

National Pollution Funds Center Determination

Claim Number and Name:	J05003-RP04 , <i>M/V Selendang Ayu</i> Oil Spill Assessment Costs
Claimant:	Ayu Navigation Sdn Bhd, and IMC Shipping Co. Pte. LTD
Claim Type:	Limit of Liability Claim, Natural Resource Damage Assessment (NRDA), Past Assessment Costs
Amount Requested:	\$11,391,721.26
Offer Amount:	\$7,218,149.91
Denied Amount:	\$4,173,571.35
Determination Date:	August 5, 2022
NPFC Claim Manager:	(b) (6)

This determination reconsiders the determination issued by the National Pollution Funds Center on April 8, 2022 for Claim J05003-RP04, M/V Selendang Ayu Oil Spill Assessment Costs. This determination represents final agency action.

I. Summary of the Reconsideration Request

The National Pollution Funds Center (“NPFC”) issued its initial determination for this claim on April 8, 2022. To the extent it is not inconsistent with this determination, NPFC’s initial determination is incorporated by reference. The facts of the incident are set forth in the initial determination.

On May 6, 2022, the NPFC received a request for reconsideration from Ayu Navigation Sdn Bhd and IMC Shipping Co. Pte. LTD (hereinafter collectively “RPs”) for \$3,867,043.06 in costs directly incurred by them. The RPs provided legal grounds contesting the standard for reimbursement employed by the NPFC when adjudicating costs directly incurred by a responsible party (“RP”). Additionally, the RPs provided their arguments in support of reimbursing the costs denied in initial determination.

II. Requirements for Claims Generally and Specific to Natural Resource Damage Claims

The NPFC is responsible for adjudicating claims against the Oil Spill Liability Trust Fund (“OSLTF” or “Fund”). Congress authorized the President to promulgate regulations for the presentation, filing, processing, settlement, and adjudication of claims under OPA. 33 U.S.C. §2713(e).¹ Acting under a series of delegations of authority, the NPFC promulgated regulations for the processing of claims. 33 C.F.R. §136.105 titled “General Requirements for a Claim” sets forth pleading requirements for the claim and is purely procedural. *Am. Steamship Owners Mut. Prot. & Indem. Ass’n, Inc. v. United States*, 489 F. Supp. 3d 106, 133 (E.D.N.Y. 2020). The claimant bears the burden of providing “all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim”, and “[i]n the discretion of the Director, NPFC, any other information deemed relevant and necessary to properly process the claim for payment.” 33 C.F.R. §§136.105(a),(e)(13). “By design, the regulation requires claimants to bolster their claim with as much information as possible so that the NPFC can reasonably

¹ In turn, by way of Executive Order 12777 (Oct. 18, 1991), the President delegated this function to the Secretary of the Department in which the Coast Guard was operating. In March 1992, the Coast Guard, Commandant delegated this function to NPFC.

determine whether reimbursement from the Fund is warranted. This is reinforced by the final, catchall provision, which requires claimants to include in their claim ‘any other information deemed relevant and necessary’ by the Director, NPFC, to properly adjudicate the claim.” *Am. Steamship*, at 134.

When the Trustees submit their claims for OSLTF reimbursement of natural resource damages (“NRD”), they must, among other things, submit: assessment and restoration plans forming the basis of the claim; a description of damages claimed by category; documented costs and cost estimates for the plan; evidence relating to the spill and the damages; witness lists and descriptions of their knowledge of the incident; certification as to accuracy of the claim and whether the assessment was conducted in accordance with the applicable natural resource damage assessment (“NRDA”) regulations (found in 15 C.F.R. Part 900); and certification that the claim does not constitute double recovery. 33 C.F.R. §136.209.

Subpart B of the Claims Regulations also provide the procedures for settlement and notice to claimant. The claimant may seek a request for reconsideration for any claim denied. The request must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 C.F.R. §136.115(d). The time in which the claimant may request reconsideration is within 60 days after date the denial was mailed, or within 30 days after receipt of the denial by claimant, whichever is earlier. *Id.* The NPFC is obligated to provide written notice of the decision within 90 days after the receipt of the request for reconsideration; the failure to provide written notice within the designated time may be deemed a denial at the option of claimant. *Id.*

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.² As a result, 5 U.S.C. §555(e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination satisfies that statutory requirement.

During the adjudication of claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence. The NPFC is not bound by the findings or conclusions reached by other entities.

The determination was electronically mailed to the RPs on April 8, 2022. The request for reconsideration was received by the NPFC on May 6, 2022 within the time limitations for a request for reconsideration. This determination is issued and constitutes a final agency action.

III. Reconsideration of NPFC Standard for Reimbursement of RP Incurred NRD

The RPs’ chief complaint is that the NPFC applied the wrong legal standard when deciding whether NRD costs incurred directly by the RPs are reimbursable by the Fund under 33 U.S.C.

² The court in *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjudication process for OSLTF claims with the following: “[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, see 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress’ overarching intent in enacting OPA was to ‘streamline’ the claims adjudication process”

§2708.³ They posit that under the “correct legal standard”, they are entitled to a “substantially greater amount” than what was offered.

Reading the language of 33 U.S.C. §2708 broadly, the RPs contend that although they are not Trustees, they still may recover any direct costs related to NRDA. They posit that because the RPs engaged in some level of cooperation with the Trustees, the NPFC must accept all costs purportedly incurred for NRD without question. They complain that NPFC set a “new standard” in requiring that they demonstrate the costs were incurred at the explicit direction of a Trustee and on behalf of the Trustee for activities determined by the Trustee to be necessary to support the Trustee-led NRDA. They assert that this “new standard” is arbitrary and capricious because this requirement is not found in OPA or the attendant regulations.

As already stated in the initial determination, because the authority to conduct NRDA rests squarely with the designated Trustees, any costs related thereto must be incurred pursuant to that Trustee authority. And because NPFC has already approved the plan by the Trustees for the NRDA and associated costs (*see* September 22, 2017 NPFC determination for DOI *Selendang* J05003-OI03), it was a simple matter that the RPs link their direct costs to activities that were conducted under the authority of the Trustees. In order to demonstrate this, the RPs ought to have shown that the costs were incurred at the explicit direction and on behalf of the Trustees in furtherance of the Trustee-approved plan. Said another way, the RPs should demonstrate that these costs would have been incurred by the Trustees for NRDA activities and that the Trustees authorized the RPs to incur those costs directly on behalf of the Trustees. Requiring this evidence is not arbitrary or capricious; rather, this comports with Congress’s intent that the designated Trustees—not the responsible parties—conduct NRDA and recover the related costs thereto.

The NPFC articulates the statutory framework and legal basis supporting its determination in this Section (Part III) and the specific factual grounds for denial in Part IV. For the reasons set forth below, the NPFC reaffirms its decision.

1. Statutory Background of Trustee Authority.

As described in the initial determination, the plain reading of OPA demonstrates that only the Trustees—not the RPs—have the authority to assess NRD and to recover the same. 33 U.S.C. §2706(b)(1) (“The President [...] shall act on behalf of the public [...] as Trustee to present a claim for and to recover damages to the natural resources”); *see also Id.* at §2706(b)(2) (“The President shall designate the Federal officials who shall act on behalf of the public as Trustees for natural resources under this Act.”); *and Id.* at §2706(c)(1) (“The Federal officials designated [...] shall assess natural resource damages”); *and id.* at 2702(b)(2)(A) (“Natural resources—Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States Trustee”). Congress compelled the Undersecretary of Commerce for Oceans and Atmosphere (NOAA)—not the RPs—to promulgate regulations for NRDA. 33 U.S.C. §2706(e)(1). Congress provided that the Trustees—not the RPs—are entitled to a rebuttable presumption for any determination or assessment made in accordance with the promulgated regulations. 33 U.S.C. §2706(e)(2). And Congress allowed the Trustees—not the RPs—to retain sums recovered in a trust account. 33 U.S.C. §2706(f).

³ Request for Reconsideration Letter dated May 6, 2022.

Even OPA's legislative history and regulations underscore the supremacy of the Trustees—not the RPs—to conduct these assessments:

Any assessment of damages conducted in accordance with the regulations promulgated under this Act has the force and effect of a rebuttable presumption on behalf of the State or Federal Trustee in any judicial or administrative proceeding under this Act. Assessments, of course, must be conducted by Trustees, not by responsible parties.

S. REP. No. 101-94 at p. 15 (1989)(emphasis added).

The Committee intends that the federal Trustees of natural resources designated in the National Contingency Plan [...] also shall act as federal Trustees for natural resources under this Act. [...] Federal [...] Trustees shall assess damages to natural resources under their Trusteeship, and shall develop and not merely adopt, but implement plans for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources under their Trusteeship. [...]

H.R. Rep. No. 101-242, Part 2 at pp. 60-61 (1989)(emphasis added).

