

U.S. Department
of Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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16480
28 May 2014

MEMORANDUM

From: Fredy Hernandez
CLAIMS MANAG [REDACTED]

To: Cynthia Dohner
Authorized Official, Department of the Interior

Subj: Claim: N10036-OI19 – *Deepwater Horizon* Oil Spill Assessment

1. On December 31, 2013, the National Pollution Funds Center (NPFC) received a claim from the Department of the Interior for costs to assess potential natural resource injuries resulting from the *Deepwater Horizon* oil spill (N10036-OI19). The claim totals \$5,161,519 to implement a Background Carcass Deposition Study Plan (\$4,488,277 to implement the study and \$673,242 as contingency funding).
2. The NPFC is issuing the enclosed determination and offer to pay \$4,488,277 to implement the Background Carcass Deposition Study Plan. This determination was made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. §2701 *et seq.*), the OPA claims regulations (33 C.F.R. Part 136), and the Natural Resource Damage Assessments regulations (15 C.F.R. Part 990). A copy of the determination and offer to pay the amount of \$4,488,277 is enclosed.
3. If you accept this offer, please complete the enclosed Acceptance/Release Form and return to:
Director (cn)
National Pollution Funds Center
U.S. Coast Guard Stop 7100
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100
4. If we do not receive the signed Acceptance/Release Form within 60 days of the date of this memo, the offer is void. If the settlement is accepted, your payment will be mailed within 30 days of receipt of the Acceptance/Release Form. Please provide account information and instruction for the transfer of funds to your Damage Assessment Restoration and Revolving Fund Account with the signed Form.
5. If you have any questions about this determination, please feel free to contact me at 703-872-6054.

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Enclosures: (1) NPFC determination
(2) Acceptance/Release Form

NPFC DETERMINATION

Claim Number and Name:	N10036-OI19, <i>Deepwater Horizon</i> Oil Spill Assessment
Claimant:	Department of the Interior
Type of Claim:	Natural Resource Damage Assessment, Upfront Assessment Costs
Claim Amount:	\$5,161,519
Offer Amount:	\$4,488,277
Determination Date:	28 May 2014
NPFC Claim Manager:	Fredy Hernandez

Summary of the Incident and Claim

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 210¹ million gallons of oil into the Gulf of Mexico until the well was capped on July 15, 2010. Responders to the discharge dispensed approximately 1.84 million gallons of dispersants² 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 the Interior (DOI), along with the Department of Commerce represented by National Oceanic and Atmospheric Administration, and five Gulf Coast states³, 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, 400 oiled sea turtles, 1,500 oiled birds⁴, and identified numerous other natural resources at risk to include fish, marine mammals, oysters, and associated habitats. The trustees have continued to work together to develop and implement assessment plans to determine the nature and extent of these losses.

On December 31, 2013, DOI presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) to implement their Background Carcass Deposition Study Plan. The claim totaled \$5,161,519, which includes \$4,488,277 to implement the study and \$673,242 as contingency funding. This determination presents the NPFC's findings with respect to these claimed costs.

Jurisdictional Information

The NPFC, which administers the Fund, 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

¹ "Deepwater Horizon Oil Spill Early Restoration Plan." Gulf Spill Restoration Publications. National Oceanic and Atmospheric Administration

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

³ The state trustees participating in the assessment are Louisiana, Mississippi, Alabama, Florida, and Texas.

⁴ *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802

of the United States after August 18, 1990. Based on the information summarized above, the NPFC has 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)-(C). Pursuant to 33 U.S.C. §2706(d)(1)(C) and 33 C.F.R. §136.207(a) and (b), natural resource trustees may present claims to the OSLTF for uncompensated natural resource damages, which include the reasonable cost of assessing those damages.

This claim for natural resource damage assessment (NRDA) costs was submitted by DOI. DOI, under the authority of the Secretary of the Interior, 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) and Section 1006(b)(2) of OPA. 33 U.S.C. §2706(b)(2).

