

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center

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16480

March 13, 2012

*CERTIFIED MAIL* Number: 7011 1570 00014802 9204

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

RE: Claim Number: N10036-OI04 – *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 \$1,857,782 to assess sea turtle injuries resulting from the *Deepwater Horizon* oil spill. We have determined that \$1,857,782 is compensable. 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.

### **Incident**

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 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.

### **Background**

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.

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

On September 21, 2011, the NPFC approved a claim from DOI for \$1,455,464 to fund the implementation of the five studies<sup>2</sup> identified in the comprehensive assessment plan. The NPFC approved a second DOI claim on October 13, 2011, providing \$775,000 for an additional study included in the comprehensive plan<sup>3</sup>.

The NPFC's September 21, 2011 determination for the first DOI claim made the following findings related to the incident and DOI claimant:

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. DOI bears the burden of proving its entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105.

The determination for the instant claim, submitted to the NPFC on December 19, 2011, adopts these findings, and provides the following additional findings as discussed below.

#### **The Claim – N10036-OI04**

On December 19, 2011, the NPFC received a third claim from DOI for upfront costs to assess injuries to loggerhead and Kemp's ridley sea turtles (i.e. the Turtle Analytical Plan (TAP)), as described in the comprehensive assessment plan. The claimed totaled \$1,857,782.

The NPFC conducted its initial review of the third claim, and, on December 31, 2011 and January 9, 2012, requested additional information about the claimed assessment studies. DOI responded to these requests on January 30, 2012, allowing the NPFC to complete adjudication and issue this determination.

#### **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 resource 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 December 19, 2011. Therefore, the claim was received within the statute of limitation period.

<sup>2</sup> Avian Toxicity, Marsh Bird Study #19 (Marsh Edge Carcass Persistence, Marsh Edge Searcher Efficiency, Wildlife Ops), and Gulf Sturgeon Study

<sup>3</sup> Technical assistance to quantify avian injuries

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 July 18, 2011, DOI adopted and posted its comprehensive assessment plan on its website<sup>4</sup>. The comprehensive plan included the TAP studies subject to this claim. Thus, this claim to the NPFC for funds to implement the TAP meets this requirement.

With certain exceptions, claims to the NPFC for damages must be presented first to the responsible party. 33 U.S.C. §2713(a). If a claim is presented in accordance with §2713(a) and the claim is not settled 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).

DOI's administrative record for this claim indicates that they presented BP with their comprehensive assessment plan and claim for implementation costs on July 5, 2011<sup>5</sup>. This plan included 11 studies collectively referred to as the TAP<sup>6</sup>, with a total cost of \$2,698,024. The TAP and associated budget was also provided to BP on July 11, 2011<sup>7</sup>, and, on September 22, 2011, the trustees' Sea Turtle Technical Working Group provided BP with additional information about the proposed assessment studies<sup>8</sup>. BP responded to DOI in a letter dated October 14, 2011, denying payment for six<sup>9</sup> of the TAP studies and agreeing to fund the remaining studies only if DOI agreed with BP to prioritize a sampling plan and to share data with BP<sup>10</sup>.

After reviewing BP's response to DOI, the NPFC asked DOI about the potential for prioritizing samples based on the results of prior sampling. DOI provided a detailed response describing how BP proposed approach could yield false negative findings, thereby underestimating injury<sup>7</sup>.

The NPFC also noted that the TAP DOI presented to BP on July 11, 2011 identified 11 studies with a total cost of \$2,698,024, while DOI's claim to the NPFC on December 19, 2011 included 9 studies with a total cost of \$1,857,782. DOI explained, and the NPFC

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<sup>4</sup> Comprehensive assessment plan entitled *Interim, Partial Claim for Assessment Costs for the 20 April 2010 Deepwater Horizon (MC252) Spill* posted at: <http://www.doi.gov/deepwaterhorizon/adminrecord/index.cfm>

<sup>5</sup> Letter from DOI to BP Transmitting *Interim, Partial Claim for Assessment Costs, 20 April 2010, Deepwater Horizon (MC252) Spill, dated July 1, 2011*. The TAP is included in this Plan as Activity 4.3.

<sup>6</sup> The 11 studies included in the claim to BP included: Petroleum and PAH, PAH metabolites of externally collected samples (carapace, skin wipes, sand), Dispersants, HAH compounds, Hatchling gonad histopathology, Maternal and hatchling tissue DNA, Isotopic ratios in maternal scute biopsies, Clinical chemistry and hematology of maternal blood samples, Kemp's ridely tissue culture toxicity assessments, Satellite Transmitter Data Analysis, and Cytochrome P450 enzyme and immunohisto chemistry activities.