And although the regulations require the Trustees to invite participation of the RPs, said participation is limited and controlled by the Trustee:

Nature and extent of participation. If the responsible parties accept the invitation to participate, the scope of that participation must be determined by the Trustees, in light of the considerations in paragraph (c)(5) of this section. [...] Final authority to make determinations regarding injury and restoration rest solely with the Trustees. Trustees may end participation by responsible parties who, during the conduct of the assessment, in the sole judgment of the Trustees, cause interference with the Trustees' ability to fulfill their responsibilities under OPA and this part.

15 C.F.R. §990.14(c)(4)(emphasis added). This entrustment of great responsibility as guardians of public resources is unsurprising. Appointed by the President, and at the highest levels of State, foreign government and Indian tribe, the Trustees serve a fiduciary role in ensuring the public resources are restored after an oil spill. This deference and entrustment does not extend to the spiller.

Notwithstanding the above deference, even the Trustees do not have an open checkbook to incur costs under the guise of assessments. The regulations provide strict constraints on the Trustees' authority. For example, assessment costs must be reasonable (33 U.S.C. §2706(d); §2702(b)(2)(A)), the definition of which is contained in the regulations:

Reasonable assessment costs means, for assessments conducted under this part, assessment costs that are incurred by Trustees in accordance with this part. In cases where assessment costs are incurred but Trustees do not pursue restoration, Trustees may recover their reasonable assessment costs provided they have determined that assessment actions undertaken were premised on the likelihood of injury and need for restoration. Reasonable assessment costs also include: administrative costs, legal costs, and other costs necessary to carry out this part;

monitoring and oversight costs; costs associated with public participation; and indirect costs that are necessary to carry out this part.

15 C.F.R. §990.30 (emphasis added). To be deemed “in accordance with this part”, the assessment procedures must comply with all of the following:

- The procedure must be capable of providing assessment information of use in determining the type and sale of restoration appropriate for a particular injury;
- The additional cost of a more complex procedure must be reasonably related to the expected increase in the quantity and/or quality of relevant information provided by the more complex procedure; and
- The procedure must be reliable and valid for the particular incident.

15 C.F.R. §990.27(a). *See also, General Elec. Co. v. U.S. Dept. of Commerce*, 128 F.3d 767, 779 (D.C. 1997)(noting that the requirement in 15 C.F.R. 900.27 that the plans be “reliable and valid for a particular incident” is sufficient safeguard to ensure accuracy and reasonableness of NRD costs). The rebuttable presumption applies only where the assessments made by the Trustees are “in accordance with this part.” 15 C.F.R. §990.13.

The Trustees likewise have a choice of assessment procedures and parameters for selecting said procedures. *Id.* at §990.27(b)-(c). Finally, it is the Trustees—not the RPs—who decide what is necessary to carry out this part, particularly in the context of coordination with the RPs: “Final authority to make determinations regarding injury and restoration rest solely with the Trustees.” 15 C.F.R. §990.14.

Congress was clear that the Trustees—not the RPs—had the authority to conduct NRDA. Congress was also clear that the regulations would govern both the Trustees’ damage assessment procedures as well as the claims procedures for payment of uncompensated damages from the Fund. Those regulations put sufficient constraints on the Trustees’ authority to incur NRDA costs and ensure that those costs are reasonable. It is highly improbable that Congress intended Section 2708 to provide the RPs more liberal access to the Fund than even that of the Trustees whose entitlement is controlled and limited by both OPA and the regulations. To the contrary, costs incurred by a RP will not be reasonable assessment costs under the OPA and the relevant regulations when those costs were not approved by the Trustee(s). That’s particularly true when a RP incurs costs to protect its litigation interests as opposed to assessing or restoring NRD resulting from the RP’s oil spill.⁴

2. OPA’s Section 2708 only permits the RPs to *submit* a claim; the controlling law for adjudications of claims is found in Section 2713 and the attendant regulations.

⁴ The NPFC specifically highlights the RPs costs related to the “cooperative” Harlequin P450 Study. The study’s purpose was to assess chronic oil exposure and injury to seaducks. However, the RPs proposed and conducted a separate component of the study involving assessment of non-oil related impacts in mussels to provide an alternate theory of injury to seaducks – i.e. injuries and associated damages were not oil related, thereby reducing the RPs liability. When the RPs proposed the mussel study component to the Trustees, the Trustees responded that the RPs failed to provide scientific literature supporting their hypothesis of non-oil impacts, failed to provide a sampling plan for the Trustees to review, did not provide the Trustees with adequate time to consider the request, and, as a result, the Trustees did not consider the mussel study a cooperative activity. Thus, even though the overall P450 Study was cooperative, the costs for the mussel study component were very clearly not directed or authorized by the Trustees and were conducted on behalf of the RPs’ own interests.

The RPs attempt to impermissibly broaden the scope of Section 2708. In their early correspondence to the NPFC, they argue:

Section 2708 of OPA thus expressly and unequivocally allows an RP that limits its OPA liability to recover from the OSLTF the sum of: (1) removal costs it incurs; (2) damages it incurs; and (3) payments it makes to settle claims, to the extent that the sum exceeds the limit of its OPA liability.⁵

In their request for reconsideration, they seem to digress from this proposition, arguing instead that they are “entitled to be reimbursed a substantially greater amount” than what NPFC offered in its initial determination.⁶

Indeed, Section 2708 only provides authority to assert a claim and the extent of recovery against the OSLTF:

(a) In general.

The responsible party [...] may assert a claim for removal costs and damages under section 2713 of this title only if the responsible party demonstrates that—[...]

(2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

(b) Extent of recovery

A responsible party who is entitled to a limitation of liability may assert a claim under section 2713 of this title only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party [...] exceeds the amount to which the total of the liability under section 2702 of this title and removal costs and damages incurred by [...] the responsible party is limited under section 2704 of this title.

33 U.S.C. §2708(emphasis added).

Thus, while the RPs may assert a claim, the claim is governed by the provisions of Section 2713.7 Section 2708 offers the RPs no more or less entitlement than the opportunity to submit a claim. As noted above, for the payment of NRD claims under Section 2713, ordinarily the Trustees are subject to detailed regulations governing the presentation, filing, processing, settlement, and adjudication of NRD claims. *Id.* §2713(e); 33 C.F.R. Part 136.

3. Given that Congress mandated the Trustees conduct NRDA, requiring the RPs to demonstrate the direct costs purportedly associated with these assessments were incurred at the explicit direction and on behalf of the Trustees to support the Trustee-led assessment was not arbitrary and capricious or manifestly contrary to the statute.

Because the RPs are not Trustees, they can neither satisfy the certification standards imposed upon the Trustees by the Claims Regulations (33 C.F.R. §136.209), nor be beholden to the restrictions and safeguards of 15 C.F.R. Part 900. Moreover, because the RPs did not reimburse

⁵ See Admin Record RP letter to NPFC May 21, 2020;

⁶ Request for Reconsideration to NPFC May 6, 2022.

⁷ All claims against the OSLTF must be paid in accordance with 33 U.S.C. §2713. See, 33 U.S.C. §2712(a)(4).

the Trustees for the RPs' own directly incurred costs, the subrogation clause of Section 2715 does not apply.

However, because the NRD regulations encourage RP participation in NRD assessments, including an RP's willingness to fund activities, it would be unfair and contrary to OPA's purpose—to provide quick and efficient clean up and compensation for damages⁸—to deny those costs that would have been incurred by the Trustees had the RP not paid them. But the NPFC could not just give RPs a blank check simply because the RPs say these were NRD costs. Accordingly, the NPFC was within its authority to require the RPs to demonstrate that the direct costs were incurred under the authority of the Trustees. 33 C.F.R. §136.105(a), 136.105(e)(13).

“If the agency action was authorized, the court must consider whether the agency's decision ‘was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. United States*, 489 F. Supp. 3d 106, 130 (E.D.N.Y. 2020)(quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (citing 5 U.S.C. § 706(2)). Moreover, “[o]nly if the agency ‘offered an explanation for its decision that runs counter to the evidence before the agency, or [one] so implausible that it could not be ascribed to a difference in view or the product of agency expertise,’ will the decision be overturned. *Id.* (citing *Karpova v. Snow*, 497 F.3d 262 at 267-268 (2nd Cir. 2007). “[T]he court will uphold the agency’s determination so long as the agency examines the relevant data and has set out a satisfactory explanation, including a rational connection between the facts found and the choice made.” *Id.* (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

As noted above, Congress authorized the President to promulgate regulations governing the claims process. 33 U.S.C. §2713(e).⁹ Under 33 C.F.R. §136.105(a), and 136.105(e)(13) the Claims regulations provide broad authority to require documentation, information, and evidence that NPFC deems relevant and necessary to adjudicate the claim. “Nowhere does 33 C.F.R. §136.105, or §136.105(e) [...] purport to enhance or limit, create or destroy, any rights or entitlement[...].” *Am. Steamship*, at 134. It is now too late to review the validity and scope of NPFC's authority granted under this regulation. 33 U.S.C. §2717(a).