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 in the case of natural resource damages under OPA section 2702(b)(2)(A), if later, the date of completion of natural resource damage assessment under OPA section 2706(e). 33 U.S.C. §2712(h)(2), 33 C.F.R. §136.101(a)(1)(ii). This claim is for costs associated with implementing a damage assessment Plan in accordance with the damage assessment regulations promulgated pursuant to section 2706(e) of OPA. The assessment was not complete when the claim was received on December 31, 2013; 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 natural resource damages. 33 USC §2712(a)(4). Damages include natural resource damages, which are damages for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs of assessing those damages. 33 U.S.C. §2702(b)(2)(A). 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 comment. 33 U.S.C. §2706(c)(5). DOI states that the Background Carcass Deposition Study Plan that forms the basis of this claim was published on the DOI gulf spill restoration website on October 17, 2013, thereby meeting this requirement⁵. DOI states that they have not received any comments on their Plan⁶.

⁵ March 6, 2014 email from DOI to NPFC

⁶ April 1, 2014, email from DOI to NPFC

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).

DOI presented its Background Carcass Deposition Study Plan and claim for implementation costs to BP on December 17, 2012⁷. The Plan identifies potential injuries to natural resources resulting from the incident, and describes the assessment approach, need for the Activity and how it connects to the NRDA process, data collection and deliverables to be produced, level of effort, timeline, and cost estimates for contractors. The Plan presented to BP on December 17, 2012, did not identify the need for contingency funding; therefore, the NPFC does not consider the \$673,242 requested for contingency funding properly presented to BP.

BP responded to DOI by letter on August 6, 2013, denying funding for the Background Carcass Deposition Study based on their opinion that the study would not provide accurate or reliable data to establish the background rate of carcass deposited in 2010-11.

On December 31, 2013, more than 90 days after presenting its claim to BP for \$4,488,277 to implement its Background Carcass Deposition Study, DOI presented this claim to the NPFC⁸. The NPFC notified BP on April 18, 2014 that this claim was received⁹.

Based on the above facts, the NPFC finds that DOI's claim to the NPFC for costs to implement the Background Carcass Deposition Study was presented to the RP in accordance with OPA.

Claimant's Burden of Proof and Adherence to the OPA Claims and NRDA Regulations

Under OPA, the claimant (in this case the trustees) bears the burden of providing all evidence, information and documentation deemed necessary to support the claim. 33 C.F.R. §136.105.

After reviewing the claim and supporting documents, the NPFC finds that DOI is following 15 C.F.R. Part 990 in carrying out the work subject to this claim. Specifically, they are coordinating actions with other trustees to ensure no double recovery of damages, issued a notice of intent to conduct restoration planning¹⁰, invited BP to participate in the NRDA¹¹, prepared a Plan that the

⁷ December 30, 2013 letter from DOI to NPFC

⁸ December 31, 2013 email from DOI to NPFC

⁹ April 18, 2014 RP notification letter from NPFC to BP

¹⁰ "Notice of Intent to Conduct Restoration Planning" *Gulf Spill Restoration Publications*. National Oceanic Atmospheric Administration.

¹¹ "Invitation to Participate in Natural Resource Damage Assessment" *Deepwater Horizon Administrative Record*. Department of the Interior, September 27, 2012.

public was given an opportunity to review¹², and are maintaining an administrative record that is available for public review¹³.

NPFC Review of Claim Activities and Associated Costs

Under this Activity, DOI plans to collect data on the number of bird carcasses typically found on beach and marsh shorelines in the northern Gulf of Mexico (i.e., the background bird carcass deposition rate). Field teams will walk or ride¹⁴ along beach or marsh shorelines and count the number of bird carcasses¹⁵ observed in the study area¹⁶. Bird carcasses observed will be marked and left in place to distinguish from newly deposited carcasses. Field teams will return to the study area every three to five days and repeat the process to determine the deposition rate of new bird carcasses under normal circumstances¹⁷. This background deposition rate will then be used by the trustees to distinguish the number of birds killed or injured due to the *Deepwater Horizon* oil spill and birds killed by other factors.

