

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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16480

May 31, 2012

Cindy Dohner
Regional Director, USFWS Southeast Region
1875 Century Blvd., Suite 400
Atlanta, GA 30345

RE: Claim Number: N10036-OI09 – *Deepwater Horizon* Oil Spill Assessment, Kemp's
ridley nesting plan

Dear Ms. Dohner:

The National Pollution Funds Center (NPFC) has completed its review of the claim presented to the Oil Spill Liability Trust Fund (the Fund or the OSLTF) by the U.S. Department of the Interior (DOI) for upfront costs to assess natural resource injuries resulting from the *Deepwater Horizon* oil spill. The claim totals \$396,434, representing \$344,725 to implement the Kemp's ridley nesting plan and \$51,709 for contingency. We have determined that \$344,725 of claimed costs is compensable and approve \$51,709 in contingency funding¹. This determination was made in accordance with the Oil Pollution Act (OPA) and the OPA claims regulations. 33 U.S.C. §2701 *et seq.*; 33 C.F.R. Part 136. The basis of our determination follows.

Incident and Background

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank, discharging an estimated 210 million gallons of oil into the Gulf of Mexico over a period of approximately three months². In addition, approximately 771,000 gallons of dispersants were applied to the waters of the spill area to minimize impacts from the oil³. 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.

Following the spill, DOI, along with NOAA and 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 the August-September 2010 period, the trustees observed over 950

¹ Subject to the NPFC's contingency policy

² <http://www.gpo.gov/fdsys/pkg/FR-2012-04-20/pdf/2012-9581.pdf>

³ <http://www.gpo.gov/fdsys/pkg/FR-2012-04-20/pdf/2012-9581.pdf>

⁴ Louisiana, Mississippi, Alabama, Florida, and Texas

miles of oiled shoreline habitat, 400 oiled sea turtles, and over 1,500 oiled birds⁵. Based on initial assessment findings, DOI developed a comprehensive plan that identifies 25 separate studies designed to assess the nature and extent of potential injuries to birds, endangered and threatened fish and mammals, and sea turtles resulting from the spill.

On April 30, 2012, the NPFC received a claim from DOI for costs to implement the Kemp's ridley nesting plan, one of the 25 studies included in the comprehensive assessment plan. The claim totaled \$396,434, representing \$344,725 for labor and contract costs to implement the nesting plan and \$51,709 for contingency.

The NPFC approved claims previously submitted by DOI for studies identified in the comprehensive assessment plan on September 21, 2011, December 5, 2011, March 13, 2012, and May 29, 2012. The NPFC's determinations for these claims made the following findings related to the incident and DOI claimant:

1. The *Deepwater Horizon* oil spill occurred after OPA's date of enactment (August 18, 1990) and is an OPA incident for which natural resource damages may be claimed. 33 U.S.C. §§2702(b)(2)(A) and 2712(a)(4);
2. DOI is a designated natural resource trustee eligible to present a claim for natural resource damages. 33 U.S.C. §2706(b)(2) and 33 C.F.R. §136.207;
3. DOI determined that there is jurisdiction to pursue restoration for this incident under OPA. 15 C.F.R. §990.41;
4. DOI is conducting an injury assessment pursuant to 15 C.F.R. §990.51; and
5. DOI bears the burden of proving its entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105.

This determination adopts these findings, and provides the following additional findings specific to the claim DOI submitted to the NPFC on April 30, 2012 for \$396,434 to implement the Kemp's ridley nesting plan.

Claim Presentation

Claims to the NPFC 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 section 1006(e) of OPA (33 U.S.C. §2706(e)), whichever is later. 33 C.F.R. §136.101(a)(1)(ii). The assessment was not complete when the claim was received on April 30, 2012. Therefore, the claim was received within the statute of limitation period.

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 18, 2011, DOI

⁵ *Federal Register*, Vol. 75, No. 190, Pgs. 60800-60802, October 1, 2012:
<http://edocket.access.gpo.gov/2010/pdf/2010-24706.pdf>

adopted and posted its comprehensive assessment plan on its website⁶. The comprehensive plan included the Kemp's ridley nesting plan subject to this claim. Thus, this claim to the NPFC for funds to implement the Kemp's ridley nesting plan meets this requirement.

With certain exceptions, claims to the NPFC for damages must be presented first to the responsible party. 33 U.S.C. §2713(a). If a claim is presented in accordance with §2713(a) and the claim is not settled by payment within 90 days after the date upon which the claim was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. §2713(c)(2).

DOI's administrative record for this claim indicates that they presented BP with their comprehensive assessment plan and claim for implementation costs on July 5, 2011⁷. This plan included 2011 and 2012 activities to assess potential exposure and injury to Kemp's ridley nesting adults, hatchlings, and eggs from *Deepwater Horizon* oil and dispersants (i.e., the Kemp's ridley nesting plan), with a total cost of \$386,704. BP responded to DOI in a letter dated July 28, 2011, agreeing to fund the 2011 Kemp's activities for \$41,979 and revisit funding of the 2012 activities in the first quarter of 2012⁸. On March 16, 2012, DOI again requested funding for the 2012 Kemp's ridley nesting plan activities and provided additional information about proposed work⁹. The record does not indicate that BP responded. Thus, the claim for \$344,725¹⁰ was not settled within 90 days, allowing presentment to the Fund as uncompensated damages.