By requiring the RPs to provide evidence that the direct costs were incurred at the direction and on behalf of the Trustees in support of the Trustee-led assessment plan, the NPFC has construed OPA and the attendant regulations in a manner to give effect to Section 2708(b)(entitlement to file a claim for damages incurred above the limit of liability) while ensuring that the Trustees' authority to conduct the assessments is not obfuscated by potentially competing agendas of the RPs to recover more than what is compensable. Because the Trustees have already demonstrated to the NPFC that their damages assessment comports with the regulations, it necessarily follows that those costs incurred at the explicit direction and on behalf of the Trustee for the Trustee-led plan should be recovered. In requiring the direct costs be pursuant to Trustee authority, the NPFC avoids the payment of duplicative, speculative, and unsubstantiated costs and ensures that the RPs do not profit by engaging in activities that were meant to disprove and/or reduce their liability, were speculative, or were otherwise meant to obfuscate the process. Costs

⁸ OPA's purpose is to establish “uniform and predictable rules that encourage prevention, quick cleanup, and reasonable compensation.” *Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. United States*, 489 F. Supp. 3d 106, 110 (E.D.N.Y. 2020)

⁹ In turn, by way of Executive Order 12777 (Oct. 18, 1991), the President delegated this function to the Secretary of the Department in which the Coast Guard was operating. In March 1992, the Coast Guard, Commandant delegated this function to NPFC.

that do not support the plan—i.e. costs that were incurred to dispute the validity of the Trustees’ assessments, costs for legal fees to undermine the Trustees’ efforts, costs that duplicate the Trustees’ efforts are not recoverable. Indeed, so long as the costs were “at the direction of and on behalf of a Trustee, for those activities determined by the Trustee to be necessary to support the Trustee-led assessment,” the NPFC will be satisfied that they are compensable. It is up to the RPs to link their damages assessment costs to specific Trustee authority. *See e.g. Am. Steamship Owners*, 489 F.Supp.3d at 135 (“Plaintiff’s challenge fails to grasp that the interplay of several OPA statutes requires a responsible party [...] to link damages and assessment costs for which it seeks compensation from the Fund, to specific third-party claims”).

The RPs point to the existence of a joint agreement in support of the direct costs that they have incurred. As will be discussed in more detail below, the RPs have failed to demonstrate how those costs were incurred at the direction of the Trustees. Indeed, the final authority to make determinations regarding injury and restoration rest solely with the Trustees. 15 C.F.R. §990.14. Though the NRDA regulations encourage responsible party participation, that participation does not give the responsible parties carte blanche to choose their own restoration and assessment activities, independent of the efforts of the Trustees or to otherwise undermine those efforts.

4. The *Julie N.* and *Kuroshima* do not stand for the proposition that the mere existence of a joint agreement gives the Responsible Parties an open checkbook to incur any costs under the guise of NRD.

The RPs complain that the outcome today is “irreconcilably different” from the decisions in *Julie N* (2002) and *Kuroshima* (2006). In both cases, the adjudication and payment were premised on a cooperative NRD assessment agreement. The outcome in this determination is not contrary—NPFC is proposing to pay nearly all of the NRD costs that the RPs reimbursed to the Trustees as well as directly incurred NRD costs when the RPs demonstrated that those costs funded activities authorized by the Trustees. With this determination, NPFC has changed its position that a RP’s mere participation in a cooperative assessment does not create an entitlement to OSLTF reimbursement of all directly incurred costs. Before a RP’s direct costs can be reimbursed, the RP should demonstrate that the claimed costs were incurred at the explicit direction and on behalf of the Trustees in furtherance of the Trustee-approved plan.

It should be noted that the determinations issued in response to the claims submitted in the *Julie N* (2002) and *Kuroshima* (2006) did not create binding precedent, Offers of payment of claims under 33 C.F.R. Part 136 are settlement offers only. 33 C.F.R. §136.115. Because these are settlement offers, the payment of NRD direct costs in prior determinations does not lead to a black letter rule that they will be automatically paid in future determinations. There is no authority for the proposition that a settlement offer to a prior claimant in a separate incident would lead to the same result to an entirely different claimant for a different incident. Each claim is adjudicated on the merits based on the evidence and the administrative record for that claim. *See e.g. Smith v. Property Holdings v. U.S.*, 311 F.Supp.2d 69, 83 (D.C. 2004)(if “settlement offers are not evidence of a defendant’s liability” they likewise do not “prove[] that a party is entitled to reimbursement”).

The NPFC acknowledges, however, that it cannot completely ignore its reasoning in past determinations. While “it is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent [...] it is equally axiomatic that an agency is free to change its mind so long as it supplies a ‘reasoned analysis’.” *Nat’l Cable &*

Telecommunications Ass'n v. F.C.C., 567 F.3d 659, 667 (D.C. Cir. 2009)(citing *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 27, 57 (1983)).

The Supreme Court illuminated what an agency is required to articulate under a reasoned analysis when it is departing from prior precedent or when it is changing policy:

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States v. Nixon*, 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009)(emphasis in original).

To the extent NPFC relied on the RP's participation in a cooperative agreement as the sole basis for reimbursing its directly incurred NRDA costs in *Julie N* (2002) and *Kuroshima* (2006), the NPFC has changed its position on what a RP must show to receive OSLTF reimbursement of a RP's directly incurred NRDA costs. After careful consideration of all the facts in this claim and OPA, NPFC concludes that requiring the RPs to demonstrate the NRD costs incurred were at the direction and on behalf of the Trustees supports the intent and purpose of OPA and ensures that the RPs do not turn the claims process into an opportunity to profit on costs that are not compensable under OPA. As previously explained, the Trustees have both the responsibility and the authority under the OPA and its regulations to assess and restore NRD, not the RP. In a complex multi-year effort, such as the *Selendang* NRDA, the mere existence of a cooperative agreement is not sufficient to establish that the RPs' costs were incurred under the authority of and authorized by the Trustees.⁴ The explicit direction of the Trustees is the clearest proof that a RP's actions are part and parcel of the Trustees' plan. By limiting OSLTF reimbursement in this manner, this change in policy will significantly improve the OSLTF claims process by avoiding costs that do not facilitate the Trustees' responsibility to assess and restore the NRD resulting from the RP's oil spill. This change in policy will also improve the NRDA process by decreasing a RP's incentive to conduct assessment activities that are deemed unhelpful by the Trustees.

The specific reasons for rejecting specific direct costs are set forth in more detail below.

IV. Reconsideration of Activity Specific Costs

Harlequin P450 Study

Summary of Claimed Activity Costs

The RPs claimed \$312,399.63 in costs related to the 2008 study of chronic exposure of oil on harlequin ducks to support the assessment of injury to birds.¹⁰ The 2008 P450 study was a continuation of assessment work conducted by both the Trustees and the RPs in 2005 and 2006¹¹ to assess impacts to seabirds from chronic exposure to residual oil. The Trustees proposed¹², and the RPs agreed to fund, another season of sampling and analysis that was conducted in 2008. During the 2008 survey, the RPs and Trustees captured live ducks, took tissue biopsies from their livers, and then conducted chemical analyses of the liver cells to study PAH exposure.¹³ The RPs' claimed damages included costs to assist in study design, participate in field work, conduct analysis of results, coordinate use of the research vessel, and conduct a mussel study to assess potential non-oil impacts to ducks.

Initial NPFC Adjudication

In its initial adjudication¹⁴ of the RPs' claim, the NPFC determined that:

1. The P450 study was an appropriate assessment activity for the incident;
2. Based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the P450 study;
3. Based on the Trustee documentation in the Administrative Record, \$262,032.10 of the RPs' claimed costs were incurred at the request of, and on behalf of the Trustees, to conduct activities necessary to support the Trustee-led P450 Study. Accordingly, such costs were reimbursable from the Fund in accordance with 33 C.F.R. §136.211(a) as reasonable Trustee past assessment costs;
4. \$23,948.95 of the RPs' claimed costs were related to the collection and analysis of mussels to evaluate paralytic shellfish poisoning (PSP), a component of the study that the Trustees did not request, direct, or participate in. Accordingly, based on the Trustee documentation in the Administrative Record, associated costs were denied because they were clearly not incurred at the request of the Trustees, on behalf of the Trustees, or necessary for the Trustees' NRDA;
5. \$8,856.25 of the RPs' claimed costs were related to communications between KYL and The Swedish Club, the vessel's insurer. Communications between the RPs and its insurer were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, costs for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable. Accordingly, such costs were denied; and

¹⁰ Claim Section II.A.2.b

¹¹ Costs related to the 2005 and 2006 surveys are discussed previously in the determination

¹² Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.c, p. 4-5

¹³ Trustee Plan, pp. 3-20 - 3-21

¹⁴ J05003-RP04 Claim Summary / Determination, pages 32-34

6. \$17,562.33 of the RPs' Polaris costs¹⁵ did not have a documented purpose¹⁶. Accordingly, based on the Trustee documentation in the Administrative Record, such costs were denied as they were clearly not incurred at the request of the Trustees, directed by the Trustees, or necessary for the Trustees' NRDA.

