers, and subrogated 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. DOI authorizes the United States to sue, compromise or settle in the name of DOI and that the NPFC be fully substituted for DOI and subrogated to all DOI rights arising from the December 5, 2011 determination.

DOI 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 DOI with any other party for costs that are the subject of the claim against the OSLTF and DOI 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.

DOI 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.

_____	_____
Title of Person Signing	Date of Signature
_____	_____
Typed or Printed Name of Claimant or Name of Authorized Representative	Signature

_____	_____
Title of Witness	Date of Signature
_____	_____
Typed or Printed Name of Witness	Signature

_____	_____	_____
ALC Required for Payment	Bank Routing Number	Bank Account Number