

U.S. Department
of Homeland
Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds
Center

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16480

September 21, 2011

CERTIFIED MAIL Number: 7011 1150 0000 4636 2533

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

RE: Claim Number: N10036-OI2 – *Deepwater Horizon* Oil Spill Assessment

Dear Ms. Dohner:

The National Pollution Funds Center (NPFC) has reviewed 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 \$66,013,771¹, representing the costs to implement 23 assessment studies. We have determined that \$1,455,464 of claimed costs is compensable at this time (Table 1).

Table 1: Activity, Claimed Amount, Compensable Amount

Activity	Claimed Amount	Compensable Amount
Avian Toxicity	\$284,774	\$284,774
Bird Study #19 (three studies ²)	\$519,679	\$519,679
Gulf Sturgeon	\$651,011	\$651,011
Total	\$1,455,464	\$1,455,464

The NPFC is issuing this partial determination to provide funding to DOI that will enable implementation of priority assessment activities for which our evaluation is complete, while we continue to adjudicate the remaining portions of the claim. This partial 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.

¹ \$66,013,771 represents claim total as revised by DOI on September 7, 2011. The original sum certain presented to BP was \$67,510,774.

² Bird Study #19 refers to three studies included in DOI's Assessment Plan: Marsh Edge Searcher Efficiency, Marsh Edge Carcass Persistence, and Wildlife Operations and Data Assessment for Beached Bird Model Use

Summary of Claim

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit exploded and sank. As a result of the explosion and sinking oil was discharged into the Gulf of Mexico (the *Deepwater Horizon* oil spill). The U.S. Coast Guard designated the source of the discharge 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.

On August 4, 2011, the NPFC received a claim from DOI, seeking the costs to continue their natural resource damage assessment³. The claim totaled \$67,510,774 as the contract, DOI labor, and contingency costs to implement 25 separate studies developed to assess injuries specific to birds, endangered and threatened fish and mammals, and sea turtles under their jurisdiction.

On September 7, 2011, DOI amended their claim to the NPFC to reflect (1) partial payments received from BP for the studies⁴, (2) removal of two projects fully funded by BP⁵, and (3) removal of DOI personnel costs erroneously included as contract costs in their initial claim submission⁶. The amended claim totals \$66,013,771, reflecting the costs to implement 23 studies (i.e., the uncompensated costs).

The NPFC has reviewed DOI's revised claim, including the claim letter, Assessment Plan, and additional Administrative Record (AR) documents. Through this partial determination, we approve \$1,455,464 for the five total studies claimed, while continuing to review the funding request for the remaining 18 studies. Details of our determination follow.

Jurisdictional Information

The NPFC first considered whether the claimed damages arose from an incident as defined by OPA. 33 U.S.C. §2701 *et seq.* To be covered, the incident must involve a discharge of oil or a substantial threat of discharge of oil from a vessel or facility into navigable waters of the United States after August 18, 1990. Based on the information provided by DOI in their claim, and the President's April 29, 2010 designation of this

³ According to the Notice of Intent to Conduct Restoration Planning (pursuant to 15 C.F.R. 990.44)- DISCHARGE OF OIL FROM THE DEEPWATER HORIZON MOBILE OFFSHORE DRILLING UNIT AND THE SUBSEA MACONDO WELL INTO THE GULF OF MEXICO, APRIL 20, 2010: The following agencies are designated natural resources trustees under OPA and are currently acting as trustees for this Incident(s): the United States Department of the Interior ("DOI"); the National Oceanic and Atmospheric Administration ("NOAA"); the United States Department of Defense ("DOD"); the State of Louisiana; the State of Mississippi; the State of Alabama; the State of Florida and the State of Texas (collectively, the "Trustees").

⁴ DOI responses to NPFC September 6, 2011 follow-up questions, received September 7, 2011

⁵ Per correspondence from BP to DOI on July 28, 2011, BP agreed to fully fund two studies included in DOI's Assessment Plan: Beach Habitat Carcass Persistence (\$244,000), and Beach Mouse (\$66,360).

⁶ DOI letter to the NPFC dated August 31, 2011 indicates that personnel costs were erroneously included within contract costs

incident as a spill of national significance, the NPFC finds that this is a claim for natural resource damages resulting from an OPA incident.

