

U.S. Department
of Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave. SE
Washington, DC 20593-7605
Staff Symbol: (CN)
Phone: 202-795-6055

16480
December 8, 2015

MEMORANDUM

From: [REDACTED] NATIONAL POLLUTION FUNDS CENTER (NPFC)

To: [REDACTED] NOAA

Subj: Claim: N14026-OC01- *Texas City Y* Oil Spill Assessment Costs

1. On July 17, 2015, the National Pollution Funds Center (NPFC) received a claim from the National Oceanic and Atmospheric Administration (NOAA) for costs to assess potential injuries to natural resources resulting from the *Texas City Y* oil spill (N14026-OC01). The claim totaled \$43,751 to provide funding for laboratory analysis to assess injuries to dolphins.
2. Through the enclosed determination, the NPFC offers to pay \$43,751. 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 Assessment Regulations (15 C.F.R. Part 990).
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 7605
2703 Martin Luther King Jr Ave. SE
Washington, DC 20593-7605
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 Release Form. Please provide account information and instruction for the transfer of funds to your Damage Assessment and Restoration Revolving Fund account with the signed form.
6. If you have any questions about this determination, please feel free to contact me at 202-795-6055.

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

National Pollution Funds Center Determination

Claim Number and Name:	N14026-OC01, <i>Texas City Y</i> Oil Spill Assessment
Claimant:	National Oceanic and Atmospheric Administration
Claim Type:	NRDA, Upfront Assessment Costs
Amount Requested:	\$43,751
Offer Amount:	\$43,751
Determination Date:	December 8, 2015
NPFC Claim Manager:	[REDACTED]

Summary of the Incident and Claim

On March 22, 2014, as the result of a collision between the cargo ship M/V SUMMER WIND and the oil tank-barge KIRBY 27706 in Galveston Bay near Texas City, Texas, the barge's #2 starboard tank was punctured, resulting in the discharge of approximately 168,000 gallons of fuel oil into Galveston Bay and the Gulf of Mexico, both navigable waters of the United States. The U.S. Coast Guard designated KIRBY 27706 as the source of the spill and identified Kirby Inland Marine, LP (Kirby) as owner of the barge and a responsible party (RP)¹. Kirby accepted the designation and advertised its claims process² pursuant to the Oil Pollution Act (OPA), 33 U.S.C. §2714(b); 33 C.F.R. §136.309(d).

Upon notification of the spill, the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), along with the Department of the Interior, Fish and Wildlife Service (FWS), and State of Texas³, acting as natural resource trustees designated under OPA and appropriate state laws, initiated an assessment of natural resource damages resulting from the discharge. Through these efforts, the trustees observed over 160 miles of shoreline habitats, including salt marshes, sandy beaches, and mangroves, exposed to the spilled oil⁴. Numerous resources, including birds, marine mammals, and fish, were identified as being at risk of potential exposure and injury. The trustees continue to work together to develop and implement plans to assess the nature and extent of these losses.

On July 17, 2015, NOAA presented the National Pollution Funds Center (NPFC) with a claim for \$43,751 to implement their 2015 Bottlenose Dolphin Sample Analysis Plan (the Plan) to assess dolphin injuries resulting from the spill. This determination presents the NPFC's findings with respect to this claim.

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) and (C). Pursuant to 33 C.F.R.

¹ March 25, 2014 Email from NPFC to Kirby

² May 20, 2014 Email from Kirby to NPFC

³ Represented by the Texas Parks and Wildlife Department, Texas Commission on Environmental Quality, and the Texas General Land Office

⁴ *Federal Register*, Vol. 80, Iss. 7, Pgs. 1512-1513, January 12, 2015

§136.207, natural resource trustees may present claims to the Oil Spill Liability Trust Fund (OSLTF or the Fund) for uncompensated natural resource damages, which include the reasonable cost of assessing those damages. 33 U.S.C. §2706(d)(1)(C).

This claim for natural resource damage assessment (NRDA) costs was submitted by NOAA. NOAA, under the authority of the Secretary of the Commerce, 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).

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 this claim is for natural resource damages resulting from an OPA incident.

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 within three years from the date of completion of the NRDA under OPA (33 U.S.C. §2706(e)), whichever is later. 33 U.S.C. §2712(h)(2), 33 C.F.R. §136.101(a)(1)(ii). This claim is for costs to assess the nature and extent of damages to natural resources resulting from the incident. The assessment was not complete when the claim was received on July 17, 2015; 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 and damages. 33 USC §2712(a)(4). Covered damages include natural resource damages. 33 U.S.C. §2702(b)(2)(A), which are for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs to assess those damages. 33 U.S.C. §2706(c)(1)(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. §2706(c)(5). NOAA states that the Plan that forms the basis of this claim was initially published on NOAA's website on June 29, 2015 and then relocated to a separate publicly available location⁵ on September 8, 2015⁶. NOAA states that it did not receive any comments regarding the Plan.

