

U.S. Department  
of Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center  
Natural Resource Damage (NRD)  
Claims Division

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16480

January 16, 2013

Tony Penn  
NOAA Office of Response and Restoration  
SMC4, RM. 10317  
1305 East West Highway  
Silver Spring, MD 20910

Re: Claim Number N10036-OC15 - *Deepwater Horizon* Oil Spill 2013/14 Lost Use  
Assessment

Dear Mr. Penn:

The National Pollution Funds Center (NPFC) has reviewed the National Oceanic Atmospheric Administration's (NOAA) claim for 2013/14 costs to assess lost human use of natural resources resulting from the *Deepwater Horizon* oil spill (claim number N10036-OC15). We have determined that the claimed amount of \$20,074,000 is compensable under 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. 990 *et seq.*). The basis of our decision follows.

### **Summary of the Incident**

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 134.4<sup>1</sup> to 210.0<sup>2</sup> million gallons of oil into the Gulf of Mexico, until the well was capped on July 15, 2012. Responders to the discharge dispensed approximately 1.84 million gallons of dispersants<sup>3</sup> at the discharge site in an attempt to keep the oil or delay the oil from reaching the shoreline and complex and sensitive ecosystems of the Gulf Coast. 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 OPA claims process.

<sup>1</sup> <http://www.bp.com/sectiongenericarticle800.do?categoryId=903674&contentId=7067698>

<sup>2</sup> "Deepwater Horizon Oil Spill Early Restoration Plan." *Gulf Spill Restoration Publications*. National Oceanic Atmospheric Administration, December 1, 2011. Web. March 13, 2012.  
<<http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2011/12/Final-ERP-121311-print-version-update.pdf>>.

<sup>3</sup> 1.07 million on the surface and 771,000 sub-sea. Deepwater Horizon Incident Joint Information Center. 2010. The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill.  
<http://www.restorethegulf.gov/release/2010/08/06/ongoing-administrationwide-response-deepwater-bp-oil-spill>.

Following the spill, NOAA, along with the Department of the Interior 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 the August-September 2010 period, the trustees observed over 950 miles of oiled shoreline habitat, 400 oiled sea turtles, and over 1,500 oiled birds<sup>5</sup>. The trustees identified 13 resource/habitat injury categories, one of which is lost human use. Each resource/habitat is interconnected with one or more of the others, with adverse impacts to one resource/habitat likely to reverberate throughout the larger Gulf of Mexico ecosystem. For the human use component, the interconnected resource/habitat categories are related to, and supportive of, direct lost human use and passive use<sup>6,7</sup>.

### **History of Human Lost Use Assessment**

Human use losses include disruptions in recreational boating, fishing, beach activities, and bird watching. For instance, both residents and non-residents of Gulf States make more than 150 million recreational trips to the Gulf of Mexico each year and in 2009 approximately 23 million of these recreational trips were individual fishing trips<sup>7,8</sup>. The *Deepwater Horizon Oil Spill* caused beach and fishery closures to protect the environment and public health. On September 9, 2010, the Unified Command reported 39,885 square miles of Gulf of Mexico federal waters remained closed to fishing<sup>9</sup>; and NOAA identified lost human use opportunities associated with these closures, including fishing, swimming, beach-going, and viewing of birds and wildlife<sup>10</sup>. The trustees began working together to develop and implement a total value assessment<sup>11</sup> to determine the nature and extent of the losses to both direct and passive use in 2010. Based on current data residents and non-residents of Gulf States continue to be negatively impacted by the spill. Therefore, a need for continued data collection to fully account for the losses exists.

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<sup>4</sup> Louisiana, Mississippi, Alabama, Florida, and Texas

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

<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

<sup>6</sup> Passive or non use losses are the value that people place on injured natural resources that do not have a direct use.

<sup>7</sup> Natural Resource Damage Assessment, April 2012 Status Update for the *Deepwater Horizon Oil Spill* ([http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL\\_NRDA\\_StatusUpdate\\_April2012.pdf](http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL_NRDA_StatusUpdate_April2012.pdf))

<sup>8</sup> NOAA National Marine Fisheries Service. 2010. Fisheries of the United States 2009.

