

National Pollution Funds Center Determination

Claim Number and Name:	N10036-EP32, 2015 <i>Deepwater Horizon</i> Assessment Costs
Claimant:	Environmental Protection Agency
Claim Type:	NRDA, Past and Upfront Assessment Costs
Amount Requested:	\$2,056,000
Offer Amount:	\$2,056,000
Determination Date:	August 3, 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 3.19¹ 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 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 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)³, and five Gulf Coast states⁴, 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 birds⁵. Numerous other natural resources at risk including fish, marine mammals, oysters, and associated habitats were identified. The trustees continue to work together to develop and implement assessment plans to determine the nature and extent of these losses.

On June 11, 2015, the EPA presented the National Pollution Funds Center (NPFC) with a claim for costs to implement their 2015 assessment and restoration planning activities. The claim totaled \$2,056,000, represented as the costs with respect to EPA's 2015 Partial, Interim Claim for Natural Resource Damage Assessment and Restoration Planning (the Plan). EPA's Plan includes two separate activities: Activity 1 describes EPA's costs to

¹ In re *Deepwater Horizon*, MDL 2179 (ED La., January 15, 2015)

² 1.07 million gallons on the surface and 771,000 gallons sub-sea. "The Ongoing Administration-Wide Response to the *Deepwater Horizon* BP Oil Spill." *Deepwater Horizon Incident Joint Information Center*, September 9, 2010.

³ 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.

⁴ The state trustees are Louisiana, Mississippi, Alabama, Florida, and Texas.

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

conduct restoration planning activities necessary to develop a draft Damage Assessment Restoration Plan (DARP), and Activity 2 describes EPA's cost to implement a study to assess the toxicity of oil burned during the response on marine mammals.

This determination presents the NPFC's findings with respect to claimed costs for both of the assessment activities presented in the claim.

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 EPA⁶.

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 June 11, 2015; therefore, the claim was received within the period of limitations for claims.

⁶ *Federal Register*, Vol. 79, No. 124, Pgs. 36429-36431, June 27, 2014

In accordance with OPA, the OSLTF is available to pay claims for uncompensated 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). EPA states that the Plan that forms the basis of this claim was published on EPA's website on January 7, 2015⁷. 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 first presented its Plan and claim for implementation costs to BP on December 30, 2014⁸. The Plan identified EPA's estimated future costs to implement two assessment activities. For both activities, EPA's Plan describes the assessment or restoration planning activity, 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 laboratory expenses. The cost to implement the two assessment activities, as presented to BP, was \$2,056,000. 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 NPFC⁹. On February 27, 2015, EPA¹⁰ provided BP with additional clarifying information to facilitate BP's review, including more detailed budgets and general claim information.

EPA indicates that, to date, BP has not responded to EPA's claim¹¹. More than 90 days after presenting its claim to BP for \$2,056,000 to implement its Plan, EPA presented this claim to the NPFC¹². The NPFC notified BP on June 16, 2015, that this claim had been received¹³.

Based on the above facts, the NPFC finds that EPA's claim to the NPFC for 2015 assessment costs was presented to the RP in accordance with OPA.

⁷ July 28, 2015 Email from EPA to NPFC

⁸ December 30, 2014 Letter from EPA to BP transmitting their Partial, Interim Claim for Assessment Costs

⁹ Claim Executive Summary, page 7

¹⁰ February 27, 2015 Letter from EPA to BP transmitting their Reformatted Partial, Interim Claim

¹¹ Claim Cover Letter, page 1

¹² June 11, 2015 Email from EPA to NPFC

¹³ June 16, 2015 RP notification letter from NPFC to BP

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. After reviewing the claim, Plan, and supporting information, the NPFC has determined that EPA has proven entitlement to all of the \$2,056,000 claimed. 33 U.S.C. §2706(e)(2).

NPFC Review of Claim Activities and Associated Costs

Restoration Planning and Injury Assessment Management and Administration

As noted above the President appointed EPA a natural resource trustee for the *Deepwater Horizon* oil spill to provide “scientific and policy expertise¹⁴” toward completion of the NRDA and restoration efforts. Executive Order 13626 further mandates that “All Federal trustees are directed to consult, coordinate, and cooperate with each other in carrying out all of their trustee duties and responsibilities.” Consistent with this directive, in its capacity as a co-trustee, EPA participates in various injury assessment Technical Working Groups¹⁵, the Restoration Subcommittee, and the Restoration Planning Teams formed by the cotrustees. Notably, EPA also began serving as Vice Chair of the Executive Committee of the Trustee Council in October of 2014.

EPA claims \$1,032,000 (\$860,000 as agency salary costs, \$32,000 as travel costs, and \$140,000 as indirect costs) to assist with completing a draft DARP for public review. These costs will fund EPA’s efforts to provide scientific and technical expertise in the development, evaluation, and selection of restoration alternatives, as well as EPA’s contributions to finalize injury determinations that will be presented in the draft DARP. This activity also includes EPA's management and administration costs necessary to complete the draft DARP, including budget planning, oversight, legal support, financial management, public communications, compiling documents for the Administrative Record, and travel to attend Trustee Council and public meetings.

The NPFC has previously provided NOAA funding in the amount of \$16,412,700 for their restoration planning efforts needed to complete a draft DARP¹⁶. While NOAA is the lead trustee with respect to the completion of the draft DARP, NOAA acknowledged that the efforts of other trustees would be necessary to complete the activities described

¹⁴ Executive Order 13626 (77 Fed. Reg. 56749, September 13, 2012)

¹⁵ Water Column, Shorelines, Human Use, Nearshore, Toxicity, and Oysters

¹⁶ NPFC Claim Number: N10036-OC30

within their own claim, expecting that an additional \$23 million would be incurred by co-trustees to support NOAA's claimed activities¹⁷.