Claim Presentment to the Responsible Party

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 is not settled by payment by any person within 90 days after the date upon which the claim was presented, the

⁵ <https://casedocuments.darrp.noaa.gov/southeast/texas-city-y/admin.html>

⁶ November 18, 2015 Email from NOAA to NPFC

claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. §2713(c)(2).

NOAA presented its Plan and claim for implementation costs to Kirby on March 24, 2015⁷. The Plan described the assessment activity, need for the activity and how it connects to the NRDA process, deliverables to be produced, timeline, level of effort, principal investigator, and agency and contractor cost estimates for laboratory analysis. The cost to implement the assessment activity, as presented to Kirby, was \$43,751. NOAA verified that all costs included in their Plan are separate and distinct from any and all funding previously provided to NOAA by Kirby⁸.

According to the record, NOAA and Kirby discussed NOAA's Plan on several occasions⁹ following presentment and Kirby responded on June 24, 2015¹⁰ with their technical concerns regarding the Plan, as well as, the submission of an offer to settle Kirby's liability for all marine mammal injury associated with the *Texas City Y* oil spill. According to NOAA, Kirby requested a 30 day extension to the 90 day presentment period, which NOAA declined¹¹. On July 17, 2015, more than 90 days after presenting its claim to Kirby, NOAA presented this claim to the NPFC. The NPFC notified Kirby on July 22, 2015 that this claim had been received¹². Kirby responded by letter to the NPFC on September 1, 2015 with their technical concerns regarding NOAA's proposed assessment activities that form the basis of this claim¹³.

Based on the above facts, the NPFC finds that NOAA's claim to the NPFC for costs to implement NOAA's Plan was presented to the RP in accordance with OPA.

Claimant's Burden of Proof

Under OPA, trustees bear the burden of proving their entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105(a). To satisfy this requirement, the claimant must submit their plan, which forms the basis of their claim, along with other supporting information so the NPFC can determine that work and associated costs are reasonable and appropriate.

The following section of this determination summarizes the NPFC's review of the Plan and supporting information submitted by NOAA along with a determination with respect to 33 C.F.R. §136.105(a).

NPFC Review of Claim Activities and Associated Costs

According to NOAA, bottlenose dolphins in the nearshore waters of Texas experience an annual spring calving peak from February through April and, consequently, the trustees are concerned about injury resulting to bottlenose dolphins exposed to oil from this incident through direct inhalation or aspiration¹⁴. During the six months following the spill, the Texas Marine Mammal

⁷ March 24, 2015 Letter from NOAA to Kirby transmitting their Interim Claim for Assessment Costs

⁸ Claim Letter, page 5

⁹ Claim Letter, page 4

¹⁰ September 1, 2015 Letter from Kirby to NPFC

¹¹ Claim Letter, page 5

¹² July 22, 2015 RP notification letter from NPFC to Kirby

¹³ September 1, 2015 Letter from Kirby to NPFC

¹⁴ 2015 Bottlenose Dolphin Sample Analysis Plan, pages 5 and 6

Stranding Network (TMMSN) used enhanced efforts to respond to marine mammals stranded on nearby shorelines. TMMSN followed specific sampling, necropsy, handling, and documentation protocols that were more rigorous and costly than TMMSN's normal operating procedures¹⁵. The additional protocols were specifically targeted at pregnant females, calves, and fresh to moderately decomposed dolphins that appeared to be visibly oiled. Within the six month period, TMMSN recorded 57 dolphin strandings, 28¹⁶ of which were in the targeted population for the additional sampling protocols.

NOAA claims \$43,751 to analyze the dolphin samples collected in 2014 by the TMMSN to assess exposure and potential injury to bottlenose dolphins resulting from the *Texas City Y* oil spill. NOAA will conduct three types of laboratory analysis on the dolphin samples: (1) polycyclic aromatic hydrocarbon (PAH) analysis; (2) histopathological analysis; and (3) differential analysis. The PAH analysis will indicate the presence and concentration of PAH's in the dolphin samples and, whether those PAHs are consistent with the oil released in the *Texas City Y* spill. For the histopathological analysis, tissues samples from major organs for each dolphin will be analyzed to determine the likely cause of death. The differential analysis involves testing samples for other commonly known non-oil causes of mortality to dolphins, specifically, toxic algae, brucella bacteria, and various other common diseases.

NOAA proposes to analyze samples from four of the 28 dolphin carcasses collected in 2014. These four dolphins had experienced the least decomposition, were located within the area impacted by the *Texas City Y* oil spill, and were dolphin calves. The \$43,751 requested by the trustees includes the cost for laboratory analysis (\$41,725), carcass disposal (\$140), sample shipping (\$1,000), contract overhead (\$710), and sample preparation (\$176).