<http://www.st.nmfs.noaa.gov/st1/fus/fus09/index.html>

<sup>9</sup> Unified Command for the BP Oil Spill, "The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill," September 9, 2010: <http://www.restorethegulf.gov/release/2010/09/09/ongoing-administration-wide-response-deepwater-bp-oil-spill>

<sup>10</sup> *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2010:

<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

<sup>11</sup> NOAA will draft, test, and implement a survey to determine the monetary value of direct and passive use losses using stated preference methods. Stated preference methods may include conjoint analyses, contingent valuation and stated choice techniques.

The trustees estimate that the magnitude of losses for recreational resources far exceeds the lost human use assessment cost<sup>12</sup>.

The trustees adopted a three phased approach for the total value assessment. In phase 1<sup>13</sup>, the trustees began their total value assessment. The effort was relatively small in this phase as the trustees began to put together their team of experts in the fields of environmental and natural resources economics, survey research, econometrics, and other social sciences; and began to define the tasks for their assessment. On August 15, 2012, the NPFC received a claim (N10036-OC14) for phase 1 of the total value survey from NOAA totaling \$3,846,347.56. This claim is for NOAA past costs incurred from July 2010 - September 2011. The NPFC is currently adjudicating claim N10036-OC14 for phase 1.

In phase 2<sup>14</sup>, the trustees further developed the total value assessment by conducting focus groups, one-on-one interviews, and pre-tests. On February 15, 2012, the NPFC received a claim (N10036-OC06) for phase 2 from NOAA for \$32,980,000<sup>15</sup> to assess human use losses resulting from the *Deepwater Horizon Oil Spill*. The costs for this phase included funding for both direct recreational use assessments, which support in part a total value assessment, and funding for a total value assessment. The plan, which formed the basis of the claim, identified potential types of human use losses resulting from the incident, the overall approach to assessing and scaling injury, and 12 specific Tasks for assessing the potential direct use and total value losses. The NPFC provided NOAA with \$32,980,000<sup>15</sup> to implement this plan.

The increased cost for the total value component of the plan reflects trustee efforts to collect more data, analyze the data, and then use the data analysis for further survey development. To date, the trustees' lost human use assessment has evaluated the direct losses<sup>16</sup> to recreation use at boat ramps, fishing piers, and shoreline areas used for fishing and other recreational activities (e.g., swimming, sunbathing, etc.) and losses of passive use of the injured natural resources to the American public. The trustees are using several sources of data to establish baseline<sup>17</sup>. For example, monthly data for recreational fishing trips on private boats, charter boats, and from shore are available for publically accessible sites along the Gulf Coast from 1981 to the present<sup>18</sup>. Data are also available for the number of fishing trips in the United States by state and include trips by

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<sup>12</sup> Letter dated December 12, 2012 from NOAA to NPFC responding to request for additional information

<sup>13</sup> Claim to NPFC N10036-OC14 (\$3,846,347.56)

<sup>14</sup> Claim to NPFC N10036-OC06 (\$32,980,000)

<sup>15</sup> \$9.48 million of this claim was claimed for the total value assessment

<sup>16</sup> Tasks to evaluate direct losses using benefit transfer methods will be used to validate the total value assessment

<sup>17</sup> Natural Resource Damage Assessment, April 2012 Status Update for the *Deepwater Horizon Oil Spill* ([http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL\\_NRDA\\_StatusUpdate\\_April2012.pdf](http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/FINAL_NRDA_StatusUpdate_April2012.pdf))

<sup>18</sup> NOAA National Marine Fisheries Service. 2011. Recreational Fisheries Statistics Queries. National Marine Fisheries Service, Fisheries Statistics Division [www.st.nmfs.noaa.gov/st1/recreational/queries/index.html](http://www.st.nmfs.noaa.gov/st1/recreational/queries/index.html)

Gulf Coast state residents and non-residents<sup>19</sup>. The trustees state their data collected to date indicates an ongoing negative impact from the spill upon recreational activities and to residents and non-residents of the affected Gulf states<sup>20</sup>. The trustees assert that based on preliminary data collection, a need for continued data collection to fully account for the loss exists.

