

U.S. Department  
of Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center

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16480  
03 July 2014

## MEMORANDU

From: Fredy Hernandez  
CLAIMS MANAGER, NPFC

To: Cynthia Dohner  
Authorized Official, Department of the Interior

Subj: Claim: N10036-OI24 – *Deepwater Horizon* Oil Spill Assessment

1. On April 25, 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-OI24). The claim totals \$8,439,806 to implement a Background Oiling Rate Study Plan (\$7,338,962 to implement the study and \$1,100,844 as contingency funding).

2. The NPFC is issuing the enclosed determination and offer to pay \$7,338,962 to implement the Background Oiling Rate Study 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 \$7,338,962 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 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-OI24, <i>Deepwater Horizon</i> Oil Spill Assessment
Claimant:	Department of the Interior
Type of Claim:	Natural Resource Damage Assessment, Upfront Assessment Costs
Claim Amount:	\$8,439,806
Offer Amount:	\$7,338,962
Determination Date:	03 July 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 210<sup>1</sup> 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 dispersants<sup>2</sup> 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 states<sup>3</sup>, 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 birds<sup>4</sup>, 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 25, 2014, DOI presented a claim to the Fund to implement their Background Oiling Rate Study Plan. The claim totals \$8,439,806, which includes \$7,338,962 to implement the study and \$1,100,844 as contingency funding. This determination presents the NPFC's findings with respect to these claimed costs.

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<sup>1</sup> "*Deepwater Horizon* Oil Spill Early Restoration Plan." Gulf Spill Restoration Publications. National Oceanic and Atmospheric Administration

<sup>2</sup> 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*

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

<sup>4</sup> *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802

## **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 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). 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 Oil Spill Liability Trust Fund (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 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 when the claim was received on April 25, 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 trustee, a State trustee, an 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. §2706(c)(5). DOI states that the Background Oiling Rate Study Plan that forms the basis of this claim was published on the DOI gulf spill restoration website on January 31, 2014, thereby meeting this requirement<sup>5</sup>. DOI states that they have not received any comments on their plan<sup>6</sup>.

### **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 Oiling Rate Study Plan and claim for implementation costs to BP on April 20, 2013<sup>7</sup>. 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 April 20, 2013, did not identify the need for contingency funding; therefore, the NPFC does not consider the \$1,100,844 requested for contingency funding properly presented to BP.

BP responded to DOI by letter on September 5, 2013, stating that BP “would like to work with the trustees to refine the proposed plan such that it could be cooperatively implemented.” In the same letter, BP requested additional information on the assessment approach adopted by DOI<sup>8</sup>. DOI responded to BP by letter on February 14, 2014, providing additional information .

On April 25, 2014, more than 90 days after presenting its claim to BP for \$7,338,962 to implement its Background Oiling Rate Study, DOI presented this claim to the NPFC<sup>9</sup>. The NPFC notified BP on April 18, 2014 that this claim was received<sup>10</sup>.

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<sup>5</sup> April 24, 2014 letter from DOI to NPFC

<sup>6</sup> April 24, 2014 letter from DOI to NPFC

<sup>7</sup> April 24, 2014 letter from DOI to NPFC

<sup>8</sup> Specifically, BP requested information on the “interaction between the beached carcass modeling (BCM) (sic) approach (see Bird Study #1 ), the Live Oiled Bird Model (LOBM) approach (see Bird Study #4), and Bird Study #25”

<sup>9</sup> April 25, 2013 email from DOI to NPFC

<sup>10</sup> June 5, 2014 RP notification letter from NPFC to BP

Based on the above facts, the NPFC finds that DOI's claim to the NPFC for costs to implement the Background Oiling Rate Study 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 damages<sup>11</sup>, issued a notice of intent to conduct restoration planning<sup>12</sup>, invited BP to participate in the NRDA<sup>13</sup>, prepared a plan that the public was given an opportunity to review<sup>14</sup>, and are maintaining an administrative record that is available for public review<sup>15</sup>.

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

Under this activity, DOI plans to collect data on the number of birds oiled by factors other than the *Deepwater Horizon* oil spill such as natural seeps, marine vessels that release oil through bilge discharges and engine exhaust, and releases from oil and gas exploration/production activities (background oiling rate) The study area extends from Galveston Bay Inlet, Texas, to Apalachicola, Florida<sup>16</sup>. Field teams consisting of at least two observers and one photographer that will observe both land and water based bird congregations using spotting scopes and binoculars to identify the presence or absence of visible oil on the birds, and will take high resolution photographs of birds to corroborate visual observations. The surveys last two weeks and will take place over a one year period<sup>17</sup> with teams of at least two observers and one photographer<sup>18</sup>.

