

U.S. Department
of Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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Arlington, VA 20598-7100
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16480
October 17, 2014

MEMORANDUM

From: Fredy Hernandez
CLAIMS MANAGER, NPFC

To: Cynthia Dohner
Authorized Official, Department of the Interior

Subj: Claim: N10036-OI21 – *Deepwater Horizon* Oil Spill Assessment

1. On April 3, 2014, the Oil Spill Liability Trust Fund (OSLTF or the Fund) 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-OI21). The claim totals \$1,180,200 to implement the 2014 Sea Turtle Nesting Plan (\$1,026,261 to implement the study and \$153,939 as contingency funding).
2. The NPFC is issuing the enclosed determination and offer to pay \$1,026,261 to implement the 2014 Sea Turtle Nesting Plan. This determination was made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. §2701 *et seq.*) and the OPA regulations (33 C.F.R. Part 136 and 15 C.F.R. Part 990). A copy of the determination and offer to pay the amount of \$1,026,261 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 transferred to you via the Intra-Governmental Payment and Collection System within 30 days of receipt of the 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 wish to seek reconsideration of this decision the process for doing so is found in the enclosed determination. 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-OI21, <i>Deepwater Horizon</i> Oil Spill Assessment
Claimant:	Department of the Interior
Type of Claim:	Natural Resource Damage Assessment, Upfront Assessment Costs
Claim Amount:	\$1,180,200
Offer Amount:	\$1,026,261
Determination Date:	17 October 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 April 3, 2014, DOI presented a claim to the Fund to implement their 2014 Sea Turtle Nesting Plan. The claim totals \$1,180,200, which includes \$1,026,261 to implement the study and \$153,939 as contingency funding. This determination presents the NPFC's findings with respect to these claimed costs.

Jurisdictional Information

The NPFC first considered whether the claimed damages arose from an incident as defined by OPA. 33 U.S.C. §2701 *et seq.* To be covered, the incident must involve a discharge, or a substantial threat of discharge, of oil from a vessel or facility into navigable waters of the United States after August 18, 1990. Based on the information summarized above, the NPFC has

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

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 to develop and implement plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of those injured natural resources. 33 U.S.C. §§2706(c)(1)(A) and (C). Also, pursuant to 33 U.S.C. §2702(b)(2)(A), damages for natural resources, including the reasonable costs of assessing the damages, shall be recoverable by a United States trustee. A trustee may present a claim for the reasonable costs of assessing natural resources damages separately from a claim for the cost of developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources damaged. 33 C.F.R. §136.207(b).

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 section 2702(b)(2)(A) of OPA, if later, the date of completion of the natural resource damage assessment under section 2706(e) of OPA. 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 to determine the nature and extent of damages to natural resources resulting from the incident. The assessment was not complete under section 2706(e) when the claim was received on April 3, 2014; therefore, the claim was received within the period of limitations for claims.

In accordance with OPA, the OSLTF is available to pay claims for uncompensated removal costs consistent with the NCP and uncompensated damages. 33 U.S.C. §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, and shall be recoverable by a United States, State, Indian tribe, or foreign trustee. 33 U.S.C. §2702(b)(2)(A). The measure of natural resource damages is the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources, the diminution in value of those natural resources pending restoration, plus the reasonable cost of assessing those damages. 33 U.S.C. §2706(d)(1)(A)-(C). Costs shall be determined with respect to plans adopted under 33 U.S.C. §2706(d)(1). Plans shall be developed and implemented under this section only 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 2014 Sea Turtle Nesting Plan that forms the basis of this claim was published on the DOI gulf spill restoration website on February 3, 2014, thereby meeting this requirement⁵. DOI states that they have not received any comments on their Plan⁶.

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 2014 Sea Turtle Nesting Plan and claim for implementation costs to BP on February 1, 2014⁷. The plan identified potential injuries to natural resources resulting from the incident, described the assessment approach, need for the activity and how it relates 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 February 1, 2014, did not identify the need for contingency funding; therefore, the \$153,939 requested for contingency funding was not properly presented to BP.

BP responded to DOI by letter on March 31, 2014⁸, stating that “BP declines to provide DOI advanced funding for the proposed activities.”

On April 3, 2014, DOI presented this claim to implement its 2014 Sea Turtle Nesting Plan, to the NPFC⁹. The NPFC notified BP on April 18, 2014 that this claim was received¹⁰.

Based on the above facts, the NPFC finds that DOI’s claim to the NPFC for costs to implement the 2014 Sea Turtle Nesting Plan minus the contingency funding was presented to the RP in accordance with OPA.

Claimant's Burden of Proof and Adherence to NRDA Regulations

Under OPA, the claimant (in this case DOI) 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. §990 *et seq.*, the NOAA Natural Resource Damage Assessments regulations, in carrying out the work subject to this claim. Specifically, they indicate that they are coordinating actions with other trustees to ensure no double recovery of damages¹¹, issued a notice of intent to

⁵ April 3, 2014, letter from DOI to NPFC

⁶ April 3, 2014, letter from DOI to NPFC

⁷ April 3, 2014, letter from DOI to NPFC

⁸ March 31, 2014, letter from BP to DOI declining to fund the claim

⁹ April 3, 2014, email from DOI to NPFC

¹⁰ April 18, 2014 RP notification letter from NPFC to BP

¹¹ April 3, 2014 letter from DOI to the NPFC

conduct restoration planning¹², invited BP to participate in the NRDA¹³, prepared a plan that the public was given an opportunity to review¹⁴, and are maintaining an administrative record that is available for public review¹⁵.