### **Claim N10036-OC15 (Phase 3)**

Phase 3<sup>21</sup>, the subject of this claim determination, is what is expected to be the final phase of the assessment and occurs over two years. The trustees will refine the survey using up to date injury information and results from pre-tests and previous survey administration. Once the survey is final, it will be administered to the largest sample group to date across the country<sup>22</sup>, which is a significant and costly effort. Also significant will be the quality assurance/quality control of the data, analysis of the data, writing reports that include summarizing all the work, and reviewing the reports.

On November 1, 2012, the NPFC received a claim from NOAA (N10036-OC15) for phase 3 totaling \$35,957,000 to continue assessment of human use losses resulting from the *Deepwater Horizon* incident through 2013/14. This claim included costs associated with Tasks 1-8, which are for direct/recreational use assessments, and Tasks 9-12, which are for a total use assessment. The NPFC notified BP that it had received this claim from NOAA on November 27, 2012<sup>23</sup>. Then on January 7, 2013 BP notified the NPFC that they intend to pay \$15,883,000 for tasks 1-8 of NOAA's claim. On January 9, 2013, NOAA confirmed that BP provided this amount and revised their sum certain to \$20,074,000<sup>24</sup>. The revised sum certain reflects a need to continue to develop and refine the total value surveys and implementation plan; and review and evaluate related information<sup>25</sup> by a team of highly skilled and experienced experts in the fields of environmental and natural resources economics, survey research, econometrics, and other social sciences. NOAA will also implement the final survey, analyze all data collected, and develop econometric and statistical models to inform injury quantification.

The remainder of this determination presents NPFC findings with respect to this claim.

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<sup>19</sup> U.S. Fish and Wildlife Service and U.S. Census Bureau. 2006. 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation. [www.census.gov/prod/2008pubs/fhw06-nat.pdf](http://www.census.gov/prod/2008pubs/fhw06-nat.pdf).

<sup>20</sup> Letter dated December 12, 2012 from Mr. Tony Penn (NOAA) to Mr. Fredy Hernandez (NPFC)

<sup>21</sup> Claim to NPFC N10036-OC15 (\$20,074,000)

<sup>22</sup> Email dated January 9, 2013 from Tony Penn (NOAA) to Fredy Hernandez (NPFC) responding to a request for additional information

<sup>23</sup> Letter from NPFC to BP dated November 27, 2012

<sup>24</sup> Amount claimed (\$35,957,000) – amount paid (\$15,883,000) = revised sum certain (\$20,074,000)

<sup>25</sup> Including papers and studies using stated preference methods, background studies on economic activity related to marine recreation and total value, and impacts of the spill on tourism and consumer prices for seafood

## **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 of oil 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 provided by NOAA in its claim, as summarized above, the NPFC finds that this claim is for natural resource damages resulting from an OPA incident.

## **Claimant Eligibility**

Federal natural resource trustees are designated pursuant to OPA by the President. 33 U.S.C. §2706(b)(2). Designated trustees have authority to assess damages to natural resources under their trusteeship (33 U.S.C. §2706(c)(1)(A)) and may present claims to the Oil Spill Liability Trust Fund (OSLTF) for uncompensated natural resource damages (33 C.F.R. §136.207), which include the reasonable cost of assessing those damages. 33 U.S.C. §2701(5); 33 U.S.C. § 2706(d)(1)(A)-(C).

This claim for natural resource damage assessment costs was submitted by NOAA. NOAA, under the authority of the Secretary of Commerce, is an appropriate federal natural resource trustees 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).

## **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 natural resource damage assessment under OPA, 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 continue to develop and implement a damage assessment plan to determine the nature and extent of lost human use of natural resources resulting from the incident. The assessment was not complete when the claim was received on November 1, 2012; therefore, the claim was received within the period of limitations for claims.