Claimant Eligibility

Claims for uncompensated natural resource damages, which include the cost of assessing those damages, may be presented to the OSLTF by an appropriate natural resource trustee for the reasonable costs of assessing those damages. 33 U.S.C. §2712(a)(2) and 33 C.F.R. §136.207(b). This claim for uncompensated assessment costs was submitted by DOI. DOI, under the authority of the Secretary of the Interior is a designated Federal natural resource trustee under OPA, Executive Order 12777, and Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan. 40 C.F.R. §300.600, 56 Fed. Reg. 54757, Oct. 22, 1991, and Section 1006(b)(2) of OPA. 33 U.S.C. §2706(b)(2).

Claimant's Burden of Proof and Adherence to NRDA Regulations

Under OPA, trustees bear the burden of proving their entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105. Any determination or assessment of damages to natural resources made in accordance with the regulations at 15 C.F.R. Part 990 have the force and effect of rebuttable presumption. 33 U.S.C. §2706 (e)(2). However, this presumption may be rebutted if the rebuttal evidence is of sufficient weight.

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

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 resources 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 completed when the claim was received on August 4, 2011. Therefore, the claim was received within the statute of limitation period.

Claims 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 5, 2011, DOI adopted and posted on their website their final Assessment Plan, thereby meeting these requirements.

With certain exceptions, claims to the NPFC for damages must be presented first to the RP. 33 U.S.C. §2713(a). If a claim is presented in accordance with 2713(a) and the claim

is not settled by any person 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).

The claim administrative record indicates that DOI presented BP with costs of DOI's assessment efforts on several occasions. On February 25, 2011, DOI presented BP with a claim for \$67,510,774, their estimated cost of implementing assessment activities. DOI and BP had follow-up communications about this request, including a May 26, 2011 correspondence where DOI presented BP with additional details for the Avian Toxicity Study. On July 5, 2011, DOI sent BP their comprehensive Assessment Plan that detailed the 25 assessment studies with a claim for \$67,510,774 to implement such studies.

By letter on July 28, 2011 and email on August 29, 2011, BP declined to fund Bird Study #19 and the Gulf Sturgeon Study, respectively. As of the date of this determination BP has not elected to fund the Avian Toxicity Study. BP has declined funding for Bird Study #19 and the Gulf Sturgeon Study and has not settled the Avian Toxicity portion of the claim from DOI within 90 days (Table 2) of presentment. Thus, the five studies considered in this partial determination meet the presentment requirements under OPA and the claims regulations.

Table 2: Presentment and Denial Dates

Study	Date Presented to BP	Date Denied by BP
Avian Toxicity	May 26, 2011 ⁷	
Bird Study #19 (three studies ⁸)	July 5, 2011 ⁹	July 28, 2011 ¹⁰
Gulf Sturgeon	July 5, 2011 ¹¹	August 29, 2011 ¹²

NPFC Review of Claim and Associated Costs

Avian Toxicity Study

Through shoreline surveys and preliminary avian assessment studies (e.g., Secretive Marsh Bird, Non-breeding Shorebird and Colonial Water Bird), DOI has documented that shorebirds and waterfowl were impacted by the exposure to *Deepwater Horizon* oil¹³ and dispersants from the spill response¹⁴. DOI developed this Avian Toxicity Study to determine the nature and extent of injury from this exposure. In Phase I of this study, DOI will work with avian experts to develop a detailed study plan based on preliminary assessment data. The Plan will be implemented in Phase 2.

⁷ Email from DOI to BP dated May 26, 2011

⁸ Bird Study #19 refers to three studies included in DOI's Assessment Plan: Marsh Edge Searcher Efficiency, Marsh Edge Carcass Persistence, and Wildlife Operations and Data Assessment for Beached Bird Model Use

⁹ Claim from DOI to BP dated July 5, 2011

¹⁰ Letter to DOI from BP dated July 28, 2011

¹¹ Claim from DOI to BP dated July 5, 2011

¹² Email from BP to DOI dated August 29, 2011

¹³ <http://www.fws.gov/home/dhoilspill/pdfs/Bird%20Data%20Species%20Spreadsheet%2005122011.pdf>

¹⁴ <http://www.restorethegulf.gov/sites/default/files/documents/pdf/Consolidated%20Wildlife%20Table%2011.0210.pdf>

DOI's claim to the NPFC, as initially submitted on August 4, 2011, sought \$510,000 for Phase 1 DOI labor and contractor costs. DOI subsequently revised this claimed amount on August 31, 2011 to \$284,774 to reflect only contractor costs.