NPFC Review of Claim Activities and Associated Costs

Starting in 2010, DOI implemented several plans (funded by both BP and NPFC) to collect satellite telemetry data on Kemp's ridley and loggerhead sea turtles. Under the 2014 Sea Turtle Nesting Plan, DOI will continue to collect satellite telemetry data on the location of sea turtles with previously affixed satellite transmitters in the northern Gulf of Mexico; analyze data collected from 2010-2013¹⁶; and preserve data and samples collected in previous years.

DOI states that sea turtles are known to "demonstrate high foraging area and home range site fidelity¹⁷"; therefore, continuing to track them and analyze movements in relation to known areas of oiling will help DOI determine potential exposure of sea turtles to *Deepwater Horizon* oil. Satellite data collected from these tracking studies will then be used with data on geographic extent and severity of oiling and oil toxicity to determine sea turtle injury to *Deepwater Horizon* oil.

DOI claims \$1,180,200 (\$1,026,261 to implement the Plan and \$153,939 for contingency) to collect telemetry data from satellite tags transmitting data affixed on sea turtles (\$88,800), analyze previously collected data (\$590,832), and preserve and manage collected data (\$346,629). The majority of the costs are for DOI to analyze previously collected data¹⁸ and to continue to manage and preserve that data.

The NPFC reviewed the claim record and requested that DOI provide (1) the rationale for conducting a fifth year of data collection and (2) a summary accounting of all funds previously provided by both BP and the NPFC. DOI responded (1) by stating that "if we have telemetry data from 2014 that shows a sea turtle inhabiting an area in the ocean that we know was exposed to oil in 2010 . . . we can accurately defend our position that there is an extremely high probability that that same turtle was in the same location in 2010 when the oil was present" and (2) providing a summary account of funds and an explanation of how and when DOI plans to obligate and/ or spend unobligated funds.

Over the past four years, DOI has implemented many assessment activities to assess potential injuries to nesting sea turtles and nests, some of which are still ongoing. These assessment activities have revealed that there has been a reduction in the quantity of nests found on beaches since 2010 and furthermore, identified spatial and temporal overlaps between the 2010

¹² "Notice of Intent to Conduct Restoration Planning" *Gulf Spill Restoration Publications*. National Oceanic Atmospheric Administration.

¹³ "Invitation to Participate in Natural Resource Damage Assessment" *Deepwater Horizon Administrative Record*. Department of the Interior, September 27, 2012.

¹⁴ April 3, 2014, claim letter from DOI to NPFC

¹⁵ April 3, 2014, claim letter from DOI to NPFC

¹⁶ DOI's satellite telemetry data and NOAA's over flight data

¹⁷ October 1, 2014, email from DOI to NPFC

¹⁸ Data collection was funded by both BP and the NPFC

Panhandle loggerhead nesting and both shoreline oiling and response activities; these overlaps are generally consistent with a potential for reduced loggerhead nesting in the Gulf of Mexico region¹⁹. Analysis and finalization of data and documenting the results are among the tasks remaining in and claimed for as part of this claim.

After reviewing DOI's 2014 Sea Turtle Nesting Plan, the NPFC finds that the (1) activity described above are appropriate procedures under 15 C.F.R. 990.27(b)(iii) capable of providing valid and reliable information to quantify injury, and (2) claimed costs 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 assessment costs of \$1,026,261 are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211. As noted above, the requested \$153,939 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 2014 Sea Turtle Nesting Plan for the *Deepwater Horizon* incident in accordance with OPA (33 U.S.C. §2701 *et seq.*), its implementing regulations (33 C.F.R. Part 136) and the Natural Resource Damage Assessments regulations (15 C.F.R. Part 990). Through this determination, the NPFC offers \$1,026,261 to implement the 2014 Sea Turtle Nesting Plan. This offer constitutes full and final payment.

Request for Reconsideration

Under OPA, you may seek reconsideration of this determination. The request must be in writing and received by the NPFC in writing within 60 days of the date of this letter. It must include the factual and legal grounds for the relief requested, providing any additional support for the claim. 33 C.F.R. §136.115(d).

A claim may be reconsidered only once, and written disposition of a reconsideration request constitutes final agency action. If the NPFC fails to issue a written decision within 90 days after receipt of a request for reconsideration, this determination, at the option of the claimant, shall be deemed final agency action.

Should you choose to request NPFC reconsideration of this determination, please mail the request and additional claim information with the appropriate claim number (N10036-OI21) to:

Chief (Cn)
National Pollution Funds Center
U.S. Coast Guard, Stop 7100
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

¹⁹ DOI's 2014 assessment plan, pg. 13

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 2014 Sea Turtle Nesting Plan addressed in this determination. For this claim, the NPFC will deposit \$1,026,261 into DOI's Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund). DOI has demonstrated that the NRDAR Fund is a non-appropriated account that meets these requirements²⁰. 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 2014 Sea Turtle Nesting 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 2014 Sea Turtle Nesting 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;

²⁰ 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.

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;
 - b. Travel: Paid travel reimbursement vouchers and receipts;
 - c. Contract: Activities undertaken, lists of deliverables, and contract invoices and receipts or other proof of payment;
 - d. Purchases/Expendables: Invoices and receipts, along with an explanation of costs or justifications for high-value purchases; 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. It is highly recommended to use this template or a similar format with the elements found in the template and that all supporting documentation is organized for expeditious processing

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
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16480

Claim Number: N10036-OI21

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

On April 3, 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 \$1,180,200 for upfront costs to assess bird injuries resulting from the discharge of oil on or about April 20, 2010, from a facility located on an area of land leased by BP (the Deepwater Horizon incident).

The Department of the Interior accepts the settlement offer of \$1,026,261 as full compensation for the 2014 Sea Turtle Nesting Plan as described in the October 17, 2014, determination (N10036-OI21). 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 October 17, 2014, determination, Claim Number N10036-OI21.

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 October 17, 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 under any other law, 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 October 17, 2014, 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