Natural resource damage claims presented to the NPFC must be based on a plan that the public has had an opportunity to review. 33 U.S.C. §2706(c)(5). On July 20, 2012, NOAA published its 2013/14 Lost Human Use Assessment Plan that forms the basis of this claim on the NOAA Gulf Spill Restoration webpage<sup>26</sup>, thereby meeting this requirement.

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<sup>26</sup> [http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2012/08/Assess-Plan-Demand-2-for-Upfront-Funding\\_Human-Use\\_DH\\_Phase2\\_final-072512-with-budget.pdf](http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2012/08/Assess-Plan-Demand-2-for-Upfront-Funding_Human-Use_DH_Phase2_final-072512-with-budget.pdf)

## 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).

The claim record indicates that NOAA invited BP to participate in the natural resource damage assessment for the *Deepwater Horizon* oil spill by letter dated September 27, 2010<sup>27</sup>. Subsequent cooperative efforts between NOAA and BP (or their representatives), including meetings and/or correspondence in May and June 2010, resulted in general agreement to pursue potential direct/recreational losses and disagreement on whether and/or how to quantify passive use losses<sup>28</sup>. In February and August 2012, BP responded to a NOAA request to fund implementation of NOAA's 2012 lost use assessment plan by conditionally approving tasks involving assessment of direct/recreational losses, and declining to pay for tasks involving assessment of passive use losses<sup>29</sup>. NOAA proceeded to implement its 2012 lost use assessment plan with funding from the NPFC, and with limited coordination with BP, in accordance with 15 C.F.R. §990.14<sup>30</sup>.

On August 1, 2012<sup>31</sup>, NOAA presented its 2013/14 lost use assessment plan and claim for implementation costs to BP<sup>32</sup>. This plan, representing a continuation of the 2012 plan to assess both direct/recreational and passive use losses, describes assessment efforts and natural resource injuries determined to date, potential types of human use losses resulting from these injuries, methods (presented as 12 separate tasks) that would be used to determine lost human uses, performance standards, assessment team development, management, and support, and anticipated deliverables. The claimed costs are for the 24-month period from January 2013 through December 2014, and are presented by quarter and each of the 12 tasks for "NOAA Staff", "Consultants/Contracts" and "Travel". BP responded to NOAA by letter on October 25, 2012<sup>33</sup>, agreeing to fund the direct/recreational plan tasks under certain conditions and, again, declining to tasks to assess passive use losses<sup>34</sup>.

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<sup>27</sup> Letter dated September 27, 2010 from NOAA to BP

<sup>28</sup> Letter dated September 21, 2012 from NOAA to BP

<sup>29</sup> Letters dated February 8, 2012 and August 3, 2012 from BP to NOAA responding to request for funding

<sup>30</sup> Section 990.14(c)(4) of the NRD regulations provide that the trustees decide the scope of the RP's participation and, under section 990.14(c)(5)(iii), may consider such factors as "the willingness of responsible parties to fund assessment activities". Under section 990.14(c)(4), the trustees have sole authority to make determinations regarding injury and restoration.

<sup>31</sup> Letter dated July 27, 2012 from NOAA to BP transmitting their Interim, Partial Claim for Assessment Costs (exhibit 4)

<sup>32</sup> Letter dated July 27, 2012 from NOAA to BP transmitting their Interim, Partial Claim for Assessment Costs (exhibit 4)

<sup>33</sup> Letter dated October 25, 2012 from BP to NOAA (exhibit 5)

<sup>34</sup> Letters dated February 8, 2012 and August 3, 2012 from BP to NOAA responding to request for funding

On November 1, 2012, more than 90 days after providing its 2013/14 assessment plan and claim for implementation costs to BP, BP had not provided NOAA any funding to implement the 2013/14 lost use assessment plan. Accordingly, NOAA presented its claim to the NPFC. On January 7, 2013 BP responded to the NPFC's notification letter<sup>35</sup> acknowledging the claim had been presented to the NPFC and BP intended to fund only the direct/recreational plan tasks and declined to fund tasks to assess passive use losses<sup>36</sup>. Based on the above facts, the NPFC finds that NOAA's claim to the NPFC for funds to implement its 2013/14 Lost Human Use Assessment Plan was presented 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. Any determination or assessment of natural resources damages under OPA by a trustee in accordance with the regulations at 15 C.F.R. Part 990 have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act. 33 U.S.C. §2706 (e)(2); 15 C.F.R. §990.13. Accordingly, trustee determinations made in accordance with 15 C.F.R. 990 *et seq.* are initially presumed correct, but the presumption of correctness may be rebutted if the rebuttal evidence is of sufficient weight.