Following initial review of the claim, the NPFC requested additional information about the claimed costs for the avian assessment (Avian Toxicity Study and Bird Study #19)¹⁵. Specifically, NPFC asked DOI to further explain (1) their overall avian assessment strategy, (2) how data collected from the different studies will be used to determine the nature and extent of avian injury and the need for, type, or scale of actions needed to restore those injuries, (3) how the avian assessment studies interconnect to ensure that there is no duplication of effort, and (4) the rationale for funding the Avian Toxicity Study prior to conclusion of the Blood Physiology Study.

DOI responded that avian injury would be determined using the Beached Bird and the Live Oiled Bird models. Data collected from the Avian Toxicity and Blood Physiology studies would be used to assess lethal and non-lethal effects and reduce variability of model input parameters¹⁶. Further, the Avian Toxicity Study assesses potential injuries by analyzing a broader and more comprehensive suite of endpoints (e.g. physiological and behavioral changes) beyond just blood parameters¹⁷.

Based on our review of the claim and claim record, including supplemental information requested and received, the NPFC has determined that the claimed cost of \$284,774 for the proposed Avian Toxicity Study is reasonable and appropriate for the incident. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

Bird Study #19

Bird Study #19 has three component studies aimed at developing input parameters for the models that will be used to determine the total number of dead oiled birds. The Marsh Edge Searcher Efficiency Study will assess the percentage of bird carcasses found in marsh edge habitat; the Marsh Edge Carcass Persistence Study will determine the proportion of carcasses that persisted long enough to be found by survey and response crews; and the Wildlife Operations and Law Enforcement Data Assessment will develop carcass deposition rates in areas searched by Wildlife Operations and law enforcement that were not otherwise surveyed.

Following initial review of the claim, the NPFC requested additional information about the claimed costs, need for these studies, and any additional assessment approaches that were being conducted¹⁸. DOI responded with details about how information from each of these studies will be used in the Beach Bird model to estimate overall avian injury and

¹⁵ Acknowledgement and additional information request letter remitted to DOI on August 22, 2011

¹⁶ DOI Response to Questions Additional Information letter, received on August 31, 2011

¹⁷ DOI Response to Questions Additional Information letter, received on August 31, 2011

¹⁸ Acknowledgement and Additional Information Request letter remitted to DOI on August 22, 2011

that these were the only studies focused on marsh edge habitat (and that any additional efforts were spatially and/or temporally distinct¹⁹).

DOI's August 4, 2011 initial submission to the NPFC claimed \$720,710 to implement the three studies, which included \$562,000 for contracts and \$158,710 for DOI labor. In a letter dated August 31, 2011²⁰, DOI amended their claimed amount to \$519,679, removing DOI labor and incorporating cost savings of combining the three studies.

After reviewing the plan proposal, AR, and DOI responses to requests for further information, the NPFC finds that the proposed assessment activity and revised claimed costs of \$519,679 are reasonable and appropriate for the incident. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

Gulf Sturgeon

DOI's plan for assessing injuries to Gulf Sturgeon resulting from the spill involves telemetry to track movements and analysis of overall sturgeon health from blood samples. DOI's August 4, 2011 initial submission to the NPFC claimed \$1,074,768 for hardware (transmitters and buoy recording devices), field monitoring, and blood sampling, and lab analyses. On August 17, 2011, DOI revised their claim amount to \$1,061,677. BP subsequently agreed to fund \$410,666 for field monitoring. The remaining balance of \$651,011 is the uncompensated costs of hardware, blood sampling, and analyses²¹.