DOI and the co-trustees have collected a large amount of data from the spill, including the species composition and abundance of avian resources and counts of dead birds found in the spill area. DOI plans to incorporate these data into models^{18,19} that will assist the trustees in estimating total avian mortality²⁰. The models will account for several variables such as searcher efficiency²¹, carcass persistence²², and background carcass deposition rate²³ (as determined by this Activity) to estimate total avian mortality. DOI states that they are not aware of any existing data in the scientific literature that can provide avian carcass deposition rates for the northern Gulf of Mexico. Further, previous bird surveys conducted are of limited use because they are not in the same geographical area or time period when the majority of carcasses were collected. DOI states that implementing this study will provide data relevant to the geographic area and time period when the majority of carcasses were collected²⁴.

¹² March 6, 2014, email from DOI to NPFC

¹³ December 30, 2013, claim letter to NPFC

¹⁴ Field teams may use all terrain vehicles for some beach shoreline and will use boats for all marsh shoreline.

¹⁵ At a minimum, a bird carcass could consist of solitary body parts (e.g., single wing) or only a few feathers attached to skin fragments.

¹⁶ The study area is defined as beach and marsh shorelines from Galveston Bay inlet, Texas, to Apalachicola, Florida. Shorelines are divided into 14 regions with each region containing 12-15 different; 2 kilometer transects.

¹⁷ Normal circumstances are defined by the trustees as times where birds are not experiencing an unusual mortality event due to an oil spill, avian disease, hurricane, other unusual weather event, etc. (see Trustee Responses to BP Comments on the "Assessment Plan: Background Deposition of Bird Carcasses on Walkable Beaches and in Marshes (Bird Study #24)" submitted with the claim)

¹⁸ Beach Bird Model (BBM) and Live Oiled Bird Model (LOBM)

¹⁹ The NPFC approved funding for the development of the BBM and LOBM under claim number N10036-OI03 on December 5, 2011

²⁰ Background Carcass Deposition study Plan, page 2

²¹ The probability that searchers walking shoreline will locate a dead bird, when one exists

²² The likelihood that bird carcasses will persist on shorelines long enough for searchers to find them

²³ The rate at which bird carcasses are deposited on beaches or marsh environments under "normal" circumstances.

²⁴ DOI responses to BP letter dated August 6, 2013 provided to the NPFC with the claim.

The NPFC reviewed the record in the context of implementing the proposed study four years after the spill. DOI has stated that “Background carcass deposition rates are meant to estimate the rate at which carcasses deposit on beaches under “normal” circumstances. In order to simulate “normal” circumstances, deposition rates for the geographic area of the spill would need to be collected outside the spill time period²⁵.” DOI further states that this type of study has been used by trustees for the *New Carissa* and *Luckenbach* claims; where the study was implemented several years after the oil spill occurred²⁶.

DOI claims \$4,488,277 in contract costs for coordination with trustees and drafting reports (\$55,163); field work and data management activities (\$3,939,757); and equipment and supplies (\$493,358)²⁷. The bulk of the costs are for fieldwork and data management, which involves logistical planning, data management, and end of study report. The marsh area proposed²⁸ in the Plan will require the field teams to rent boats to access the sites and in some cases may also need to rent an ATV. Given the size of the study area and potentially challenging terrain²⁹, the study will require 14 field teams for a duration of 14 weeks.

After reviewing DOI’s claim and Background Carcass Deposition Study Plan, the NPFC finds that the (1) Activity described above is an appropriate procedure under 15 C.F.R. §990.27(b)(iii) and is capable of providing valid and reliable information to quantify injury 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 study area, and magnitude of potential injury. Therefore, claimed costs of \$4,488,277 for this Activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211. As noted above the requested \$673,242 in contingency funding is denied because it was not properly presented to the responsible party prior to submitting the claim to the Fund.