After careful review of the claim and supporting documents, the NPFC finds that NOAA followed 15 C.F.R. 990 *et seq.* Specifically, they coordinated actions with other trustees to ensure no double recovery of damages, issued a notice of intent to conduct restoration planning, invited BP to participate in the natural resource damage assessment, prepared a plan that was reviewed by the public, and are maintaining an administrative record that is available for public review.

### **NPFC Review of Claimed Activity and Costs**

NOAA claims \$20,074,000 to implement its tasks 9-12 of its 2013/14 Lost Human Use Assessment Plan to determine the total value of direct/recreation and passive human use losses of natural resources injured by the spill. The 2013/14 plan represents a general continuation of the 2012 lost human use plan. Both plans describe 12 tasks, with tasks 1-8 focused on determining direct/recreational losses and tasks 9-12 focused on determining the total value of lost human use, including both direct/recreation use and passive use. Direct use assessment tasks 1-8 are based on generally accepted natural resource damage assessment methods that involve on-site sampling, surveys, and benefits transfer models to determine the number and dollar value of lost and/or diminished value trips resulting from the spill<sup>37</sup>. Under the total value assessment tasks 9-12, NOAA will draft, test, and implement a survey to determine the monetary value of direct and passive

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<sup>35</sup> Letter dated November 27, 2012 from NPFC to BP

<sup>36</sup> Letter dated December 20, 2012 from Bea Strong (BP) to Jim Hoff (NPFC)

<sup>37</sup> Data obtained from Tasks 1-8 will be used to validate the total value assessment.



use losses using stated preference methods<sup>38</sup>. The scope of the surveys/assessment will be national, given the magnitude of the spill. NOAA intends for the direct/recreational use loss and total value losses tasks to be complimentary, whereby the direct/recreational assessment tasks will be used to inform and validate part of the injury scenario for the total value survey<sup>39</sup>.

The NPFC is aware that use of survey-based techniques to determine the value of direct and/or passive use losses has been subject to debate among economists and injury assessment practitioners, which NOAA acknowledges<sup>40</sup>. In correspondence with NOAA, BP stated that proposed survey-based assessment of total value losses (including passive use loss) was not appropriate under OPA. However, survey-based valuation methods, are permitted for use in damage assessments under both the CERCLA<sup>41</sup> and OPA (15 C.F.R. Part 990 natural resource damage regulations. In particular, the OPA natural resource damage regulations specifically allow trustees to estimate the dollar value of lost services where the trustees determine that such an approach is practicable and neither resource-to-resource nor service-to-service approaches are appropriate. 15 C.F.R. §990.53(3). Such methods are also subject to the standards for acceptable procedures in the OPA NRD regulations. 15 C.F.R. §990.27.

NOAA's claim documents their compliance with both 15 C.F.R. §990.53 and 15 C.F.R. §990.27. Specifically, section 3.2 of NOAA's 2013/14 assessment plan states that the trustees considered alternate resource-to-resource and service-to-service approaches, but determined that addressing the public's lost value through replacement projects without an explicit measure of value was not appropriate given the size of the spill and potential magnitude of passive use losses<sup>42,43</sup>. Further, section 3.0 of NOAA's 2013/14 assessment plan states that the trustees considered the criteria set forth in 15 C.F.R. §990.27 and determined that the unprecedented geographic scale and complexity of the spill warrants a combination of assessment procedures<sup>44</sup> that are more complex, but offer reliable and valid information relevant to the type and scale of restoration necessary for the level of potential injury<sup>45</sup>.