On August 20, 2015¹⁷, the NPFC requested that NOAA describe their overall approach for the assessment of dolphin injuries and how the requested sampling analysis supports that approach. On November 18, 2015, NOAA responded, stating that they are taking a weight of evidence approach to dolphin injuries, which includes the comparison of stranding rates after the spill to baseline conditions, documentation of oil exposure, and analysis of factors that could have lead to dolphin mortality during the period after the oil spill¹⁸. NOAA's claimed cost to analyze samples will both support the documentation of oil exposure to dolphins and inform the trustees' assessment of factors affecting dolphin mortality.

In a letter dated September 1, 2015¹⁹, Kirby provided the NPFC their concerns with NOAA's Plan for sample analysis. Kirby asserts that: (1) evidence of exposure by itself is not an indicator of injury, (2) combined necropsy/ histopathology analyses rarely, if ever, identify oil exposure as a conclusive cause of death, (3) baseline data for Texas dolphins is too limited for NOAA to understand whether the laboratory results would be indicative of spill-related injuries, and (4) the potential length of exposure to dolphins was not long enough to result in the type of adverse effects assessed during histopathological evaluation.

¹⁵ Kirby provided funding for the enhanced sampling protocols pursuant to the Memorandum of Agreement to Conduct a Cooperative NRDA signed by both Kirby and the trustees.

¹⁶ 25 were calves, 3 were visibly oiled

¹⁷ August 20, 2015 Email from NPFC to NOAA

¹⁸ November 18, 2015 Email from NOAA to NPFC

¹⁹ September 1, 2015 Letter from Kirby to NPFC

On September 3, 2015²⁰, the NPFC requested that NOAA provide a response to Kirby's concerns regarding the proposed sample analysis. On November 5, 2015, NOAA provided a response to Kirby's concerns, stating: (1) analyses of oil exposure and necropsy/ histopathology provide instructive information when examining the entire weight of evidence of injury to dolphins, (2) NOAA possesses sufficient background data on dolphins from Texas and the larger southeastern region to establish baseline conditions, and (3) oil exposure to dolphins resulting from the *Texas City Y* oil spill could have occurred through the inhalation of contaminated air/ oil droplets, ingestion of contaminated water, or physical contact with skin and mucus membranes, and these various exposures could cause the type of adverse conditions being assessed in the claimed laboratory analysis²¹.

After reviewing NOAA's Plan and additional claim information provided by NOAA, the NPFC finds that: (1) NOAA's 2015 Bottlenose Dolphin Sample Analysis Plan, while limited in scope, identifies reliable and valid laboratory procedures that are capable of providing assessment of use in determining the type and scale of appropriate restoration, and (2) costs claimed for these activities are reasonable for the proposed level of effort. Therefore, claimed costs of \$43,751 for the bottlenose dolphin sample analysis activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, and 15 C.F.R. §§ 990.27, 990.53 and 990.55.

Summary

The NPFC has reviewed the claim submitted by NOAA for costs to implement its Plan for the *Texas City Y* oil spill in accordance with OPA (33 U.S.C. §2701 *et seq.*) and associated regulations (15 C.F.R. Part 990 and 33 C.F.R. Part 136). Through this determination, the NPFC offers \$43,751 to implement the activities detailed in NOAA's Plan.

This offer constitutes full and final payment for the activities addressed in this determination.

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 activities addressed in this determination in accordance with NOAA's Plan. For this claim, the NPFC will deposit \$43,751 into NOAA's Damage Assessment and Restoration Revolving Fund Account, which NOAA has demonstrated²² to be a non-appropriated, revolving trust fund. NOAA shall reimburse the Fund for any amounts received from the Fund in excess of that amount required to accomplish the activities for which the claim was paid. 33 CFR 136.211(b).

Cost Documentation, Progress Reporting, and Final Report

As the claimant, NOAA shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the Plan for the activities approved in this determination. Any funds not spent for the activities in the plan or appropriately documented shall be returned to the Fund. 33 U.S.C. §2706(f).

²⁰ September 3, 2015 Email from NPFC to NOAA

²¹ November 5, 2015 Email from NOAA to NPFC

²² October 15, 2013 Email from NOAA to NPFC

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

1. Certification by NOAA that all assessment activities approved in this determination have been conducted in accordance with the Plan;
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 of the work 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.

NOAA shall submit a final progress report within 120 days from the date an approved activity is complete. This report should include:

1. Certification by NOAA 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 and/or studies;
4. Documentation of OSLTF funds remaining in the Revolving Trust Fund for this claim, including account balance and interest earned; 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;
 - 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 standardized templates with instructions to facilitate final cost reporting (enclosed).