After reviewing EPA's 2015 Assessment Plan, the NPFC finds that the: (1) Restoration Planning and Injury Assessment Management and Administration assessment activity described above is appropriate and supports EPA's efforts to quantify injury and plan appropriate restoration, and (2) based on the NOAA estimate of co-trustee costs to support NOAA's claimed activities, the EPA costs claimed for these activities 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 magnitude of potential injury. Therefore, claimed costs of \$1,032,000 for the Restoration Planning assessment 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. §§990.53 and 990.55.

Assessment of Burned Oil Air Emission and Toxicity

EPA claims \$1,024,000 to conduct a toxicity study that will provide assessment information on injuries to marine mammals¹⁸ caused by the inhalation of emissions from oil burned during the response to the *Deepwater Horizon* oil spill. During the response to the *Deepwater Horizon* oil spill, the USCG conducted approximately 410 in-situ burns to remove oil from the surface of the Gulf of Mexico. While NOAA and EPA conducted air-monitoring activities during the time period that the burns occurred, these efforts were limited in scope and were directed more towards protection of humans, both response workers near the spill site and the onshore population. NOAA has previously conducted assessment activities with respect to injury to marine mammals from unburned oil, but the affects of the emissions from burned oil on marine mammals in the Gulf has not been studied by any trustee to date¹⁹.

The study consists of two main components. First, EPA will conduct oil burnings at the U.S. Army's Aberdeen Test Center for a period of six days. They will burn oil similar to the oil released in the *Deepwater Horizon* oil spill, both with and without the same type of dispersants used during the response. From the burnings, EPA will collect and analyze the resulting constituents, measuring both the type and amount of pollutants created by the burned oil.

EPA will then take extracts from the pollutants collected during the burnings and, via in-vitro testing, introduce those pollutants to both human pulmonary cells and bacterial cells to determine the amount of oxidative stress experienced by the cells. EPA will use the human pulmonary cell²⁰ testing to determine the potency of the metal and salt components of the emissions by monitoring the cells for known biomarkers of oxidative stress. EPA will use the bacterial cell testing to assess the genetic damage resulting from

¹⁷ June 8, 2015 Email from NOAA to NPFC

¹⁸ EPA stated that the results of this study could potentially be used to inform the assessment of injury to reptiles and habitat as well.

¹⁹ July 9, 2015 Email from NOAA to NPFC

²⁰ Pulmonary cells are the primary targets of inhaled emissions.

the organic extracts²¹ of the emissions by measuring the amount of mutations in the cells that occur. EPA will then compare the potencies of these extracts against other more well-studied emissions to understand the level of oxidative stress placed on the cells by the oil emissions.

By determining the toxicity of the emissions from oil burned during the response, the trustees will be able to more fully understand and quantify injuries to marine mammals. On July 9, 2015, NOAA, who is the lead trustee for the quantification of marine mammals, confirmed that they would be considering the results of EPA's study during final injury analysis of marine mammals²².

EPA claims \$1,024,000 (\$636,000 for component one and \$388,000 for component two) to complete the study as described above. Costs for component one are agency salary and travel expenses (\$201,000), contractor expenses (\$157,000), laboratory expenses²³ (\$185,000), and indirect costs (\$93,000). Costs for component two are for agency salary and travel expenses (\$90,000), contractor expenses (\$160,000), laboratory expenses (\$81,000), and indirect costs (\$57,000).

On July 15, 2015²⁴, the NPFC requested that EPA describe specifically how the results of the burned oil study would be used to quantify injury for marine mammals. On August 3, 2015, EPA responded that studies of dolphins in areas affected by the Deepwater Horizon oil spill have been observed with lung lesions and elevated levels of inflammatory proteins in their blood. Oxidative stress is a known cause of these types of injuries and determining the level of oxidative stress caused by the burned oil emissions will directly inform the scope of potential injuries experienced by marine mammals²⁵.

After reviewing EPA's 2015 Assessment Plan and additional claim information provided by EPA, the NPFC finds that the: (1) Assessment of Burned Oil Air Emissions and Toxicity activity described above is appropriate and supports EPA's efforts to quantify injury and plan appropriate restoration, and (2) costs claimed for these activities 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 magnitude of potential injury. Therefore, claimed costs of \$1,024,000 for the Burned Oil Air Emissions and Toxicity assessment 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 EPA for costs to implement its Plan for the *Deepwater Horizon* oil spill in accordance with OPA (33 U.S.C. §2701 *et seq.*) and

²¹ The organics include polycyclic aromatic hydrocarbons, nitroarenes, and aromatic amines.

²² July 9, 2015 Email from NOAA to NPFC

²³ Costs include use of the Army test facility; purchase, transportation, and disposal of oil; and test equipment and supplies.

²⁴ July 15, 2015 Email from NPFC to EPA

²⁵ August 3, 2015 Email from EPA to NPFC

associated regulations (15 C.F.R. Part 990 and 33 C.F.R. Part 136). Through this determination, the NPFC offers \$2,056,000 to implement approved activities detailed in EPA'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 nine activities addressed in this determination in accordance with EPA's Plan. For this claim, the NPFC will deposit \$2,056,000 into EPA's Damage Assessment and Restoration Revolving Fund Account, which EPA has demonstrated²⁶ to be a non-appropriated, revolving trust fund. 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 CFR 136.211(b).

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. Any funds not spent or appropriately documented shall be returned to the Fund. 33 U.S.C. §2706(f).

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:

²⁶ March 12, 2015 Email from EPA to NPFC

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.

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).