After reviewing the claim, the NPFC requested that DOI provide additional information to support their claim request. Specifically: (1) what evidence exists that injuries likely occurred to the Gulf sturgeon that would warrant the need for further assessment, (2) how will information on the movement of Gulf sturgeon be used to determine injury and/or evaluate the need for, type, and scale or restoration actions, (3) how were the number of rivers, transmitters and receivers chosen, and (4) how will this study be coordinated with another study by NOAA to ensure no duplication of effort.

DOI responded that blood samples collected during preliminary assessment efforts revealed DNA fragmentation in fish returning from the Gulf as compared to fish leaving their summer river systems, which can be caused by exposure to oil and oil related products²². Additional receivers and transmitters are necessary to provide tracking capability over the large area of the Gulf exposed to oil²³. Accordingly, despite the ongoing efforts by NOAA, additional receivers and tagged fish requested by this proposal would provide a more robust data set by providing information on nearshore and river habitats, thereby reducing data variability and uncertainty²⁴. Combining the telemetry

¹⁹ DOI Response to Questions Additional Information letter, received on August 31, 2011

²⁰ An email from DOI to the NPFC on September 7, 2011 provided clarification and further detail of the accounting by combining the three studies.

²¹ Email from BP to DOI dated August 29, 2011

²² DOI Response to Questions Additional Information letter, received on August 31, 2011

²³ DOI Response to Questions Additional Information letter, received on August 31, 2011

²⁴ Conversation with NOAA representative regarding NOAA Gulf sturgeon activities, September 8, 2011

data with oil mapping and sampling data will aid in establishing which fish from which river systems were exposed to or injured by MC252 oil, thereby determining which populations would benefit most from river restoration activities²⁵.

After reviewing the plan proposal, AR and DOI responses to requests for further information, the NPFC finds that the proposed assessment activity and revised claimed costs of \$519,679 are reasonable and appropriate for the incident. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

Contingency

DOI claims \$8,805,753, or 15 percent of total claimed amount, for contingency costs. 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, with a limit of 15 percent of total costs, as provided in Table 3.

Table 3. Approved Contingency Amount by Activity.

Activity	NPFC Approved Implementation Costs	Approved Contingency (15 percent)
Avian Toxicity	\$284,774	\$42,716
Bird Study #19 (three studies)	\$519,679	\$77,952
Gulf Sturgeon	\$651,011	\$97,652
Total	\$1,455,464	\$218,320

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 (33 U.S.C. §2706(f)) and NRDA regulations (15 C.F.R. §990.65), sums recovered by trustees for natural resource damages must be retained by the trustees in a revolving trust account. For purposes of this claim, the NPFC will deposit funds into the Natural Resource Damage Assessment and Restoration Fund managed by the Department of the Interior.

Sums provided under this determination may only be used to implement the activities approved in this partial determination. All unused funds, including interest earned, shall

²⁵ DOI Response to Questions Additional Information letter, received on August 31, 2011

be returned to the OSLTF in a timely basis and no later than six months from the completion of each individual project as described in this determination in accordance with 15 C.F.R. §990.65.

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 Assessment Plan for the activities approved by this determination. Any funds not spent or appropriately documented shall be returned to the Fund.

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

1. Certification by DOI that all assessment activities have been conducted in accordance with the Assessment Plan as approved in this determination;
2. A progress report that includes a description of work accomplished, a timeline for future activities, 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 project 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;
5. An accounting, including the source and value, of any additional compensation received for the studies approved in this determination.

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

1. Certification by DOI that all expenditures of OSLTF funds were in accordance with the 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 in the Revolving Trust Fund established for this claim, 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 project. 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 and all remaining funds and/or inadequately documented costs will be returned to the OSLTF.

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

All unused funds, including interest earned, shall be returned to the OSLTF in a timely basis and no later than six months from the completion of each individual project as described in this determination in accordance with 15 C.F.R. §990.65.

Summary

The NPFC has reviewed the revised claimed submitted by DOI for upfront costs to assess natural resource damages resulting from the Deepwater Horizon incident in accordance with OPA and its implementing regulations. 33 U.S.C. 2701 *et seq.* and 33 C.F.R. §136. Through this partial determination, we have determined to pay \$1,455,464 as the cost to implement the Avian Toxicity Study, Bird Study #19 (three studies), and Gulf Sturgeon Study. We have also approved up to \$218,320 for potential contingency costs for these five studies, subject to DOI providing the NPFC with appropriate justification and documentation of past expenditures (Table 4).

