

## National Pollution Funds Center Determination

Claim Number and Name:	N10036-EP25, <i>Deepwater Horizon</i> Oil Spill Assessment Costs
Claimant:	Environmental Protection Agency
Claim Type:	NRDA, Upfront Assessment Costs
Amount Requested:	\$781,000
Offer Amount:	\$679,000
Available Contingency:	\$102,000
Determination Date:	March 18, 2015
NPFC Claim Manager:	[REDACTED]

### Summary of the Incident and Claim

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 3.19<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 used 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 Commerce, National Oceanic and Atmospheric Administration (NOAA), along with the Department of the Interior, Fish and Wildlife Service (FWS), Environmental Protection Agency (EPA), Department of Agriculture (USDA)<sup>3</sup>, and five Gulf Coast states<sup>4</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 September of 2010, the trustees observed over 950 miles of oiled shoreline habitat, 400 oiled sea turtles, and over 1,500 oiled birds<sup>5</sup>. Numerous other natural resources at risk including fish, marine mammals, oysters, and associated habitats were identified. All the trustees continue to work together to develop and implement assessment plans to determine the nature and extent of these losses.

On September 8, 2014, EPA presented the Oil Spill Liability Trust Fund (OSLTF or the Fund) with a claim for costs to implement their 2014 assessment and restoration planning activities. The claim totaled \$2,347,000, represented as the costs with respect to EPA's Partial, Interim Claim for Natural Resource Damage Assessment and Restoration Planning. EPA's Interim Claim describes two separate activities: Activity 1 describes EPA's cost to participate<sup>6</sup> in the natural resource damage assessment (NRDA) activities being implemented by other trustees, and Activity 2 describes EPA's cost to implement a study to reduce nutrient loading in estuarine

<sup>1</sup> In re *Deepwater Horizon*, MDL 2179 (E.D. La., January 15, 2015)

<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*, September 9, 2010.

<sup>3</sup> On September 10, 2012, through Executive Order 13626, the President designated the EPA and USDA as additional natural resource trustees specifically for the *Deepwater Horizon* oil spill. *Federal Register*, Vol. 77, No. 178, Pgs. 56749-56752, September 13, 2012.

<sup>4</sup> The state trustees are Louisiana, Mississippi, Alabama, Florida, and Texas.

<sup>5</sup> *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2010

<sup>6</sup> EPA described their participation as including: coordination, preparation or review of technical materials; oversight of the Administrative Record; legal support; and financial management activities.

waters that would provide the basis for scaling injuries resulting from the incident to restoration projects. On February 2, 2015, EPA withdrew their claimed costs for Activity 1, participation in the NRDA (\$1,566,000), resulting in a claim total of \$781,000 for EPA's restoration planning study (the Plan).

This determination presents the NPFC's findings with respect to claimed costs for EPA's restoration planning study, Activity 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 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 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 C.F.R. §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 NRDA costs was submitted by EPA. EPA is an appropriate federal natural resource trustee for the *Deepwater Horizon* oil spill pursuant to the President's designation under Executive Order 13626 (77 Fed. Reg. 56749, September 13, 2012), and Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. §300.600) as revised by EPA<sup>7</sup>.

### **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 September 8, 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 natural resource damages. 33 USC §2712(a)(4). Natural resource damages are damages for injury to,

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<sup>7</sup> *Federal Register*, Vol. 79, No. 124, Pgs. 36429-36431, June 27, 2014

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)(B). 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). EPA states that the Plan that forms the basis of this claim was first published on EPA's website on August 22, 2014<sup>8</sup>, and then later linked to EPA's central *Deepwater Horizon* website<sup>9</sup> for Enforcement, thereby meeting this requirement<sup>10</sup>. EPA states that they have not received any comments on their plan.

### **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).

EPA presented its Plan to implement the restoration planning study and claim for implementation costs to BP on February 19, 2014<sup>11</sup>. The Plan identified the restoration planning approach, need for the activity and how it connects to the NRDA process, deliverables to be produced, level of effort, timeline, and cost estimates for contractors, EPA personnel, and field instrumentation. The cost to implement the restoration planning study, as presented to BP, was \$781,000. EPA verified that all costs included in their plan are separate and distinct from any and all previous funding requests and claims to both BP and the NPFC<sup>12</sup>.

BP responded to EPA on March 27, 2014<sup>13</sup>, declining to pay the claim because of the lack of a cooperative agreement between all the trustees and BP, because BP was not invited to participate in EPA's restoration planning study, and because BP did not believe the claim provided enough information<sup>14</sup>. On August 1, 2014, EPA responded to BP and provided a more detailed plan of the restoration planning study. More than 90 days after presenting its claim to BP for \$781,000<sup>15</sup> to implement its Plan, EPA presented this claim to the Fund<sup>16</sup>. The NPFC notified BP on January 21, 2015, that this claim had been received<sup>17</sup>.

Based on the above facts, the NPFC finds that EPA's claim to the Fund for costs to implement the restoration planning study was presented to the RP in accordance with OPA.