This background oiling rate will then be used by the trustees to distinguish the number of birds oiled due to the *Deepwater Horizon* oil spill from birds oiled by other factors (and for which BP would not be required to restore).

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<sup>11</sup> April 24, 2014 letter from DOI to the NPFC

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

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

<sup>14</sup> April 24, 2014, claim letter from DOI to NPFC

<sup>15</sup> April 24, 2014, claim letter from DOI to NPFC

<sup>16</sup> DOI will focus the surveys in areas not impacted by *Deepwater Horizon* oil.

<sup>17</sup> Twenty-four weeks of intermittent searches (each two week survey event separated by a two-week period with no surveys).

<sup>18</sup> Boat teams will have an additional person designated as a boat captain. There will be two teams dedicated to land-based observations and six teams dedicated to boat-based observations.

In 2010 and 2011, the trustees implemented a number of studies to generate model input data for dominant bird groups, or guilds, affected by the oil spill<sup>19,20</sup>. DOI plans to incorporate data from this study into the model<sup>21,22</sup> that will assist the trustees in estimating total avian mortality resulting from the Deepwater Horizon incident. The model will account for several variables such as oiling rate<sup>23</sup>, fate after oiling<sup>24</sup>, abundance in affected area<sup>25</sup>, and background oiling rate (as determined by this Activity) to estimate total adult avian mortality<sup>26,27</sup> due to the incident.

This study is intended to address concerns that other oiling events are contributing to the total observed bird mortality, including comments from BP that “numerous “natural oil seeps” exist in the Northern Gulf of Mexico that are not associated with the Macondo well”<sup>28</sup>. Therefore, the Trustees have proposed the Background Oiling Rate Study to promote a more accurate estimate of oiled birds attributable to the *Deepwater Horizon* incident.<sup>29</sup>

DOI claims \$7,338,962 in contract costs for coordination with trustees and drafting reports (\$187,975); field work and data management activities (\$6,428,505); and equipment and supplies (\$722,482)<sup>30</sup>. The majority of the costs are for fieldwork and data management, which involves logistical planning, data management, and end of study report.

After reviewing DOI’s Background Oiling Rate 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) 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 \$7,338,962 are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211. As noted above, the requested \$1,100,844 in contingency funding is denied because it was not properly presented to the responsible party prior to submitting the claim to the Fund.

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<sup>19</sup> Bird Studies 3,4,5,6,10, and 12 collected input data.

<sup>20</sup> Bird studies were either funded by, reimbursed by, or implemented cooperatively with BP and included study components to document the occurrence and severity of external oiling on birds across the area potentially impacted by the *Deepwater Horizon* Oil Spill.

<sup>21</sup> Live Oiled Bird Model (LOBM)

<sup>22</sup> The NPFC approved funding for the development of the LOBM under claim number N10036-OI03 on December 5, 2011

<sup>23</sup> The number of birds oiled during the spill.

<sup>24</sup> The fate of birds after oiling.

<sup>25</sup> The number of birds present in the affected area.

<sup>26</sup> The Beach Bird Model, DOI’s other model being used to determine injury to avian resources will focus acute avian mortality, with results focused on the time period from the initiation of the Deepwater Horizon Oil Spill to approximately September 30, 2010.

<sup>27</sup> February 1, 2014 letter from DOI to BP

<sup>28</sup> June 25, 2014, email from DOI to NPFC

<sup>29</sup> June 25, 2014, email from DOI to NPFC

<sup>30</sup> Equipment and supply costs include: boat rental, cameras, GPS, spotting scopes, etc.

## Summary

The NPFC has reviewed the claim submitted by DOI for costs to implement its Background Oiling Rate Study 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. 990). Through this determination, the NPFC offers \$7,338,962 to implement the Background Oiling Rate Study Plan. This offer constitutes full and final payment.

## 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 Oiling Rate Study Plan addressed in this determination. For this claim, the NPFC will deposit \$7,338,962 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 requirements<sup>31</sup>. 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 Oiling Rate 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 Oiling Rate 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

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<sup>31</sup> 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. 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;
  - 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



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16480

Claim Number: N10036-OI24	Claimant Name: The U.S. Department of the Interior
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On April 25, 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 \$8,439,806 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 \$7,338,962 as full compensation for the Background Oiling Rate Study Plan as described in the July 3, 2014 determination (N10036-OI24). 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 July 3, 2014 determination, Claim Number N10036-OI24.

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 July 3, 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 July 3, 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