Claimant Basis for Reconsideration of Denied Costs

In their request for reconsideration¹⁷, the RPs included a study report¹⁸ from their contractor that asserts exposure of ducks to PSP toxins can produce the same indicators of injury in ducks (i.e. elevated P450 levels) as those caused by oil exposure. The report further asserts that elevated levels of PSP had been observed in the area of the spill. The RPs conducted the mussel study to determine if PSP toxins were the cause of elevated P450 levels the areas impacted by oil. The RPs states that their proposal was made shortly before the 2008 study and the Trustees did not have time to evaluate it. The RPs did not provide any additional information or argument to support the reconsideration of denied costs related to communications with the Swedish Club, nor did they provide additional information or argument to support the reconsideration of insufficiently documented Polaris costs.

NPFC Analysis and Reconsideration Determination

Upon review of the additional information provided by the RP, along with consideration of the overall Administrative Record, the NPFC affirms its original determination denying \$50,367.53 in costs related to the P450 study. The documentation in the Administrative Record evidences that the mussel study was conceived and conducted by the RPs without request, direction, or participation from the Trustees.¹⁹ The Administrative Record further reflects that, when the mussel study was proposed by the RPs, the Trustees' responded that the RPs failed to provide scientific literature supporting their hypothesis of PSP impacts, failed to provide a sampling plan for the Trustees to review, did not provide the Trustees with adequate time to consider the request, and, as a result, the Trustees did not consider the mussel study a cooperative activity.²⁰ Accordingly, costs related to the mussel study are denied because they were clearly not incurred at the request of the Trustees, on the behalf of the Trustees, or necessary for the Trustees' NRDA.

While PSP may have been a subject of relevant interest to the RPs, the RPs interest has no basis on the NPFC's determination of reasonable Trustee assessment costs. Even though parts of the *Selendang* NRDA were conducted cooperatively, the RPs did not, and cannot, obtain independent Trustee authority to conduct NRDA activities of their own selection. An RP may understandably choose to incur costs to conduct any number of activities related to an incident, however such efforts are conducted on behalf of its own legal and financial interests. These divergent interests were fully acknowledged by the RPs from the beginning of the NRDA, admitting that the Trustees and RPs have different "constituencies" whom they represent in the

¹⁵ J05003-RP04 Claim Summary / Determination, footnote 178

¹⁶ NPFC suspected that the costs related to duplicative analysis of the Trustees report

¹⁷ RPs' Request for Consideration, page 32

¹⁸ Potential Paralytic Shellfish Poisoning (PSP) Toxin Induction of Cytochrome P-450 (CYP1A) in Harlequin Ducks Over-Wintering in the Waters of Unalaska Island, Polaris Applied Sciences, January 7, 2008

¹⁹ Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.c, pp-4-5

²⁰ Email from DOI to RPs, dated February 4, 2008

NRDA.²¹ This divergence of interest is clearly manifested here, where the RPs were interested in studying the potential impacts of PSP because such impacts would provide a separate source of injury to marine birds, thereby reducing their potential liability for incident-related OPA damages. For this reason, only such costs that were incurred at the direction of the Trustees, on behalf of the Trustees' NRDA, and necessary to support the Trustees' NRDA can be considered "reasonable Trustee assessment costs" that were incurred as representatives of the public as designated by, among other authorities, subpart G of the National Contingency Plan and 33 U.S.C. §2706(b).

As stated previously, the RPs did not provide additional information or argument to dispute the NPFC's earlier determination that costs related to communications with the Swedish Club, the NPFC were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, that costs for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable. Furthermore, given that the RPs' did not provide additional information to support the \$17,562.33 of insufficiently documented Polaris costs, such costs remain denied because, based on the Trustee documentation in the Administrative Record they were clearly not incurred at the request of the Trustees, on the Trustees' behalf, or necessary for the Trustees' NRDA.

Accordingly, the NPFC affirms its' initial determination that \$262,032.10 of the RPs' claimed costs for the P450 study are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable Trustee past assessment costs.

2010 Reference Beach Study and Seabird Mortality Estimates

Summary of Claimed Costs

The RPs claimed costs of \$626,755.72 for their assessment efforts to estimate seabird mortality and to conduct a reference beach study to assist in their mortality estimate.²² Early in the NRDA, the Trustees identified the Beached Bird Model (BBM) as their chosen method for quantifying the number of birds injured from direct oiling.²³ The Trustees and RPs cooperatively conducted reference beach studies²⁴ in 2005 to provide site specific data to use as inputs for the BBM.

In 2007, the Trustees and RPs engaged in cooperative discussions involving the interpretation of bird injury data, including the results of the 2005 reference beach studies.²⁵²⁶ The Trustees' directed their technical expert to proceed with the data from the studies and calculated a preliminary estimate of injury with the BBM. The draft technical report of the Trustees' BBM was shared with the RPs. The RPs disagreed with the analysis and results of the Trustees' BBM. In response, the RPs planned a 2009 aerial survey to detect auklet locations, conducted a separate set of reference beach studies in 2010, and developed its own model to estimate seabird

²¹ Email from Polaris to KYL, dated February 7, 2005

²² Claim Section II.A,2.h

²³ Trustee Plan, pp. 3-16 to 3-19

²⁴ Studies assessing carcass deposition rate, carcass persistence, searcher efficiency, and background mortality

²⁵ The Trustees report that the results of the background bird mortality study were complicated by the presence of oiled birds (the study was conducted at an unoiled reference beach site, thus there should not have been any oiled birds found in the study)

²⁶ Enclosure G of Trustee Additional Information Response for Claim N10036J05003-OI03, dated October 7, 2016, p 3.

mortality.²⁷ The RPs' claimed damages included costs to review the Trustees BBM injury report, analyze bird feather chemistry, develop the 2009 aerial bird survey, conduct the 2010 Reference Beach Study, and develop the RPs' BBM estimate of injury.

Summary of Initial NPFC Adjudication

In its initial adjudication²⁸ of the RPs' claim, the NPFC determined that:

1. The BBM was an appropriate assessment activity for the incident²⁹;
2. Based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the BBM;
3. Based on the Trustee documentation in the Administrative Record, \$94,358.83 of the RPs' claimed costs were incurred at the request of, and on behalf of the Trustees, to conduct activities necessary to support the Trustee-lead study to quantify bird injury through the BBM. Accordingly, such costs were reimbursable from the Fund in accordance with 33 C.F.R. §136.211(a) as reasonable Trustee past assessment costs;
4. \$455,529.52 of the RPs' claimed costs were related to the development of a separate BBM from that prepared by the Trustees and a second field study of background mortality in 2010. The Trustees did not request or direct the activities conducted by the RPs and, with respect to the 2010 field studies, the Trustees specifically emphasized that they never endorsed that the study would provide more useful data than the 2005 studies.³⁰ Accordingly, associated costs were denied because, based on the Trustee documentation in the Administrative Record, they were duplicative, clearly not incurred at the request of the Trustees, on the Trustees' behalf, or necessary for the Trustees' NRDA;
5. \$34,964.87 of the RPs' claimed costs were related to a planned, but later aborted, 2009 overflight of seabird rafting locations. Associated costs were denied because, based on the Trustee documentation in the Administrative Record, they were clearly not incurred at the request of the Trustees, directed by the Trustees, or necessary for the Trustees' NRDA;
6. \$33,557.50 of the RPs' claimed costs were related to oil source analysis of oiled feathers from previously collected carcasses. Associated costs were denied because, based on the Trustee documentation in the Administrative Record, they were duplicative, clearly not incurred at the request of the Trustees, directed by the Trustees, or necessary for the Trustees' NRDA;
7. \$1,232.50 of RPs' Polaris costs³¹ were related to subsistence and third party claims. Associated costs were denied because, based on the Trustee documentation in the Administrative Record, they were clearly not incurred at the request of the Trustees, directed by the Trustees, or necessary for the Trustees' NRDA; and

²⁷ Proposed Bird Background Mortality Study in the Region of the *Selendang Ayu* Grounding, Unalaska Island, Prepared By: (b) (6) 2010, 2 pages

²⁸ J05003-RP04 Claim Summary / Determination, pages 40-42

²⁹ J05003-RP04 Claim Summary / Determination, page 14

³⁰ Enclosure G of Trustee Additional Information Response for Claim N10036J05003-OI03, dated October 7, 2016, pp. 2-3

³¹ J05003-RP04 Claim Summary / Determination, footnote 246

8. \$7,112.50 of the RPs' claimed costs were related to communications between KYL and The Swedish Club, the vessel's insurer. Communications between the RPs and its insurer were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, costs for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable. Accordingly, such costs were denied.