Table 4: Determination Summary

			Total
Claim Amount	Contract Costs (23 studies)	\$20,358,263	\$66,013,771
	DOI labor	\$36,849,755	
	Contingency	\$8,805,753	
Total Amount Approved	Avian Toxicity	\$284,774	\$1,455,464
	Bird Study #19	\$519,679	
	Gulf Sturgeon	\$651,011	
Contingency Approved	Avian Toxicity	\$42,716	\$218,320
	Bird Study #19	\$77,952	
	Gulf Sturgeon	\$97,652	

Total Pending Adjudication		\$64,339,987
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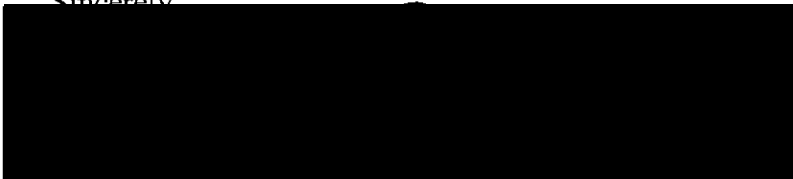
This offer constitutes partial payment of DOI assessment costs for the *Deepwater Horizon* incident. If you accept this offer, please sign the enclosed Acceptance/Release Form where indicated and return to:

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 mailed within 30 days of receipt of the form. Please provide account information including Agency Locator Codes (ALC) with matching addresses, Treasury Accounting Symbol (TAS) number, and instruction for the transfer of funds to trustee accounts 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 (202) 493-6623.

Sincerely,



FREDY HERNANDEZ
Claims Manager
Natural Resource Damage Claims Division

Enclosures: Acceptance/ Release Form
CD with Annual and Final Reporting Forms and Instructions
NPFC-CN Policy Document "NRD Contingency Payments"

U.S. Department
of Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds
Center

U.S. Coast Guard Stop 7100
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (Cn)
Phone: 202-493-6623
E-mail: [REDACTED]@uscg.mil

Claim Number: N10036-OI2 – *Deepwater Horizon* Oil Spill Assessment

On August 4, 2011 the Department of the Interior (DOI) presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$67,510,774 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 claim was revised to \$66,013,771 on September 7, 2011. The revised claim represents costs to implement 23 assessment studies.

DOI accepts the settlement offer of \$1,455,464 as full compensation for the Avian Toxicity, Bird Study #19 and Gulf Sturgeon damage assessment studies as described in the September 21, 2011 determination. This amount represents the costs to conduct assessment studies for: (1) Avian Toxicity in the amount of \$284,774; (2) Bird Study #19 (three studies) in the amount of \$519,679, and (3) Gulf Sturgeon in the amount of \$651,011¹. The determination approves up to 15 percent in contingency funding in the amount of \$218,320 for these studies: Avian Toxicity - \$42,716; Bird Study #19 - \$77,952; and \$97,652 for Gulf Sturgeon.

This settlement represents full and final release and satisfaction of all assessment costs described in the September 21, 2011 determination.

This release includes any right DOI may have to dispute the contingency awards in the NPFC September 21, 2011 determination. Although this settlement and release does not pay the contingency awards detailed in that determination, DOI acknowledges that any future contingency payments will be limited to the amounts awarded for each study as detailed in the determination. The NPFC will only authorize actual payment of these contingency awards from the OSLTF if and when a permissible contingency occurs and the request is fully documents and complies with the NPFC policy for Natural Resource Damage Contingency Payments.

DOI agrees to provide annual and final reports for each study 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 to the OSLTF any amounts awarded by the September 21, 2011 determination in excess of that amount required to accomplish the assessment activities approved in the determination.

DOI hereby assigns, transfers, and subrogated 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 incident.

DOI warrants that no legal action has been brought by DOI regarding this matter and no settlement will be made by any person on behalf of DOI with any other party for costs that are the subject of the determination issued by the NPFC on September 21, 2011 against the OSLTF and DOI will cooperate fully with the NPFC and the United States 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 United States 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.