NPFC is also aware of BP's concern that NOAA's proposed assessment of passive losses is not appropriate<sup>46</sup>. However, natural resource damages under both CERCLA and OPA regulations include the loss of use of natural resources, which have been validated by the courts. *State of Ohio v. U.S. Depart. of the Interior*, 880 F. 2d 432, 475 (C.A.D.C. 1989) (When the injured resource is traded in a market, the lost use value is the diminution in

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<sup>38</sup> Stated preference methods may include conjoint analyses, contingent valuation and stated choice techniques .

<sup>39</sup> Letter from NOAA to NPFC dated March 5, 2012 and phone conversation with Norman Meade (NOAA) on December 19, 2012

<sup>40</sup> <http://www.darpp.noaa.gov/economics/tools.html>

<sup>41</sup> 43 C.F.R Part §11 (1987)

<sup>42</sup> NOAA claim section 3.2 GENERAL APPROACH TO THE STUDY

<sup>43</sup> Letter dated March 5, 2012 from NOAA to NPFC responding to request for additional information

<sup>44</sup> Field, behavioral laboratory, model and/or literature-based methods

<sup>45</sup> NOAA claim section 3.0 LOST HUMAN USE ASSESSMENT PLAN

<sup>46</sup> Letters dated February 8, 2012 and August 3, 2012 from BP to NOAA responding to request for funding



market price. When that is not precisely the case, but similar resources are traded in a market, an appraisal technique may be used to determine damages. When, however neither of these situations obtains the market value, nonmarket resource methodologies are available. One of these is contingent valuation.) *See also General Electric Co. v. Department of Commerce*, 128 F.3d 767, 772 (C.A.D.C. 1997) (NOAA did not ignore the research panel's warning that contingent valuation studies must be conducted subject to stringent standards nor did it ignore criticisms of contingent valuation but simply gave trustees discretion to use contingent valuation so long as the technique produced valid and reliable results for a particular incident).

BP also expressed concern that NOAA's proposed use of stated preference methods is premature and may provide respondents with inaccurate and incomplete information about the injury and its recovery. NOAA addresses this concern, by using a conservative approach to developing total value surveys, where experts will only use confirmed resource injury data (e.g., miles of shoreline oiled and oiled birds recovered) where results have a high degree of certainty<sup>47</sup>. NOAA further states that it will not implement the final total value survey until late 2013/early 2014, when NOAA expects the results of the natural resource damage assessments to be sufficient and appropriate for inclusion in the surveys<sup>48</sup>.

On November 27, 2012 the NPFC requested that NOAA provide additional information including (1) a summary accounting of funds provided to NOAA for claim N10036-OC06 and (2) a justification of the scope and scale of assessment efforts claimed. On December 12, 2012 NOAA responded by saying that to date (1) NOAA has incurred or obligated all \$32m<sup>49</sup> provided by the NPFC for claim N10036-OC06, that costs exceeded their best estimates<sup>50</sup> and were required to use internal funding to continue the assessment and (2) that the magnitude of losses, for recreational impacts alone, far exceed the lost human use assessment costs, both past and expected future costs. Residents and non-residents of Gulf States continue to be negatively impacted by the spill. Therefore, a need for continued data collection to fully account for the losses exists.

NPFC reviewed the submission to determine how the costs claimed were determined with respect to the work proposed to be performed.

The cost to implement tasks 9-12 of NOAA's Lost Human Use Assessment Plan is \$20,074,000 which includes costs for consultants/contractors, NOAA labor, and travel. NOAA assembled a team of highly skilled and experienced professionals/experts in the fields of environmental and natural resource economics, survey research, psychologists, and econometrics to develop and implement the assessment plan. Costs claimed reflect the magnitude and spatial extent of the spill, as well as the number and location of consultant/contractors and NOAA staff that are required for the assessment.