<sup>8</sup> August 28, 2014 claim letter from EPA to NPFC

<sup>9</sup> <http://www2.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill#information> (accessed February 25, 2015)

<sup>10</sup> February 25, 2015 email from EPA to NPFC

<sup>11</sup> February 19, 2014 letter from EPA to BP transmitting their Partial, Interim Claim for Assessment Costs

<sup>12</sup> Claim Executive Summary, page 7

<sup>13</sup> March 27, 2014 letter from BP to EPA

<sup>14</sup> BP's statement was largely with respect to EPA's withdrawn part of the claim.

<sup>15</sup> The claims to both BP and NPFC initially included the \$1,566,000 for Activity 1.

<sup>16</sup> September 8, 2014 email from EPA to NPFC

<sup>17</sup> September 11, 2014 RP notification letter from NPFC to BP

## Claimant's Burden of Proof and Adherence to NRDA Regulations

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.

After reviewing the claim and supporting documents, the NPFC finds that EPA is following 15 C.F.R. 990 *et seq.* in carrying out the work subject to this claim. Specifically, they coordinated actions with other trustees to ensure no double recovery of damages<sup>18</sup> and prepared a plan that the public was given an opportunity to review<sup>19</sup>. Additionally, the trustee council, of which EPA is a member, issued a notice of intent to conduct restoration planning<sup>20</sup>, invited BP to participate in the NRDA<sup>21</sup>, and is maintaining an administrative record that is available for public review<sup>22</sup>. The NPFC determines that EPA has proved entitlement to the claimed amount.

## NPFC Review of Claim Activities and Associated Costs

The trustees have conducted a number of studies that have documented injuries to water column resources<sup>23</sup> resulting from the *Deepwater Horizon* spill<sup>24</sup>. While these efforts are ongoing, the trustees have begun to consider appropriate alternatives to restore such losses. Among the alternatives being considered to compensate for injuries to water column resources are actions to reduce the amount of nutrients from sources such as fertilizers that are released into the watershed, which can reduce oxygen levels (i.e., hypoxia)<sup>25</sup> and production of water column resources.

EPA claims \$781,000 (including \$102,000 of contingency funding) to conduct a study that will provide information on the benefits to water column resources resulting from reduction of nutrients, information that will facilitate the trustees' efforts to scale the amount of water column injury that would be offset by implementing restoration projects to reduce hypoxia in coastal waters. The study consists of three main components. First, EPA will deploy water quality sensors at locations<sup>26</sup> affected by the *Deepwater Horizon* oil spill to measure oxygen levels every thirty minutes for three months. These measurements will allow EPA to determine oxygen levels throughout the full day in coastal waters, where low oxygen levels may only exist for short

<sup>18</sup> Claim Executive Summary, page 4

<sup>19</sup> August 28, 2014 claim letter from EPA to NPFC; February 25, 2015 email from EPA to NPFC

<sup>20</sup> "Notice of Intent to Conduct Restoration Planning" *Gulf Spill Restoration Publications*. National Oceanic and Atmospheric Administration. Accessed November 12, 2013. <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2011/02/Deepwater-Horizon-Final-NOI-Fully-Executed.pdf>

<sup>21</sup> "Invitation to Participate in Natural Resource Damage Assessment" *Deepwater Horizon Administrative Record*. Department of the Interior, September 27, 2012. Accessed November 12, 2013. [http://www.doi.gov/deepwaterhorizon/adminrecord/upload/NRDA-Invitation-Letter-w-NOI-attachment-9\\_27\\_10.pdf](http://www.doi.gov/deepwaterhorizon/adminrecord/upload/NRDA-Invitation-Letter-w-NOI-attachment-9_27_10.pdf)

<sup>22</sup> Claim Executive Summary, page 7

<sup>23</sup> Water column resources include fish at all life stages (larvae, juvenile, and adult)

<sup>24</sup> DOI's *Deepwater Horizon* Administrative Record lists 55 cooperative workplans, including addendum that were conducted to assess water column injuries at: <http://www.doi.gov/deepwaterhorizon/adminrecord/Pre-assessment-Water-Column.cfm> (accessed February 25, 2015). Additionally, NOAA's Second and Third Interim, Partial Claims for Assessment and Restoration Planning Costs included activities to assess water column injuries entitled "Evaluation of Historical Biological Data and Analysis of Field Data from 2010-2011" and "Documentation of Oil Pathway, Water Column Organisms Exposed and Injured."

<sup>25</sup> February 2, 2015 Email from EPA to NPFC

<sup>26</sup> EPA chose the sites based on watersheds that experience a large percentage of nutrient loading from agricultural sources and where EPA could reduce the nutrient intake by 30%.

periods of time during late hours of the night. EPA will also conduct four monthly water quality surveys by boat at each study site that will measure oxygen levels from the surface water down to the bottom water. Cumulatively, the two sampling exercises will allow EPA to understand the temporal and spatial extent of hypoxia at each site.

In the second component of the study, EPA will run various models to establish the relationship between nutrient loading into these coastal waters and hypoxic conditions. Using the water quality results from the first component of the study as a baseline for each site, EPA will then model the expected improved water quality and increased production and biomass of water column resources associated with reduced nutrient loading.