Claimant Basis of Reconsideration

In their request for reconsideration³², with respect to denied costs related to estimating seabird mortality using the BBM, the RPs emphasized that the Trustees invited them to participate in the estimation of seabird mortality and that this assessment activity was a cooperative study under the Funding and Participation Agreement. The RPs stated that the location of the incident limited the assessment data available to the Trustees, which complicated the development of the BBM and necessitated numerous modeling assumptions. Consequently, the RPs asserted that extensive coordination and discussion between the RPs and Trustees were needed to complete the BBM. The RPs highlighted numerous discussions between the RPs and Trustees to establish the cooperative efforts that lasted several years' time.³³ The RPs asserted that the Trustees provided the RPs with their underlying BBM model to allow for the RP to conduct its own model and that all the work conducted by the RPs was of the type expected by the Trustees.

With respect to the 2010 Reference Beach Surveys, the RPs asserted that they had concerns regarding the validity of the data produced by the 2005 beach surveys. The RPs emphasized the Trustees were invited to participate in the study, commented on the draft proposal of the study, and agreed to provide carcasses for the RPs use in the 2010 study. The RPs emphasized that (1) the report from the 2010 Reference Beach Surveys was shared with the Trustees, (2) that the report was included in the Trustees' Administrative Record for the NRDA, (3) the Trustees referenced the report and results in their Assessment plan, and (4) the NPFC confirmed in its adjudication of the Trustees request for additional assessment funding that the Trustees would consider the results of the 2010 surveys in their final assessment of bird injury.

The RPs did not provide any additional information or argument to support the reconsideration of denied costs related to (1) communications with the Swedish Club, (2) Polaris subsistence and third party claims work, (3) the proposed 2009 overflight, and (4) source analysis of oiled feathers.

NPFC Analysis and Reconsideration Determination

Upon review of the additional information provided by the RP, along with consideration of the overall Administrative Record, the NPFC affirms its original determination denying \$532,396.89 in costs related to the 2010 Reference Beach Study and Seabird Mortality Estimates. With respect to denied costs related to estimating seabird mortality using the BBM, as established in the original determination, the general status of an assessment study as "cooperative" is, not in itself, sufficient evidence to prove that a specific RP activity was conducted at the direction of the Trustees, on the behalf of the Trustees, for costs necessary to support the Trustees NRDA.

³² RPs' Request for Consideration, pages 29-32

³³ See Exhibit 2 to RP's November 2018 Claim at 02_000460 – 62; 02_000485; 02_000600; 02_000609; 02_000611; 02_000723; 02_000745; 02_000756; 02_000782; 02_000823; 02_000849 – 50; 02_000895; 02_000901; 02_0010

15 C.F.R §990.14(c) requires that Trustees provide a certain level of cooperation and coordination with the RPs, which, at a minimum includes “notice of Trustee determinations required under this part, and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment.” Regulatory compliance should not be conflated with a direction to the RPs to conduct activities on the Trustees’ behalf. Furthermore, unlike the requirements placed on the Trustees, an RP elects to participate in the NRDA and, as discussed previously, this participation serves to protect its own legal and financial interests.

Similarly, the placement of an assessment activity in the Funding and Participation Agreement (FPA) does not prove that a specific RP activity was conducted at the direction of the Trustees, on behalf of the Trustees, for costs necessary to support the Trustees’ NRDA. Largely, the FPA requires the Trustees to allow the RPs’ to participate in the Trustees’ NRDA in exchange for guaranteed funding from the RPs. The existence of an assessment activity in the FPA more convincingly supports quite the opposite of the RPs assertion – rather than proving that the Trustees’ requested the RPs’ participation, the FPA indicates that the RPs themselves wanted access to participate in a Trustee activity and were willing to provide funding to the Trustees in order to obtain that access. This interpretation of the FPA is clearly supported by correspondence during its origination, with the Trustees informing the RPs that “DOI, ADNR and ADF&G anticipate that they would need, collectively, approximately \$120,000 in advance funding to enter into a cooperative agreement with the responsible parties” and that continued failure of the RPs to provide timely funding to the Trustees prior to the FPA was causing the Trustees to consider “the value of entering into a cooperative agreement at all.”³⁴

Despite the above analysis documenting the requirements of the Trustees to engage the RPs in their estimation of seabird mortality, as opposed to requesting the RPs’ participation, the NPFC endeavored to interpret the RPs’ participation in the most favorable perspective possible.³⁵ This generous interpretation of the RPs’ participation was even further extended in light of OPA’s prohibition against double recovery at 33 U.S.C. §2706(d)(3), which would reasonably compel the NPFC to question whether, given that the NPFC has agreed to reimburse the RPs for the costs of the Trustees personnel and contractors to conduct seabird mortality assessment efforts, why any of the RPs costs would be considered necessary to support the Trustees’ NRDA and not represent duplicative efforts and a double recovery of damages. However, consistent with a favorable interpretation of the RPs’ participation, the NPFC approved the reimbursement of \$94,358.83 in costs incurred directly by the RPs to review, discuss, and comment on the Trustees’ BBM and estimation of bird morality. Notably, the costs approved by the NPFC span numerous years and cover the entire period of time³⁶ that focused on the discussion and analysis of the Trustee produced BBM.

The costs denied by the NPFC for the seabird morality estimate activity related to activities that were conducted, as described in the RPs’ claim, “to develop the RPs’ estimate of seabird mortality”.³⁷ Based on the Administrative Record, these are costs that were clearly not incurred

³⁴ Email from the Trustees to the RPs, dated November 15, 2006

³⁵ “When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs’ activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees.”

³⁶ Notably, this period of time for reimbursement allowed by the NPFC includes almost all the communications and interactions cited by the RPs in their reconsideration request.

³⁷ Claim Section II.A,2.h

at the direction of the Trustees, on the Trustees' behalf, or necessary to support the Trustees' NRDA. While the Trustees' may have provided their model to allow for the RPs to conduct their own injury calculations, this does not evidence that the Trustees' directed or requested the RPs efforts. As well, even if the Trustees anticipated that the RPs would need to conduct these sort of activities, the RPs themselves elected to participate and had their own separate interests in calculating their own mortality estimate which, unsurprisingly, was significantly lower than the Trustees' estimates.

With respect to the 2010 Reference Beach Surveys, the RPs did not provide any evidence to rebut the NPFC's prior determination that the costs were clearly not incurred at the request of the Trustees, on the Trustees' behalf, or necessary for the Trustees' NRDA. The Administrative Record clearly established that the Trustees never endorsed that the RPs study would provide more useful data than the 2005 studies, either at the time it was conducted or at any point afterwards. While the survey may have been a subject of relevant interest to the RPs, the RPs interest has no basis on the NPFC's determination of reasonable Trustee assessment costs. Even though parts of the *Selendang* NRDA were conducted cooperatively, the RPs did not, and cannot, obtain independent Trustee authority to conduct NRDA activities of their own selection. An RP may understandably choose to incur costs to conduct any number of activities related to an incident, however such efforts are conducted on behalf of its own legal and financial interests. For this reason, only such costs that were incurred at the direction of the Trustees, on behalf of the Trustees' NRDA, and necessary to support the Trustees' NRDA can be considered "reasonable Trustee assessment costs" that were incurred as representatives of the public as designated by, among other authorities, subpart G of the National Contingency Plan and 33 U.S.C. §2706(b).

The NPFC similarly rejects the RPs' assertion that references to the 2010 surveys in the Administrative Record and the NPFC's adjudication of the Trustees' claim qualifies as retroactive approval of the study. First, the Trustees' continued disassociation from the study directly contradicts any implied import from the study's inclusion in the Administrative Record. Furthermore, the Administrative Record reflects that the RPs' ensured that, according to the FPA and its amendment, that they be allowed to participate in adding their preferred documents to the Administrative Record to support their own interests, such as getting reimbursed from the NPFC. Finally, the NPFC's reference to the study in the Trustees' assessment determination in no way could be interpreted as Trustee authorization of the RPs' study. Identically to an RP, the NPFC has no trustee authority to conduct or authorize an NRD assessment activity. As well, the NPFC would simply expect the Trustees to address any public comments on their plan in the Administrative Record, whether it be from a member of the public, an NGO, the RP, or anyone else.