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<sup>47</sup> Email dated December 19, 2012 from Tony Penn (NOAA) to Fredy Hernandez (NPFC)

<sup>48</sup> Letter dated December 12, 2012 from NOAA to NPFC responding to request for additional information

<sup>49</sup> \$9.5m of the \$32m claimed was for total value assessment

<sup>50</sup> Letter dated December 12, 2012 from NOAA to NPFC indicated that costs for FY 2012 totaled \$34.8m

After reviewing the claim and considering BP's concerns, the NPFC has determined that (1) proposed survey-based valuation methods are in accordance with 15 C.F.R. §§990.27 and 990.53, and (2) claimed costs are reasonable and appropriate given the spill size and potential for injury. 33 U.S.C. §2706(d)(1)(C), 33 C.F.R. §136.211.

### **Revolving Trust Fund and Return of Unused Funds to the OSLTF**

As established by OPA (33 U.S.C. §2706(f)) and NRDA regulations (15 C.F.R. §990.65), sums recovered by trustees for natural resource damages must be retained by the trustees in a revolving trust account. For purposes of this claim, the NPFC will deposit funds into the Damage Assessment Restoration and Revolving Fund Account managed by NOAA. All unused funds, shall be returned to the OSLTF in a timely basis and no later than six months from the completion of the assessment as described in this determination in accordance with 15 C.F.R. §990.65.

### **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 Lost Human Use Assessment 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, 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 have been conducted in accordance with the Lost Human Use Assessment Plan as approved in this determination;
2. A progress report that includes a description of work accomplished, timeline for future activities, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (i.e., labor, consultant/contractors, and travel); and
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress for the year. Enough detail should be included to determine reasonableness of costs for each employee when cost documentation is received with the final report.

In addition to annual reports NOAA shall submit a final progress report within 120 days of the date that plan implementation 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 annual progress and final cost reporting. These templates are provided on the compact disc included with this determination.

### **Conclusion**

The NPFC has reviewed the claim submitted by NOAA for 2013/14 costs to assess lost human use of natural resource resulting from the *Deepwater Horizon* incident in accordance with OPA (33 U.S.C. 2701 *et seq.*) and its implementing regulations (15 C.F.R. 990 *et seq.* and 33 C.F.R. Part 136). We have determined that \$20,074,000 is compensable to fund activities in the Lost Human Use Assessment Plan. This offer constitutes full and final payment for costs associated with this damage assessment plan.

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

If we do not receive the signed Acceptance/Release Form within 60 days of the date of this letter, 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 trustee account with the signed Release Form.

If you have any questions regarding this determination, please feel free to contact me at 703-872-6054.



Fredy Hernandez  
Claims Manager

Encl: (1) Acceptance/Release Form  
(2) Compact Disc with standardize template and instructions to facilitate annual progress and final cost reporting

U.S. Department  
of Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

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

Phone: [REDACTED]  
E-mail: [REDACTED]@uscg.mil

Claim Number: N10036-OC15	Claimant Name: National Oceanic Atmospheric Administration
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NOAA, the undersigned, accepts the determination of \$20,074,000 as compensation for the claim listed above.

On November 1, 2012, the NOAA presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$20,074,000 for upfront costs to lost human use of natural resources resulting from the discharge of oil on or about April 20, 2010, from an area of land leased by BP (the *Deepwater Horizon* incident).

The NOAA accepts the settlement offer of \$20,074,000 as full compensation for the cost to assess lost human use damages as described in the January 16, 2012 determination (N10036-OC15).

NOAA agrees to provide annual and final reports to the NPFC as directed in the determination. NOAA 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 January 16, 2012 determination and any amounts in excess of those required to accomplish the assessment studies approved in the determination shall be deposited to the OSLTF.

NOAA hereby assigns, transfers, and subrogates to the United States all rights, claims, interest and rights of action, that it may have against any party, person, firm or corporation that may be liable for the loss. NOAA authorizes the United States to sue compromise or settle in the name of NOAA and that the NPFC be fully substituted for NOAA and subrogated to all NOAA rights arising from the January 16, 2012 determination.

NOAA 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 NOAA with any other party for costs that are the subject of the claim against the OSLTF and NOAA 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.

NOAA 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.

**FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

\_\_\_\_\_  
Tony Penn  
NOAA Office of Response and Restoration

\_\_\_\_\_  
Date