<sup>7</sup> Letter from DOI to NPFC dated January 30, 2012

<sup>8</sup> Letter from BP to DOI dated October 14, 2011

<sup>9</sup> Per October 14, 2011 correspondence, BP denied funding for the following six TYAP studies: Dispersants, HAH compounds, Maternal and hatchling tissue DNA, Cytochrome P450 enzyme and immunohisto chemistry activities, Kemp's ridely tissue culture toxicity assessments, and Satellite Transmitter Data Analysis

<sup>10</sup> Per October 14, 2011 correspondence BP stated that they would only fund the following studies if prioritize samples for testing and share data: Petroleum and PAH, PAH metabolites of externally collected samples (carapace, skin wipes, sand), Hatchling gonad histopathology, Isotopic ratios in maternal scute biopsies, and Clinical chemistry and hematology of maternal blood samples.

agrees, that the nine studies and associated costs presented to the NPFC were the same as presented to BP<sup>7</sup>. Further, during the time between presentments to BP (July 5, 2011) and NPFC (December 19, 2011) DOI decided to (1) not proceed with two of the 11 studies initially presented to BP, and (2) conduct certain studies with DOI personnel rather than contractors, which resulted in cost-savings<sup>11</sup>. These two DOI decisions resulted in a reduction of the costs to implement the TAP.

To confirm that BP was declining to pay the TAP costs presented to the NPFC, the NPFC sent a letter to BP on February 14, 2012, seeking confirmation that BP will not fund DOI's assessment costs, without condition, for the nine studies included in the TAP valued at \$1,857,782, or alternatively, the precise amount of the costs that BP is denying or agreeing to pay. BP responded on March 2, 2012<sup>12</sup> stating that they will not fund five<sup>13</sup> of the nine studies, and placed conditions on funding the remaining four<sup>14</sup> studies. The NPFC considers the costs to implement the TAP denied by BP.

After review of the claim and supplemental information, the NPFC finds that DOI has met the presentment requirements under OPA and the claims regulations.

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

##### *Sea Turtle Analytical Plan*

During 2010 and 2011, DOI conducted field investigations to assess the impacts of *Deepwater Horizon* oil on endangered Kemp's ridley and threatened loggerhead sea turtles. The trustees recovered hundreds of dead sea turtles at the height of the spill<sup>15</sup>. Many of these dead turtles were visibly oiled. Many hundreds of additional live sea turtles were so heavily oiled they had to be rescued at sea. In addition to these acute exposures there is also evidence of sea turtles being exposed to MC 252 oil through the food chain, preassessment activities confirmed sea turtles in the Gulf of Mexico repeatedly foraged in areas in the Gulf that were confirmed to have been exposed to MC 252 oil. Further, during preassessment aerial and boat surveys sea turtles were observed swimming through and near visible oil on the surface of the water and thus were likely exposed to the oil while in the water, and subject to prolonged exposure to PAHs in the water, on the subsurface of the ocean, and in their food items<sup>15</sup>. All of the above confirmed exposure scenarios lead to the conclusion that sea turtles were likely injured by exposure to MC 252 oil and further assessment is warranted.

This claim seeks funds to implement nine studies to assess sea turtle exposure and injury using chemical and biological analyses of samples and data collected from previous field

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<sup>11</sup> Dispersants and Kemp's ridley tissue culture studies are not included in the claim to the NPFC per email from DOI dated January 30, 2012 (attachment 2).

<sup>12</sup> Letter from Robin Bullock (BP) to Fredy Hernandez (NPFC) dated March 2, 2012

<sup>13</sup> Cytochrome P450 Immunohistochemistry Analyses, HAH (Halogenated aromatic hydrocarbon) Compounds, Maternal and Hatchling Tissue DNA analyses, and Satellite Transmitter Data Analyses.

<sup>14</sup> Petroleum and PAH Analyses, PAH Metabolites, Hatchling Gonad Histopathology, Isotopic Ratios in Maternal Scut Biopsies, and Clinical Chemistry and Hematology for Maternal Blood Samples.

<sup>15</sup> Email from DOI to NPFC dated March 8, 2012.

investigations. Chemical analyses<sup>16</sup> will measure the presence of PAHs in samples to provide DOI with data on oil exposure. Biological analyses<sup>17</sup> will (1) analyze satellite tracking data to assess potential sea turtle exposure to oils, and (2) measure changes in reproductive success, organ, cellular, and tissue health, and foraging behavior resulting from such exposure.

After an initial review of the claim, the NPFC requested that DOI provide more detailed accounting of the claimed costs<sup>18</sup>. DOI responded by providing a table with the value of each of the nine studies included in this claim totaling \$1,857,782<sup>19</sup>.