After review of the claim, the NPFC finds that DOI has met the presentment requirements under OPA and the claims regulations.

NPFC Review of Claim and Associated Costs

During 2010 and 2011, the trustees conducted field investigations to assess the potential impacts of *Deepwater Horizon* oil on Kemp's ridley sea turtles, a species listed under the Endangered Species Act. The trustees recovered Kemp's ridley sea turtles, many of which were visibly oiled. Exposure to crude oil is known to impact egg production, and cause embryo mortality and hatchling deformities. Turtle eggs are also susceptible to physical and chemical effects of oil from oil-contaminated sand through exchange of water and gases with the external environment¹¹.

⁶ Comprehensive assessment plan entitled Interim, Partial Claim for Assessment Costs for the 20 April 2010 Deepwater Horizon (MC252) Spill posted at: <http://www.doi.gov/deepwaterhorizon/adminrecord/index.cfm>

⁷ Letter from DOI to BP Transmitting *Interim, Partial Claim for Assessment Costs, 20 April 2010, Deepwater Horizon (MC252) Spill, dated July 1, 2011*. The Kemp's ridley nesting plan is included in this Plan as Activity 4.1.

⁸ Letter from BP to DOI dated July 28, 2011

⁹ Email from DOI to BP dated March 16, 2012

¹⁰ Total claimed amount to implement the Kemp's ridley nesting plan (\$386,704) minus partial payment from BP (\$41,979) = uncompensated damages (\$344,725)

¹¹ 2010 adopted trustee plan titled "Preassessment Plan to Determine Potential Exposure and Injuries of Nesting and Hatchling Kemp's ridley Turtles" (see: http://www.doi.gov/deepwaterhorizon/adminrecord/upload/Preassessment-Plan-to-Determine-Potential-Exposure-and-Injuries-of-Nesting-and-Hatchling-Kemps-Ridley-Sea-Turtles-9_7_10.pdf)

This claim seeks funds to implement the Kemp's ridley nesting plan. The objectives of this activity are to: (1) assess physical condition and track movements of nesting females, and (2) collect and analyze tissue biopsies and other samples from nesting females, eggs, and hatchlings. The results will be compared with similar data collected prior to the spill to determine potential injury to Kemp's ridley sea turtles resulting from the incident.

DOI claims \$344,725 for this activity. Costs are for contracts with Texas A&M and USGS Columbia Environmental Research Center, which include staff time, supplies for biopsies, sample collection, satellite tracking, shipping of samples, associated travel, and indirect costs for both Texas A&M and USGS Columbia Environmental Research Center.

After reviewing the claimed study and associated costs the NPFC finds that (1) DOI's assessment approach to determine injuries to sea turtles meets the standards for assessment procedures under 15 C.F.R. §990.27, and (2) claimed study and costs of \$344,725 are reasonable and appropriate, given the scale and complexity of the incident and need for assessment. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

Contingency

DOI claims \$51,709, or 15 percent of total claimed amount (\$344,725), for contingency costs associated with implementation of the Kemp's ridley nesting plan. The NPFC recognizes the uncertainties inherent in the cost estimates of the approved assessment activities and that costs may unexpectedly increase, and/or that new and unforeseeable costs may surface in the future. Accordingly, the NPFC has determined that the OSLTF will remain available for contingency costs not to exceed \$51,709.

Contingency funding will be made available in accordance with the NPFC Contingency Policy (enclosed) when, and if, needed, and when supported by appropriate justification and documentation of costs incurred to date. If the need for contingency funds arises, DOI 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. In a rare case additional contingency may be granted if adequate documentation and rationale are provided.

Revolving Trust Fund and Return of Unused Funds to the OSLTF

As established by OPA and NRDA regulations, sums recovered for natural resource damages must be retained by the trustees in a revolving trust account without further appropriation for use only to reimburse or pay costs incurred by the trustee under subsection (c) of 33 U.S.C. §2706 with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the OSLTF. 33 U.S.C. §2706(f); 15 C.F.R. §990.65. For this claim, the NPFC will deposit \$344,725 into the DOI managed Natural Resource Damage Assessment and Restoration (NRDAR) Fund codified at 43 U.S.C. §1474(b), which DOI has demonstrated to be a non-appropriated, revolving trust fund.

Sums provided under this determination may only be used to implement the studies approved in this determination. All unused funds, including interest earned, shall be returned to the OSLTF on a timely basis and no later than six months from the completion of the study as described in this determination.

Cost Documentation, Progress Reporting, and Final Report

As the claimant, DOI shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the Kemp's ridley nesting plan approved by this determination. One year from the date of this determination, and annually thereafter, DOI shall provide the NPFC with a report on the status of study implementation and expenditures. These annual progress reports should include the following:

1. Certification by DOI that the Kemp's ridley nesting plan has been implemented as approved in this determination;
2. A description of work accomplished, a timeline for future work, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (i.e., labor, contracts, purchases/expendables, travel, and government equipment);
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress of the study 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; and
5. An accounting, including the source and value, of any additional compensation received for the study approved in this determination.