As stated previously, the RPs did not provide additional information or argument to dispute the NPFC's earlier determination that costs related to communications with the Swedish Club, the NPFC were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, that costs for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable. Furthermore, given that the RPs' did not provide additional information to support the (1) Polaris subsistence and third party claims work, (2) the proposed 2009 overflight, and (3) source analysis of oiled feathers, such costs remain denied because, based on the Trustee documentation in the Administrative Record they were clearly not incurred at the request of the Trustees, on the Trustees' behalf, or necessary for the Trustees' NRDA.

Accordingly, the NPFC affirms its' initial determination that \$94,358.83 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable Trustee past assessment costs.

Lingering Oil Study

Summary of Claimed Activity Costs

The RPs claimed \$695,213.73 in costs to conduct a lingering oil study to support the assessment of injury to marine resources.³⁸ In 2008, the Trustees proposed conducting cooperative follow-up studies to determine the extent that oil remained within the spill area and, if it remained, whether it was in a location and form that was continuing to cause injuries to natural resources.³⁹ In response to the Trustees request, the RPs agreed to cooperatively participate in and fund the Trustees' study. The Trustees' produced a detailed study plan with input from the RPs and relied on direct coordination and funding of the vessel charters from the RPs for the study. The RPs provided personnel to participate in the study, but the remainder of the study components (sample analysis and report generation) were identified as Trustees activities.⁴⁰ The RPs' claimed damages included costs to assist in study design, participate in field work, conduct laboratory analysis of tissue samples, conduct independent analysis of study data, analyze the Trustees' report, and develop an independent study report.

Summary of Initial NPFC Adjudication

In its initial adjudication⁴¹ of the RPs' claim, the NPFC determined that:

1. The overall Lingering Oil study was an appropriate assessment activity for the incident;
2. Based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the Lingering oil study;
3. Based on the Trustee documentation in the Administrative Record, \$567,640.23 of the RPs' claimed costs were incurred at the request of, and on behalf of the Trustees, to conduct activities necessary to support the Lingering Oil study. Accordingly, such costs were reimbursable from the Fund in accordance with 33 C.F.R. §136.211(a) as reasonable Trustee past assessment costs;
4. \$122,942.30 of the RPs' claimed costs were related to independent data analysis, generation of an independent report, and other activities conducted after finalization of the Trustees' report. Accordingly, based on the Trustee documentation in the Administrative Record, such costs were denied because they were duplicative of Trustee activities, were not requested or directed by the Trustees, were not on the Trustees behalf, and were not necessary to support the Trustees' NRDA; and
5. \$4,631.25 of the RPs' claimed costs were related to communications between KYL and The Swedish Club, the vessel's insurer. Communications between the RPs and its insurer were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, costs for communications between RPs' counsel and RPs' insurance

³⁸ Claim Section II.A.2.c

³⁹ Trustee Plan, pp. 3.11-3.12

⁴⁰ *M/V Selendang Ayu* 2008 Study Plan for Assessment of Remaining Oil, 21 pages.

⁴¹ J05003-RP04 Claim Summary / Determination, pages 30-32

company are a litigation cost that is not OSLTF compensable. Accordingly, such costs were denied.

Claimant Basis for Reconsideration of Denied Costs

In their request for reconsideration⁴², the RPs emphasized that (1) the Lingering Oil Study was a cooperative assessment activity and that, pursuant to the terms of the Funding and Participation Agreement signed by the Trustees and RPs, the RPs and Trustees would cooperatively develop assessment plans for cooperative studies, and (2) the Administrative Record reflects that the Trustees solicited comments from the RPs during the development of the study plan. Thus, costs related to the RPs efforts to evaluate the draft study plan were inappropriately denied. The RPs also contend that costs denied for analysis and comment on the Trustee report were inappropriately denied because (1) the NPFC erroneously determined that the Lingering Oil report was finalized in March 2010 prior to providing it to the RPs, (2) the Funding and Participation Agreement provides for exchange and discussion of data and results from cooperate studies, and (3) the Administrative Record reflects that the Trustees solicited comments from the RPs on their draft study report. The RPs did not provide any additional information to support the costs for communications with the Swedish Club.

NPFC Analysis and Reconsideration Determination

Upon review of the additional information provided by the RP, along with consideration of the overall Administrative Record, the NPFC affirms its original determination denying \$122,942.30 in costs related to the Lingering Oil study. With respect to the Lingering Oil Study being considered a cooperative study, the general status of an assessment study as “cooperative” is, not in itself, sufficient evidence to prove that a specific RP activity was conducted at the direction of the Trustees, on the behalf of the Trustees, for costs necessary to support the Trustees NRDA. 15 C.F.R §990.14(c) requires that Trustees provide a certain level of cooperation and coordination with the RPs, which, at a minimum includes “notice of Trustee determinations required under this part, and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment.” Regulatory compliance should not be conflated with a direction to the RPs to conduct activities on the Trustees’ behalf. Furthermore, unlike the requirements placed on the Trustees, an RP elects to participate in the NRDA and, as discussed previously, this participation serves to protect its own legal and financial interests.

Similarly, the placement of an assessment activity in the Funding and Participation Agreement (FPA) does not prove that a specific RP activity was conducted at the direction of the Trustees, on behalf of the Trustees, for costs necessary to support the Trustees’ NRDA. Largely, the FPA requires the Trustees to allow the RPs’ to participate in the Trustees’ NRDA in exchange for guaranteed funding from the RPs. The existence of an assessment activity in the FPA more convincingly supports quite the opposite of the RPs assertion – rather than proving that the Trustees’ requested the RPs’ participation, the FPA indicates that the RPs themselves wanted access to participate in a Trustee activity and were willing to provide funding to the Trustees in order to obtain that access. This interpretation of the FPA is clearly supported by correspondence during its origination, with the Trustees informing the RPs that “DOI, ADNR and ADF&G anticipate that they would need, collectively, approximately \$120,000 in advance

⁴² RPs’ Request for Consideration, pages 25-29

funding to enter into a cooperative agreement with the responsible parties” and that continued failure of the RPs to provide timely funding to the Trustees prior to the FPA was causing the Trustees to consider “the value of entering into a cooperative agreement at all.”⁴³

Despite the above analysis documenting the requirements of the Trustees to allow the RPs participation in certain activities, rather than requesting the RPs’ participation, the NPFC endeavored to interpret the RPs’ participation in the most favorable perspective possible.⁴⁴ This generous interpretation of the RPs’ participation was even further extended in light of OPA’s prohibition against double recovery at 33 U.S.C. §2706(d)(3), which would reasonably compel the NPFC to question whether, given that the NPFC has also agreed to reimburse the RPs for the costs of the Trustees personnel and contractors to design and conduct field work for the Lingering Oil study, why any of the RPs costs related to such efforts would be considered necessary to support the Trustees’ NRDA and not represent duplicative efforts and a double recovery of damages. However, consistent with a favorable interpretation of the RPs’ participation, the NPFC approved the reimbursement of \$567,640.23 in costs incurred by the RP, including costs for the RPs to participate in the development of the study and conduct field work with the Trustees.

With respect to costs incurred by the RPs following the Trustees completion of their laboratory analysis and draft report, the Administrative Record reflects that the RPs’ activities were clearly not incurred at the direction of the Trustees, on the Trustees’ behalf, or necessary to support the Trustees’ NRDA. As established in the agreed upon study plan⁴⁵, NOAA’s Auke Bay Laboratory conducted analysis of the samples collected during the field work. Despite the Trustees’ completion of sample analysis in concert with the plan, the RPs conducted additional analyses of tissue samples and “performed independent analysis of the data generated by the study.”⁴⁶ The RPs’ independent election to conduct this work is clearly captured in correspondence to the Trustees - “When do you think we will get the Lingering Oil Study complete chemistry data packages? As we have discussed, we would like to evaluate these data prior to the Trustees developing a complete report.”⁴⁷

Furthermore, as documented by the Trustees, the RPs’ independent interpretation of data and analyses culminated in the RPs’ producing their own technical report and using it as a basis to contradict the Trustees’ report.⁴⁸ Based on all of the above, the RPs’ activities following the completion of the Trustees’ draft report were clearly duplicative of Trustee activities, were not requested or directed by the Trustees, were not incurred on the Trustees’ behalf, and were not necessary to support the Trustees’ NRDA.

With respect to the \$4,095 in Newfields Laboratory costs to comment on the Trustees’ draft study plan, the NPFC reiterates that NOAA’s Auke Bay Laboratory was the laboratory explicitly selected to conduct analyses on the collected samples and the RPs provided no explanation or justification for these specific costs in their original claim. Furthermore, the NPFC agreed to

⁴³ Email from the Trustees to the RPs, dated November 15, 2006

⁴⁴ “When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs’ activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees.”

⁴⁵ M/V Selendang Ayu 2008 Study Plan for Assessment of Remaining Oil, 21 pages.