The NPFC also requested that DOI describe the trustees' overall sea turtle assessment approach and how the trustees were coordinating efforts to ensure no overlap or double recovery, particularly with respect to NOAA's and DOI's assessment efforts. DOI responded that the trustees are pursuing a coordinated assessment strategy through the Sea Turtle Technical Working Group, which includes representatives from each federal and state trustee, whereby NOAA and DOI assessment efforts are organized by turtle life stage. The NPFC accepts DOI's response with the understanding that the trustees bear the burden of demonstrating there is no double counting or double recovery of damages, as prohibited by OPA. 33 U.S.C. §2706(d)(3).

The NPFC also asked a number of technical questions regarding the basis and need for claimed assessment studies, including the qualifications of the principal investigators identified for each of the nine studies included in this claim, known holding times of previously collected samples, and reliability and past use of proposed studies for assessing injuries to sea turtles. NPFC's technical questions and DOI's responses are included in the NPFC administrative Record for the claim adjudication.

The NPFC acknowledges the role and expertise of the trustees in determining how to assess sea turtle injuries from the spill. In reviewing the TAP, the NPFC finds that the proposed analyses comply with the requirements for assessment procedures at 15 C.F.R. §990.27. Specifically, the chemical and biological analyses proposed are 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 and have been used in other NRDA cases. Additionally, the trustees' principle investigators provide knowledge and experience consistent with the work described in the TAP.

## **Conclusion**

Accordingly, after reviewing the claimed studies, costs, and additional information provided, the NPFC finds that (1) DOI's assessment approach to determine injuries to sea turtles meets the standards for assessment procedures under 15 C.F.R. §990.27, and (2)

<sup>16</sup> Petroleum and PAH, PAH metabolites of externally collected samples (carapace, skin wipes, sand), and HAH compounds.

<sup>17</sup> Hatchling gonad histopathology, Maternal and hatchling tissue DNA, Isotopic ratios in maternal scute biopsies, Clinical chemistry and hematology of maternal blood samples, and Cytochrome P450 enzyme and immunohistochemistry activities.

<sup>18</sup> Email from NPFC to DOI dated December 20, 2011.

<sup>19</sup> Email from DOI to NPFC dated January 30, 2012 (attachment 2).

claimed studies and costs of \$1,857,782 are reasonable and appropriate, given the scale and complexity of the incident 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 and NRDA regulations, sums recovered 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 under subsection (c) of this section with respect to the damages natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the OSLTF. 33 U.S.C. §2706(f); 15 C.F.R. §990.65. For this claim, the NPFC will deposit \$1,857,782 into the DOI managed Natural Resource Damage Assessment and Restoration (NRDAR) Fund codified at 43 U.S.C. §1474(b), which DOI has demonstrated to be a non-appropriated, revolving trust fund.

Sums provided under this determination may only be used to implement the studies 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 study 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 TAP approved by this determination. One year from the date of this determination, and annually thereafter, DOI shall provide the NPFC with a report on the status of study implementation and expenditures. These annual progress reports should include the following for each of the nine assessment studies funded by this claim:

1. Certification by DOI that all assessment studies have been conducted in accordance with the TAP, as approved in this determination;
2. A progress report that includes a description of work accomplished, a timeline for future studies, 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 study 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; and
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 study is completed. This report should include the following:

1. Certification by DOI that all expenditures of OSLTF funds were in accordance with the TAP 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, 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 approved study. 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 on a timely basis and no later than six months from the completion of each individual assessment study as described in this determination in accordance with 15 C.F.R. §990.65(f).

The NPFC has prepared standardized templates 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 nine studies included in the TAP 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 proposed studies and associated cost are reasonable and appropriate for the incident and \$1,857,782 is compensable

This offer constitutes full and final payment of DOI assessment costs for the TAP associated with the *Deepwater Horizon* incident. If you accept this offer, please sign the enclosed Acceptance/Release Form 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 address for the NRDAR fund, Treasury Accounting Symbol (TAS) number, and instruction for the transfer of funds to the NRDAR account 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.



FREDY HERNANDEZ  
Claims Manager  
Natural Resource Damage Claims Division

Enclosures: Acceptance/ Release Form  
CD with Annual and Final Reporting Forms and Instructions



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Claim Number: N10036-OI04	Claimant Name: The U.S. Department of the Interior
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On December 19, 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 \$1,857,782 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 Department of the Interior accepts the settlement offer of \$1,857,782 as full compensation for the Turtle Analytical Plan as described in the March 12, 2012 determination (N10036-OI04). The settlement does not include any additional funding for contingency.

This settlement represents full and final release and satisfaction of all damage assessment costs described in the March 12, 2012 determination.

DOI agrees to provide annual and final reports 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 March 12, 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.

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 March 12, 2012 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