Cindy Dohner

Date

ALC

TAS

U.S. Department of
Homeland Security

United States
Coast Guard



Director
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NPFCPOLICY CN09
15 OCT 09

NATIONAL POLLUTION FUNDS CENTER POLICY CN

Subj: NRD CONTINGENCY PAYMENTS

1. PURPOSE. This policy addresses how the NPFC will adjudicate requests for "contingency" amounts as part of a natural resource damage claim for payment from the OSLTF.
2. ACTION. The Cn Division Chief shall ensure that all Cn Claims Managers understand and follow the provisions of this policy, division SOP is updated to reflect this policy, and that the *Funding Guidelines* and relevant Web pages inform claimants of the policy.
3. POLICIES AFFECTED. Contingency Policy 05 dated 24 January 2007 is cancelled.
4. BACKGROUND. An OPA natural resource damage that may be compensated from the OSLTF is unique among OPA damages to the extent the damage amount is the cost of a plan to conduct restoration or assessment activities in the future. Accordingly, plan costs are largely best or reasonable estimates. While the NPFC has a clear interest in finality when it pays a natural resource damage claim, that interest should be balanced against the desirability of natural resource restoration under a plan(s) as it is approved for payment by NPFC. This policy establishes that balance.
5. POLICY.
 - a. General. NPFC will authorize certain contingent amounts in claim determinations consistent with this policy. Because of the speculative nature of those contingencies at the time of the claim determination, contingent amounts will be paid only if and when those contingencies arise. A contingency shall be project specific. A claim determination authorizing a contingency may provide a reasonable period beyond which the contingency shall not be available. The maximum period of time for the availability of a granted contingency shall be 6 years from the date of payment of the determined claim. For example if a claim payment is made on January 31, 2007, any related contingency may be requested no later than January 31, 2013 unless the determination provides an earlier cut-off date. In a rare case, an exception to this rule may be granted if adequate documentation and rationale are provided.
 - b. The NPFC will authorize contingencies based on the following factors:
 - (1) the potential in complex project plans to overlook certain activities/costs that nevertheless are later found to be necessary to complete the project, and

NPFCPOLICY CN

- (2) the potential that certain specific significant costs of a plan are subject to later developments or events that result in an increase in costs, and that can be described in reasonable detail and within reasonable cost parameters (e.g. a plan to purchase property may be subject to the future availability of property for purchase and/or the outcome of purchase negotiations).
- c. The initial claim determination will establish the contingency percentage by project, based on a determination of degree of project complexity or potential for unknown event(s). The maximum allowable contingency is 25% of the cost of a project plan approved in the NPFC claim determination. This is consistent with the claimant's burden in presenting the claim to present a reasonably complete plan and cost estimate. In a rare case, an exception to this rule may be granted if adequate documentation and rationale are provided. The related release shall expressly recognize the contingency percentage(s) as part of the payment agreement and provide that any subsequent request for a contingency payment, within the specified percentage(s), shall be subject to a separate determination and release at the time determined.
 - d. The contingency shall be payable at a future date (up to 6 years), up to the maximum dollar amount, provided a claimant documents the specific activities and reasonable costs to the satisfaction of the NPFC. The trustee claimant must describe in sufficient detail the nature and likelihood of the additional project activities and/or uncertain future event, and the basis for the claimed contingency amount. The trustee claimant must provide adequately detailed, complete and reasonable plans and cost estimates. A trustee claimant shall certify that the activities and costs were not included in the initial trustee claim but nevertheless are activities and costs that are necessary to complete the project plan as approved in the NPFC claim determination.
 - e. The NPFC retains all discretion to grant or deny a contingency request in its determination under this policy or to amend or cancel this policy at any time.
 - f. Contingent amounts are not available under this policy for activities or costs outside the scope of the plan(s) as approved in the initial NPFC claim determination. Contingent amounts are not available where the plan cost is not the basis for the damage amount claimed, e.g. lost recreational use where the damage amount claimed is determined as what the public is willing to pay to use the natural resource, notwithstanding those damage amounts are to be applied to a restoration project.
 - g. This policy does not otherwise provide for contingencies for the success of a project. The risk that a project will restore natural resources as intended is not a risk assumed by the Fund.


CHRISTOPHER DENNETT