⁴⁶ Claim Section II.A.2.c

⁴⁷ Email from RPs to Trustees, dated December 31, 2008

⁴⁸ Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.A, page 1

reimburse the RPs' for the Trustees' incurred costs to develop the study plan and, despite its' concerns about duplication of efforts, the NPFC also agreed to reimburse the RPs for both Polaris and Exponent to review and comment upon the study protocol on the RPs' behalf. There is nothing in the Administrative Record that evidences the Trustees' direction or need to engage an additional laboratory to comment on the draft study and, even with the wide latitude extended by the NPFC in its' review of the RPs' costs, there is a limit to the number of RP contractors that can be expected to be necessary to participate in the development of a Trustee plan and still be considered a reasonable Trustee assessment cost. Accordingly, given the explicit identification of another laboratory in the assessment study, the NPFC finds that the Newfields laboratory costs were duplicative, were not requested or directed by the Trustees, were not incurred on the Trustees' behalf, and were not necessary to support the Trustees' NRDA.

As stated previously, the RPs did not provide additional information or argument to dispute the NPFC's earlier determination that costs related to communications with the Swedish Club, the NPFC were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, that costs for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

Accordingly, the NPFC affirms its' initial determination that \$567,640.23 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable Trustee past assessment costs.

Auklet Habitat Manipulation – Vegetation Removal Pilot Study

Summary of Claimed Activity Costs

The RPs claimed costs of \$3,088,898.39 to conduct a pilot project to evaluate vegetation manipulation as an alternative to restore injuries to auklets.⁴⁹ In April 2009, the RPs proposed a study to assess whether the removal of vegetation from auklet breeding colonies on Gareloi Island⁵⁰ would increase suitable nesting sites for those colonies.⁵¹ The study was conducted during the summers of 2009, 2010, and 2011⁵² and results of the study indicated that restoration benefits of vegetation removal were difficult to quantify and that a large-scale project using the same methods would not be allowed on the island because of Refuge land management policies⁵³.

Summary of Initial NPFC Adjudication

In its' initial adjudication of the RPs' claim⁵⁴, the NPFC determined that Trustee documentation provides clear evidence that the activities conducted by the RPs were not conducted at the direction of the Trustees or on their behalf, nor were they necessary for the Trustees' NRDA. Documentation reflects that the RPs identified, proposed, developed, and conducted this study on

⁴⁹ Claim Section II.A.2.f

⁵⁰ The island is part of the Alaska Maritime National Wildlife Refuge

⁵¹ Proposal from Responsible Party to evaluate habitat restoration at Gareloi Island, April 24, 2009. *Selendang Ayu* NRDA Administrative Record, IV.C.3.a.

⁵² Trustee Plan, pp. 4-7 to 4-8

⁵³ Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section 11.B, p. 6

⁵⁴ J05003-RP04 Claim Summary / Determination, pages 37-40

their own initiative, in large part because of concerns regarding the costs of the Trustees' preferred restoration alternative from the beginning – rat eradication project.

While the Trustees were generally open to considering vegetation removal as an alternative, they expressed skepticism from the beginning about the pilot project proposed by the RPs⁵⁵, documented extensive concerns to the RPs about the vegetation project⁵⁶, and informed the RPs prior to beginning the study that “they were unable to determine whether the feasibility study will effectively address the issues that need to be resolved for the Trustees to determine whether habitat manipulation would be a feasible restoration project.”⁵⁷ Despite the Trustees significant reservations, the RPs proceeded with field work in 2009 and informed the Trustees that they would not be able to effectively address the Trustees' concerns until after completion of both the 2009 and 2010 work.⁵⁸

Correspondence established that the Trustees initially only agreed to cooperate in the vegetation study in order to acquire funding from the RPs to conduct a feasibility project studying their preferred rat eradication alternative.⁵⁹ Further correspondence indicates the RPs planned on proceeding with the habitat feasibility project without cooperation from the Trustees, only finding out after the initial project stages had begun that the Trustees were willing to conduct the activity “cooperatively”.⁶⁰ While the Trustees did discuss study design and results with the RPs, the Trustees continued to express significant concerns with the study and its results throughout the project.⁶¹

In addition, 15 C.F.R. §990.54(c) provides that studies⁶² to evaluate the feasibility and likelihood of restoration alternatives should only be implemented when, in the Trustees' judgment, the project is *likely* to provide information useful in evaluating restoration alternatives⁶³ and can be conducted at a reasonable time cost and in a reasonable timeframe. Based on the significant amount of Trustee skepticism and criticism found in the Administrative Record for this study from its inception, it was clear that this project did not meet the standard of likely providing useful information in evaluating restoration alternatives. Furthermore, there is no basis to consider the cost and timeframe of the project reasonable. The project spanned over three years of study and came at a cost representing a significant proportion of the entire NRDA. Ultimately, consistent with the concerns expressed by the Trustees, the results from the study did not provide information useful to their evaluation of restoration alternatives, further supporting that the study was not necessary for the Trustees' NRDA and did not meet the requirements of 15 C.F.R. §990.54(c).

Accordingly, claimed costs in the amount of \$3,088,898.30 could not be considered reasonable Trustee assessment costs in accordance with 33 C.F.R. §136.211(a) and were therefore denied.

Claimant Basis for Reconsideration of Denied Costs

⁵⁵ Email from DOI to RPs, dated March 18, 2009

⁵⁶ *Trustee Question & Concerns.8-12-09*

⁵⁷ Email from DOI to RPs, dated August 3, 2009

⁵⁸ Email from Polaris to DOI, dated August 11, 2009

⁵⁹ Email from DOI to RPs, dated June 5, 2009

⁶⁰ Email from RPs to DOI, dated June 29, 2009

⁶¹ Email from DOI to RPs, dated March 11, 2010

⁶² Referred to as “pilot projects”

⁶³ Specifically the evaluation criteria in 15 C.F.R. 990.54(a)

In their request for reconsideration⁶⁴, the RPs emphasize that the vegetation study was a cooperative effort with the Trustees, that the Trustees commented on plans and discussed results of the vegetation surveys, and that the Trustees are still considering habitat manipulation as a restoration alternative.

The RPs then highlight specific disagreements with the NPFC's determination including:

1. Rat eradication had not been selected as the Trustees' "preferred" restoration alternative in 2009
2. The Trustees supported studying the feasibility of removing vegetation as a potential restoration alternative
3. The RPs and Trustees discussed significant concerns regarding the viability of a rat eradication project
4. There is no evidence that the Trustees believed the costs or length of project was unreasonable

NPFC Analysis and Reconsideration Determination

Upon review of the additional information provided by the RP, along with consideration of the overall Administrative Record, the NPFC affirms its original determination denying \$3,088,898.30 of RP incurred costs to conduct the vegetation study. The NPFC denies these costs because the RPs failed to prove that such costs were incurred at the direction of the Trustees, on the Trustees behalf, and necessary to support the Trustees' NRDA. With respect to the study being considered a cooperative assessment, the general status of an assessment as "cooperative" is, not in itself, sufficient evidence to prove that a specific RP activity was conducted at the direction of the Trustees, on the behalf of the Trustees, for costs necessary to support the Trustees' NRDA.

Documentation in the Administrative Record reflects that the RPs identified, proposed, developed, and conducted this study on their own initiative and had even planned on conducting the study without the Trustees' "cooperation". While the Administrative Record reflects that the Trustees commented on study plans and results, nothing provided by the RPs evidences that the vegetation study was an assessment activity that the Trustees directed the RPs to conduct or considered a study that the Trustees thought was necessary to the NRDA. If the RPs had not ardently developed and funded the entire project and, substantially, conducted all the associated work, there is no indication that the Trustees would have given any consideration to the study as a cooperative activity. As documented in the Administrative Record, the Trustees initial agreement to even consider the study "cooperative" was based on the RPs agreement to also fund the rat eradication project.

While this study may have been a subject of particular interest to the RPs, the RPs interest has no basis on the NPFC's determination of reasonable Trustee assessment costs. Even though parts of the *Selendang* NRDA were conducted cooperatively, the RPs did not, and cannot, obtain independent Trustee authority to conduct NRDA activities of their own selection. An RP may understandably choose to incur costs to conduct any number of activities related to an incident, however such efforts are conducted on behalf of its own legal and financial interests. These divergent interests were fully acknowledged by the RPs from the beginning of the NRDA, admitting that the Trustees and RPs have different "constituencies" whom they represent in the

⁶⁴ RPs' Request for Consideration, pages 6-29

NRDA.⁶⁵ This divergence of interest is clearly manifested here, where the RPs clearly expressed concerns about the cost of a rat eradication project⁶⁶. For this reason, only such costs that were incurred at the direction of the Trustees, on behalf of the Trustees' NRDA, and necessary to support the Trustees' NRDA can be considered "reasonable Trustee assessment costs" that were incurred as representatives of the public as designated by, among other authorities, subpart G of the National Contingency Plan and 33 U.S.C. §2706(b).