In the third component of the study, EPA will conduct a literature review to determine the relationship between improved water quality and increased biomass of coastal organisms. This information can then be used to establish restoration credits associated with specific reduction projects to reduce nutrient inputs into coastal waters.

Of the \$781,000 claimed, \$679,000 is to implement the three components of the proposed restoration planning study. For component 1 of the study, EPA claims \$271,000 for agency labor and travel (\$168,000) to conduct the field sampling and for the use of EPA vessels and field instrumentation (\$103,000). For component 2 of the study, EPA claims \$217,000 for agency labor (\$67,000) and contractor costs (\$150,000) to model the extent proposed restoration actions would improve water quality. For component 3 of the study, EPA claims \$91,000 for agency labor (\$41,000) and contract costs (\$50,000) to quantify restoration benefit. EPA also claims an additional \$100,000 in indirect costs<sup>27</sup>. The remaining claimed amount of \$102,000 is claimed as contingency for potential unforeseen costs associated with implementing the study.

On September 24, 2014<sup>28</sup>, the NPFC requested that EPA provide an updated timeframe for the proposed study, identify the injuries that would be offset by restoration projects to reduce hypoxia, describe how EPA would scale potential restoration projects to injuries from the oil spill, and identify the restoration projects being considered by the trustees as preferred alternatives. On November 26, 2014<sup>29</sup>, EPA responded that, with respect to the updated timeline of the study, EPA had revised the study to take place from March 2015 through December of 2015. With respect to injuries that would be offset and how EPA would scale restoration projects to those injuries, EPA stated that injuries to water column resources would be offset by potential restoration projects to reduce hypoxia and that potential restoration projects would be scaled by relating increased fish biomass as the restoration benefit. With respect to the specific restoration projects being considered as preferred compensatory alternatives, EPA stated that specific actions being considered include providing technical assistance to farmers and private land owners to implement cost-effective land management practices<sup>30</sup>. On February 12, 2014<sup>31</sup>, the EPA further provided that, at this point, the trustee council has not chosen any preferred alternatives, however projects to reduce nutrient loading are being considered by the council and

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<sup>27</sup> Rate of 17.28% charged on all direct costs

<sup>28</sup> September 24, 2014 Email from NPFC to EPA

<sup>29</sup> November 26, 2014 Email from EPA to NPFC

<sup>30</sup> These management practices include precision agriculture, cover crops, crop rotation, irrigation water management, and preservation/restoration of riparian buffer habitat.

<sup>31</sup> February 12, 2015 email from EPA to NPFC

EPA's proposed restoration scaling assessment is necessary for the trustees to understand and evaluate the potential value of the nutrient loading reduction projects as a restoration alternative.

After reviewing EPA's Plan to implement a restoration planning study, the NPFC finds that the (1) activity described above is an appropriate procedure under 15 C.F.R. 990.27(b) and is capable of providing valid and reliable information to help determine the type and scale of restoration, 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 \$679,000 to implement the three components of the proposed restoration planning study are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

### **NPFC Treatment of Contingency**

The trustees claim \$102,000 (15% of the cost of the study) as contingency funding because of "uncertainties inherent in the cost estimates for these activities, as well as a recognition that costs may unexpectedly increase, and/or that new and unforeseeable costs may arise in the future."<sup>32</sup> The NPFC recognizes that costs of approved projects are estimates and may unexpectedly increase as a result of new and/or unforeseeable circumstances. The NPFC's policy is to pay contingency when and if needed, and supported by appropriate justification and documentation of costs incurred to date.<sup>33</sup> The NPFC approves the availability of \$102,000 in contingency funding based on the potential for unknown events, especially in light of the amount of outdoor sampling required for this study. The OSLTF will remain available for contingency costs that arise during the implementation of the approved restoration study.

If the need for contingency funds arises, EPA should make a formal request to the NPFC. Such a request can be made through the annual cost and progress reporting described below, and must include a justification for the additional funds and documentation of past expenditures.

### **Summary**

The NPFC has reviewed the claim submitted by EPA for costs to implement its restoration planning study for the *Deepwater Horizon* incident is 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 \$679,000 from the Fund to implement approved activities detailed in EPA's Plan. The NPFC also approves \$102,000 in available contingency funding that may be provided contingent on demonstrated need.

### **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 restoration planning study addressed in this determination in accordance with EPA's Plan. For this claim, the NPFC will deposit \$679,000

<sup>32</sup> February 12, 2015 Email from EPA to NPFC

<sup>33</sup> In a rare case additional contingency may be granted if adequate documentation and rationale are provided.

into EPA's Damage Assessment and Restoration Revolving Fund Account, which EPA has demonstrated<sup>34</sup> to be a non-appropriated, revolving trust fund.

### **Cost Documentation, Progress Reporting, and Final Report**

As the claimant, EPA shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the Plan for the activities approved in this determination. EPA 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 U.S.C. §2706(f); 33 CFR 136.211(b).

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

1. Certification by EPA 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.

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

1. Certification by EPA 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.

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<sup>34</sup> March 12, 2015 Email from EPA to NPFC

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).