

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
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16480

May 29, 2012

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

RE: Claim Number: N10036-OI10 – *Deepwater Horizon* Oil Spill Assessment, Avian Toxicity Plan, Phase 2

Dear Ms. Dohner:

The National Pollution Funds Center (NPFC) has reviewed the claim presented to the Oil Spill Liability Trust Fund (the Fund or the OSLTF) by the U.S. Department of the Interior (DOI) for upfront costs to assess natural resource injuries resulting from the *Deepwater Horizon* oil spill. The claim totals \$5,175,260, representing \$4,500,226 to implement phase 2 of the Avian Toxicity Plan (ATP) and \$675,034 for contingency. We have determined that \$4,500,226 of claimed costs is compensable and approve \$675,034 in contingency funding¹. 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 and Background

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 210 million gallons of oil into the Gulf of Mexico over a period of approximately three months². In addition, approximately 771,000 gallons of dispersants were applied to the waters of the spill area to minimize impacts from the oil³. 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 states⁴, 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 the August-September 2010 period, the trustees observed over 950 miles of oiled shoreline habitat,

¹ Subject to the NPFC's contingency policy

² <http://www.gpo.gov/fdsys/pkg/FR-2012-04-20/pdf/2012-9581.pdf>

³ <http://www.gpo.gov/fdsys/pkg/FR-2012-04-20/pdf/2012-9581.pdf>

⁴ Louisiana, Mississippi, Alabama, Florida, and Texas

400 oiled sea turtles, and over 1,500 oiled birds⁵. Based on initial assessment findings, DOI developed a comprehensive assessment plan that identifies 25 separate assessment studies specific to birds, endangered and threatened fish and mammals, and sea turtles under their jurisdiction. This comprehensive plan includes a toxicity study to evaluate the effects of *Deepwater Horizon* oil and dispersants on avian species, described in two phases; work plan development in phase 1 with work plan implementation in phase 2. The NPFC approved a previous claim from DOI for phase 1 funding on September 21, 2011.

On May 2, 2012, the NPFC received a claim from DOI for \$5,175,260 to implement phase 2 of the ATP, as described in the comprehensive assessment plan. The NPFC reviewed the claim, and on May 11, 2012, requested additional information about the claimed assessment study. DOI responded to this request on May 17, 2012, allowing the NPFC to complete adjudication and issue this determination.

The NPFC previously approved claims submitted by DOI for studies identified in the comprehensive assessment plan on September 21, 2011, December 5, 2011, and March 13, 2012. The NPFC's determinations for these claims 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.

This determination adopts these findings, and provides the following additional findings specific to the claim DOI submitted to the NPFC on May 2, 2012 for \$5,175,260 to implement phase 2 of the ATP, as discussed below.

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 completed when the claim was received on May 2, 2012. Therefore, the claim was received within the statute of limitation period.

⁵ *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2012:
<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

Claims 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 5, 2011, DOI adopted and posted on their website their final comprehensive assessment plan, which described the avian toxicity study in two phases. DOI posted further details of the phase 2 ATP study on their website on May 9, 2012⁶. Accordingly, the NPFC finds that this claim is based on a plan that the public had an opportunity to review.

With certain exceptions, claims to the NPFC for damages must be presented first to the 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 record indicates that DOI presented BP with costs of DOI's assessment efforts on several occasions. On February 25, 2011, DOI sent BP a letter requesting \$67,510,774 for future assessment activities. DOI and BP had follow-up communications about this request, including a May 26, 2011 correspondence where DOI presented BP with additional details about phase 1 of the ATP⁷. On July 5, 2011, DOI presented BP their comprehensive assessment plan and claim for \$67,510,774 to fund implementation, which included a description, justification, and sum certain for ATP phases 1 and 2.

BP responded to DOI's claim for funds to implement the ATP on at least two occasions. First, by letter dated July 28, 2011, BP declined funding for the ATP pending completion of a separate study on blood physiology⁸. Then, by letter dated September 28, 2011, BP stated that they "decline participation in, and funding of, the proposed avian toxicity study⁹."

Based on the above, the NPFC has determined that the claimed ATP phase 2 activity subject to this claim was presented to BP. The claim was not settled within 90 days, allowing presentment to the Fund.

NPFC Review of the Claim Activities and Costs

DOI's preassessment data documents shorebirds and waterfowl exposed to *Deepwater Horizon* oil¹⁰ and dispersants from the spill response¹¹. Based on these data and available literature, DOI has determined that there is a high potential for lethal and sublethal avian injury from this exposure, and that spill specific toxicity studies are needed to evaluate the nature and extent of this potential injury.