Furthermore, the RPs did not provide any documentation to support that the project met the requirements of 15 C.F.R. §990.54(c) – especially that the project is *likely* to provide information useful in evaluating restoration alternatives. As described in the original determination, while the Trustees were open to considering vegetation removal as an alternative, they expressed skepticism from the beginning about the study⁶⁷, documented extensive concerns to the RPs about the vegetation project⁶⁸, and informed the RPs prior to beginning the study that "they were unable to determine whether the feasibility study will effectively address the issues that need to be resolved for the Trustees to determine whether habitat manipulation would be a feasible restoration project."⁶⁹ Despite the Trustees significant reservations, the RPs proceeded with field work in 2009 and informed the Trustees that they would not be able to effectively address the Trustees' concerns until after completion of both the 2009 and 2010 work.⁷⁰ The Trustees continued to doubt the value of the study through the end of the study.⁷¹ Furthermore, once the RPs had been granted their limit and began reducing their participation in the NRDA, the Trustees immediately declined to continue the study any further.⁷² Given that the Trustees ultimately concluded at the end of the vegetation study that, in fact, the study did not produce useful information for determination restoration, the Trustees' long held concerns about the RPs vegetation study are both persuasive and confirming.

With respect to the reasonability of cost and length of the project pursuant to 15 C.F.R. §990.54(c), the RPs were entirely funding the field work and conducting substantially all of the analyses. Accordingly, there would have been no reason or basis for the Trustees to comment on the cost and length of the project. The Administrative Record doesn't reflect that Trustees would have even had knowledge of what the costs of the project were. However, given the Trustees overall skepticism regarding whether the study would provide useful information suggests that they would have considered the length and cost of the study to be unreasonable. As well, the Trustees' immediate shut down of further field activities once the RPs ceased participation and funding provide further indication that the Trustees did not view the study as a reasonable assessment cost.

⁶⁵ Email from Polaris to KYL, dated February 7, 2005

⁶⁶ The NPFC acknowledges that additional concerns regarding rat eradication were acknowledged and discussed with the RPs and Trustees. However, the Trustees still insisted that it was a favorable alternative that they sought to explore and pursue. Furthermore, concerns with the viability of rat eradication has no impact or basis with respect to whether the RPs election to conduct the vegetation study should be considered a reasonable Trustee assessment cost.

⁶⁷ Email from DOI to RPs, dated March 18, 2009

⁶⁸ *Trustee Question & Concerns.8-12-09*

⁶⁹ Email from DOI to RPs, dated August 3, 2009

⁷⁰ Email from Polaris to DOI, dated August 11, 2009

⁷¹ Email from Trustees to RPs, dated April 16, 2011

⁷² Email from RPs to Trustees, dated March 19, 2012

Accordingly, the NPFC affirms its' initial determination that the \$3,088,898.30 in RPs' claimed costs cannot be considered reasonable Trustee past assessment in accordance with 33 C.F.R. §136.211(a) costs and are therefore denied.

Rat Eradication Feasibility Study

Summary of Claimed Activity Costs

The RPs claimed costs of \$76,630.00 to conduct preliminary analysis of a proposed feasibility project to study rat eradication as a potential restoration alternative.⁷³ The Trustees identified rat eradication as a desirable restoration project to restore injuries to birds and developed a study plan to implement a feasibility study on Kiska Island⁷⁴. The Trustees requested funding from the RPs to cooperatively conduct the feasibility study together. While ultimately refusing to fund the Trustees' study, the RPs' claimed damages included costs to analyze and review other eradication projects, review and analyze literature of rat predation at the proposed study site, contractor coordination, and restoration credit research.

Summary of Initial NPFC Adjudication

In its' initial adjudication of the RPs' claim⁷⁵, the NPFC determined that Trustee documentation provides clear evidence that the activities conducted by the RPs were not conducted at the direction of the Trustees, on their behalf, and were not necessary for the Trustees' NRDA. The Trustees had already begun focusing on rat eradication as a restoration alternative and engaged a contractor who developed a feasibility study plan to further study the restoration alternative. The RPs engaged their own contractors to provide additional review of the proposal and then independently decided to coordinate with and submit the proposal to International Tank Owners Pollution Federation Limited ("ITOPF") to conduct ever further review of the proposal. Furthermore, despite a rat eradication project being the favored restoration alternative for the Trustees, the RPs ultimately declined to fund a cooperative feasibility study. The NPFC denied certain costs⁷⁶ on a secondary basis because they were related to communications between KYL and The Swedish Club, the vessel's insurer. Communications between the RPs and its insurer were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA and, further, costs for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable – accordingly such costs were denied.

Claimant Basis for Reconsideration of Denied Costs

In their request for reconsideration⁷⁷, the RPs emphasized that the development of restoration alternatives was a cooperative project as established by agreement⁷⁸ between the RPs and Trustees. Further, the RPs highlighted numerous correspondence with the RPs that document the Trustees' efforts to cooperatively conduct the study with the RPs. The RPs did not provide any additional information to support the costs for communications with the Swedish Club.

NPFC Analysis and Reconsideration Determination

⁷³ Claim, Section II.A.2.e, pp. 44-46

⁷⁴ Trustee Plan, pp. 4-5 to 4-7

⁷⁵ J05003-RP04 Claim Summary / Determination, pages 34-35

⁷⁶ \$2,430

⁷⁷ RPs' Request for Consideration, page 24-25

⁷⁸ See Exhibit 5 to RP's November 2018 Claim at 05_000058 - 61

Upon review of the additional information provided by the RP, along with consideration of the overall Administrative Record, the NPFC affirms its original determination denying \$76,630 of RP incurred costs to conduct preliminary analysis of a proposed feasibility project to study rat eradication. With respect to developing restoration alternatives being considered a cooperative assessment, the general status of an assessment as “cooperative” is, not in itself, sufficient evidence to prove that a specific RP activity was conducted at the direction of the Trustees, on the behalf of the Trustees, for costs necessary to support the Trustees NRDA. 15 C.F.R §990.14(c) requires that Trustees provide a certain level of cooperation and coordination with the RPs, which, at a minimum includes “notice of Trustee determinations required under this part, and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment.” Regulatory compliance should not be conflated with a direction to the RPs to conduct activities on the Trustees’ behalf. Furthermore, unlike the requirements placed on the Trustees, an RP elects to participate in the NRDA and, as discussed previously, this participation serves to protect its own legal and financial interests.

In this case, even the “agreement” cited above by the RPs’ to establish that development of restoration alternatives was a cooperative activity is, in fact, an unsigned draft scope of work. Furthermore, while the Administrative Record does reflect numerous Trustee correspondence with the RPs regarding the feasibility study, the activities of the RPs with respect to rat eradication cannot be interpreted as being conducted at the Trustees’ direction, on the Trustees’ behalf, for activities necessary to the Trustees’ NRDA and, alternately, were duplicative of Trustee efforts. The Trustees had already developed a feasibility study and engaged the RPs to acquire funding to conduct the feasibility study on their preferred time schedule.⁷⁹ Despite the Trustees’ persistent interest in rat eradication, development of a feasibility study, and repeated efforts to engage the RPs in funding the study, the RPs never funded the Trustees’ study. The Administrative Record does not reflect that the Trustees invited additional analysis from the RPs on the feasibility study. The study was not in draft form and the Trustees intended to implement it immediately as is. The RPs however engaged multiple contractors in additional analysis and, without the Trustees knowledge or permission, engaged ITOPF to provide additional review of the proposal.

As stated previously, the RPs did not provide additional information or argument to dispute the NPFC’s earlier determination that costs related to communications with the Swedish Club, the NPFC were incurred on the RPs’ behalf rather than directly in support of the Trustees’ NRDA and, further, that costs in the amount of \$2,430 for communications between RPs’ counsel and RPs’ insurance company are a litigation cost that is not OSLTF compensable.

Accordingly, the NPFC affirms its’ initial determination that the \$76,630 in RP’s claimed costs cannot be considered reasonable Trustee past assessment in accordance with 33 C.F.R. §136.211(a) costs and are therefore denied.

V. Summary

The NPFC has reviewed the Claim submitted by the RPs for past assessment and restoration planning costs in accordance with OPA (33 U.S.C. §2701 et seq.) and associated OSLTF Claims Regulations (33 C.F.R. Part 136). Through this determination the NPFC denies payment of all

⁷⁹ Email from Trustees to RPs on March 18, 2019 - “we will need to know whether the RP will support the proposed feasibility assessment for rat eradication by April 6 to help us take advantage of the 2009 field season.”

reconsidered costs. Further, through this determination, the NPFC offers payment of \$5,113,673.03 for past assessment costs incurred directly by the Trustees and \$2,104,476.88 for costs incurred directly by the RPs as approved in the original determination on April 8, 2022. This written decision is final agency action.