In addition to the annual reporting requirements, DOI shall submit a final progress report for the approved study within 120 days of the date the funded assessment study is completed. This report should include the following:

1. Certification by DOI that all expenditures of OSLTF funds were in accordance with the Kemp's ridley nesting plan as approved by the NPFC;
2. A summary of assessment study findings;
3. Copies of final reports and/or studies;
4. Documentation of OSLTF funds remaining, including account balance and interest earned;
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 approved study. 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, work plans, 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.
6. An accounting, including the source and value, of any additional compensation received for the studies approved in this determination.

With the final report(s), the NPFC will reconcile costs. All unused funds, including interest earned, shall be returned to the OSLTF on a timely basis and no later than six months from the completion of each individual assessment study as described in this determination in accordance with 15 C.F.R. §990.65(f).

The NPFC has prepared standardized templates with detailed instructions to facilitate annual progress and final cost reporting. These templates are provided on the compact disc (CD) included with this determination.

Summary

The NPFC has reviewed the claim submitted by DOI for the costs to implement the Kemp's ridley nesting plan in accordance with OPA and its implementing regulations. 33 U.S.C. §2701 *et seq.* and 33 C.F.R. Part 136. We have determined that the proposed plan and associated costs are reasonable and appropriate for the incident and \$344,725 is compensable.

This offer constitutes full and final payment of DOI assessment costs for the Kemp's ridley nesting plan associated with the *Deepwater Horizon* incident. If you accept this offer, please sign the enclosed Acceptance/Release Form and return to:

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

If we do not receive the signed original 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 issued within 30 days of receipt of the form. Please provide account information including Agency Locator Codes (ALC) with address for the NRDAR fund, Treasury Accounting Symbol (TAS) number, and instruction for the transfer of funds to the NRDAR account when you submit the Release Form.

If you have any questions about this determination, you may write me at the above address or contact me by phone at [REDACTED]

Sincerely,



Fredy Hernandez
Claims Manager
Natural Resource Damages

Enclosures: Acceptance/ Release Form
CD with Annual and Final Reporting Forms and Instructions
NPFC Contingency Policy

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center

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Claim Number: N10036-OI09	Claimant Name: The U.S. Department of the Interior
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On April 30, 2012, the U.S. Department of the Interior (DOI) presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$396,434 for upfront costs to assess natural resource injuries 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 Department of the Interior accepts the settlement offer of \$344,725 as full compensation for the Kemp's ridley nesting plan as described in the May 31, 2012 determination (N10036-OI09). The settlement does not include any additional funding for contingency.

This settlement represents full and final release and satisfaction of all damage assessment costs described in the May 31, 2012 determination.

This release includes any right DOI may have to dispute the contingency awards in the May 31, 2012 determination. Although this settlement and release does not pay the contingency payments detailed in this determination, DOI acknowledges that any future contingency payments will be limited to the amounts awarded and the NPFC will only authorize actual payments of the award from the OSLTF if and when a permissible contingency occurs and the request is fully documented and complies with the NPFC policy for Natural Resource Damage Contingency Payments.

DOI agrees to provide annual and final reports to the NPFC as directed in the determination. DOI agrees to comply with 33 U.S.C. §2706(f) and 33 C.F.R. §136.211 by depositing into a revolving trust account the amounts awarded in the May 31, 2012 determination and any amounts in excess of those required for these reimbursements to accomplish the assessment studies approved in the determination shall be deposited to the OSLTF.

DOI hereby assigns, transfers, and subrogates to the United States all rights, claims, interest and rights of action, that it may have against any party, person, firm or corporation that may be liable for the loss. DOI authorizes the United States to sue, compromise or settle in the name of DOI and that the NPFC be fully substituted for DOI and subrogated to all DOI rights arising from the May 31, 2012 determination.

DOI acknowledges that the United States has pending legal actions associated with the Deepwater Horizon incident in federal district court but warrants that no settlement will be made by any person on behalf of the DOI with any other party for costs that are the subject of the claim against the OSLTF without consultation with the NPFC. DOI will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the OSLTF. The cooperation shall include but not be limited to, immediately reimbursing the OSLTF any compensation received from any other source for the same claim, and providing any documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person.

DOI certifies that to the best of its knowledge and belief the information contained in this claim represents all material facts and is true, and understands that misrepresentation of facts is subject to prosecution under federal law, including but not limited to 18 U.S.C. §§287 and 1001.

_____	_____
Title of Person Signing	Date of Signature
_____	_____
Typed or Printed Name of Claimant or Name of Authorized Representative	Signature

_____	_____
Title of Witness	Date of Signature
_____	_____
Typed or Printed Name of Witness	Signature

_____	_____	_____
ALC Required for Payment	Bank Routing Number	Bank Account Number