DOI developed the ATP with experts in the fields of avian toxicology, avian metabolism and nutrition, avian flight performance and aerodynamics, immunology, endocrinology, and experimental design to determine the effect(s) of avian exposure to *Deepwater Horizon* oil and dispersants. The ATP, phase 2, involves four specific studies:

⁶ <http://www.doi.gov/deepwaterhorizon/upload/AvianToxicity.pdf>

⁷ Email from DOI to BP dated May 26, 2011

⁸ Letter from BP to DOI dated July 28, 2011

⁹ Letter from BP to DOI dated September 28, 2011

¹⁰ <http://www.fws.gov/home/dhoilspill/pdfs/Bird%20Data%20Species%20Spreadsheet%2005122011.pdf>

¹¹ http://www.restorethegulf.gov/sites/default/files/documents/pdf/Consolidated%20Wildlife%20Table%2011_0210.pdf

- (1) Oral dose-response study, designed to predict the toxicity of ingested *Deepwater Horizon* oil on birds by focusing on indicators for hemolytic anemia and other known toxic effects;
- (2) External oiling dose-response study, designed to establish a quantitative relationship between external oiling and ingestion including the persistence of oil on birds over time;
- (3) Metabolic, thermoregulatory, and flight performance effects study, designed to measure the effects of ingesting *Deepwater Horizon* oil and its relationship to metabolic and flight performance, thermoregulation, and effects from preening; and
- (4) Field-based flight effects study, designed to determine how pigeons trained for long-distance free flights are affected by both oral and external exposure to oil.

DOI will use the results from these four ATP, phase 2, studies to determine the relationship between internal and external exposure and adverse toxicological effects and assess impacts of exposure on avian survival, reproduction, thermoregulatory capacity, disease resistance, and migratory capacity.

Following initial review of the claim, the NPFC requested additional information about the claimed costs for the four phase 2 ATP studies. Specifically, the NPFC asked DOI to further explain: (1) how the ATP and Live Oiled Bird Model (LOBM), a previously claimed and NPFC-funded avian assessment activity, are not a duplication of effort given that both seek to measure lethal and sublethal impacts to birds, (2) the appropriateness of substituting *Deepwater Horizon* oil with Louisiana sweet crude oil in the ATP studies, (3) the difference between the Metabolic, thermoregulatory, and flight performance effects study and Field-based flight effects study studies, both of which appear to measure the effects of oil on flight performance and how they are not a duplication of effort, and (4) how the costs for the ATP were developed.

DOI responded that: (1) data collected from the avian toxicity studies would be used to assess lethal and non-lethal effects and reduce variability of model input parameters¹² and produce data essential to the LOBM; (2) DOI will only use *Deepwater Horizon* oil for all avian toxicity studies; (3) the two studies on flight performance are complimentary to each other and are not a duplication of effort; (4) DOI claimed costs for experts¹³, laboratory analyses¹⁴, and data management to implement phase 2 of the ATP, are based on established GSA schedule rates.

Based on our review of the claim and claim record, including supplemental information requested and received, the NPFC has determined that: (1) DOI's assessment approach to determine avian injuries meets the standards for assessment procedures under 15 C.F.R. §990.27, and (2) the claimed cost of \$4,500,226 to implement the proposed ATP phase 2 is 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.

¹² DOI Response to Questions Additional Information letter, received on August 31, 2011

¹³ avian toxicology, avian metabolism and nutrition, avian flight performance and aerodynamics, immunology, endocrinology, and experimental design

¹⁴ Laboratory cost at Michigan State University, University of Nevada, and University of Western Ontario

Contingency

DOI claims \$675,034, or 15 percent of the total claimed amount, for unforeseen costs or cost increases (i.e., contingency funds). The NPFC recognizes the uncertainties inherent in the cost estimates of the claimed ATP studies, and that such 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, with a limit of 15 percent of total costs.

Contingency funding will be made available in accordance with the NPFC Contingency Policy, 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 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 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 \$4,500,226 into the DOI managed Natural Resource Damage Assessment and Restoration 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 ATP 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 expenditures of OSLTF funds were in accordance with the ATP, as approved in this determination;
2. A progress report that includes a description of work accomplished, a timeline for future work, 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 ATP 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

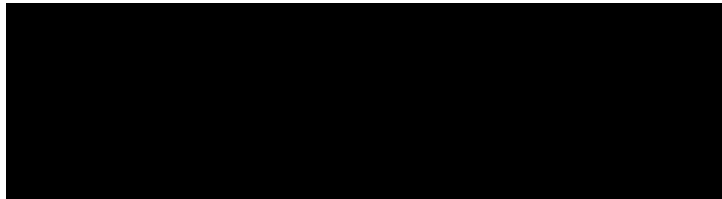
The NPFC has reviewed the claim submitted by DOI for the costs to implement the ATP, phase 2, in accordance with OPA and its implementing regulations. 33 U.S.C. §2701 *et seq.* and 33 C.F.R. Part 136. We have determined that proposed studies and associated cost are reasonable and appropriate for the incident and \$4,500,226 is compensable.

This offer constitutes full and final payment of DOI assessment costs for the ATP, phase 2, 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 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 [REDACTED].



Claims Manager
Natural Resource Damage Claims Division

Enclosures: Acceptance/ Release Form

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center

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Claim Number: N10036-OI10	Claimant Name: The U.S. Department of the Interior
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On May 2, 2012, 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 \$5,175,260 (\$4,500,226 for implementation and \$675,034 for contingency) 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 \$4,500,226 as full compensation for the Avian Toxicity Plan as described in the May 29, 2012 determination (N10036-OI10). 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 May 29, 2012 determination.

This release includes any right DOI may have to dispute the contingency award in this claim. Although this settlement and release does not pay the contingency award detailed in this determination, DOI acknowledges that any future contingency payments will be limited to the amounts awarded for the study in this claim. The NPFC will only acknowledge payment of a contingency award 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 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 May 29, 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 May 29, 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 without consultation with the NPFC. 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