Summary

The NPFC has reviewed the claim submitted by DOI for costs to implement its Background Carcass Deposition Study Plan for the *Deepwater Horizon* incident in accordance with OPA (33 U.S.C. §2701 *et seq.*) and its implementing regulations (15 C.F.R. Part 990 and 33 C.F.R. Part 136). Through this determination, the NPFC offers \$4,488,277 to implement the Background Carcass Deposition Study Plan. This offer, if accepted, constitutes full and final payment for this claim.

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 Background Carcass Deposition Study Plan addressed in this determination. For this claim, the NPFC will deposit \$4,488,277 into DOI’s Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund). DOI has demonstrated that

²⁵ DOI responses to BP letter dated August 6, 2013 provided to the NPFC with the claim.

²⁶ DOI responses to BP letter dated August 6, 2013 provided to the NPFC with the claim.

²⁷ Equipment and supply costs include: boat rental, cameras, GPS, laptops, etc.

²⁸ Marsh from Galveston Bay, TX to Apalachicola, FL

²⁹ Marsh from Galveston Bay, TX to Apalachicola, FL

the NRDAR Fund is a non-appropriated account that meets these requirements³⁰. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund. 33 U.S.C. §2706(f) and 33 C.F.R. §136.211(b).

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 Background Carcass Deposition Study Plan as approved in this determination. Any funds not spent or appropriately documented shall be returned to the Fund.

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

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

DOI shall provide the NPFC with a final report 120 days after completion of these activities. The report should include:

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 findings;
3. Copies of final reports;
4. Documentation of OSLTF funds remaining in the Revolving Trust Fund for this claim including account balance; and
5. Documentation of all expenditures as follows:
 - a. Labor: For each employee –
 - i. A narrative description of the work accomplished by each individual and how that work fit into the Plan. Enough detail should be included to determine reasonableness of costs; and
 - ii. The number of hours worked, labor rate, and indirect rate. An explanation of indirect rate expenditures, if any, will be necessary;

³⁰ The Department of the Interior and Related Agencies Appropriation Act, 1992 (H.R. 2686/P.L. 102-154) permanently authorized receipts for damage assessment and restoration activities to be available without further appropriation until expended. The Dire Emergency Supplemental Appropriations for Fiscal Year 1992 <<http://www.doi.gov/restoration/hjres157.cfm>> (H.J.RES. 157/P.L. 102-229) provides that the fund's receipts are authorized to be invested and available until expended. Additionally, the Department of the Interior and Related Agencies Appropriation Act, 1996 <<http://www.doi.gov/restoration/upload/pl104-134.pdf>> (P.L. 104-134) provides authority to make transfers of settlement funds to other Federal trustees and payments to non-Federal trustees.

- b. Travel: Paid travel reimbursement vouchers and receipts;
- c. Contract: Activities undertaken, lists of deliverables, and contract invoices and receipts;
- d. Purchases/Expendables: Invoices and receipts, along with an explanation of costs; and
- e. Government Equipment: Documentation of costs, including the rate (i.e., hourly, weekly) and time for all equipment used for which costs were incurred.

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

The NPFC has prepared a standardized template with detailed instructions to facilitate annual progress and final cost reporting.

If you have any questions or would like to discuss this determination, please contact me by phone (703-872-6054) or email at Fredy.e.hernandez@uscg.mil.

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center

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16480

Claim Number: N10036-OI19

Claimant Name: The U.S. Department of the Interior

On December 31, 2014, 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 \$5,161,519 for upfront costs to assess bird 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 \$4,488,277 as full compensation for the Background Carcass Deposition Study Plan as described in the May 28, 2014 determination (N10036-OI19). 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 28, 2014 determination, Claim Number N10036-OI19.

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 28, 2014 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 subrogates to the United States all rights, claims, interest and rights of action, that it may have against any party, person, firm or corporation for compensation paid from the Fund for this claim. 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 28, 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