



16480
July 14, 2016

MEMORANDUM

From:

To:

Department of the Interior (DOI)

Subj: Claim: S99028-OI01 – *Oregon/Washington Coast Mystery* Oil Spill Assessment Costs

1. On March 30, 2015, the NPFC received a claim from DOI for costs to assess potential natural resource injuries resulting from the *Oregon/Washington Coast Mystery* oil spill (S99028-OI01) that occurred in March 1999. The claim totaled \$1,406,169 for past (\$387,633) and future (\$1,018,536) costs to assess injuries to birds resulting from the spill and conduct restoration planning activities. On November 4, 2015, DOI reduced the claim sum certain to \$1,306,783 (\$380,217 for past costs and \$926,566 for future costs). On March 24, 2016, the NPFC issued a determination offering to pay \$540,439 for past assessment and restoration planning costs and future assessment costs, approving \$27,952 for future injury assessment contingency funding, deferring adjudication of \$533,183 in future restoration planning costs, and denying payment of \$205,209 in indirect costs and associated contingency.
2. Pursuant to 33 C.F.R. §136.115(d), on May 19, 2016, DOI requested that the NPFC reconsider its decision to (1) deny payment of indirect costs and associated contingency in the amount \$205,209 and (2) defer adjudication of future restoration planning costs (specific to \$407,392 of the total deferred amount of \$533,183).
3. After careful review of DOI's reconsideration request, we are issuing the enclosed determination offering to pay an additional \$173,427 for indirect costs, and approve additional contingency of \$7,810. We also affirm our decisions to defer adjudication of \$533,183 in future restoration planning costs, and deny payment of \$23,972 in indirect costs.
4. Accordingly, upon reconsideration, the NPFC offers to pay \$713,866 for past assessment and restoration planning costs and future assessment costs, and approves the availability of an additional \$35,762 for future injury assessment contingency funding. The NPFC denies \$23,972 in indirect costs. The NPFC defers adjudication of \$533,183 for future restoration planning costs for three years from the date of this determination. These actions are final agency action with respect to past assessment and restoration planning costs and future assessment costs for Claim Number S99028-OI01.

5. This determination upon reconsideration was made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. §2701 *et seq.*), the OPA claims regulations (33 C.F.R. Part 136), and the Natural Resource Damage Assessment Regulations (15 C.F.R. Part 990). If you accept this offer, please complete the enclosed Acceptance/ Release Form and return *it to*:

Director (cn)
National Pollution Funds Center
U.S. Coast Guard Stop 7605
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7605

6. If we do not receive the signed Acceptance/ Release Form within 60 days of the date of this memo, the offer is void. If the settlement is accepted, your payment will be processed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds to your Natural Resource Damage Assessment and Restoration Fund account with the signed form.

7. If you have any questions about this determination, please feel free to contact me at 202-795-6055.

Enclosures: (1) NPFC determination
(2) Acceptance/Release Form
(3) NPFC Contingency Policy

National Pollution Funds Center Determination

Claim Number and Name:	S99028-OI01 , <i>Oregon/Washington Coast Mystery Oil Spill Assessment Costs</i>
Claimant:	Department of the Interior (DOI)
Type of Claim:	Natural Resource Damage Assessment, Past and Future Assessment Costs (Reconsideration)
Amount Requested:	\$1,306,783
Offer Amount:	\$713,866
Available Contingency:	\$35,762
Deferred:	\$533,183
Determination Date:	July 14, 2016
Reviewing Official:	[REDACTED]

Claim History

On March 30, 2015, the Department of the Interior (DOI) presented the National Pollution Funds Center (NPFC) with a claim that totaled \$1,406,169 for injury assessment and restoration planning costs associated with the *Oregon/Washington Coast Mystery* oil spill. The claim was based on DOI's Natural Resource Damage Assessment Plan (Plan) and described both past and future activities to assess bird injury associated with the incident and develop restoration alternatives to restore those injured resources. The Plan describes how the trustees will develop a Beach Bird Model¹ (BBM) to estimate the total amount of injured birds, use a resource equivalency analysis (REA) to determine the amount of compensatory restoration required to offset the bird injury, identify and evaluate potential restoration alternatives to compensate for the bird injuries, and develop a draft Damage Assessment and Restoration Plan (DARP) for public review.

On May 27, 2015², the NPFC requested additional information from DOI requesting clarification on direct³ and indirect⁴ labor rates charged on past labor, further budget detail regarding future costs for agency labor⁵, justification to support claimed contingency on future costs, and proof of payment to support certain contract costs⁶. On November 4, 2015⁷, DOI responded to the NPFC's request, reducing past labor costs to reflect the rate sheets on file with the NPFC, stating that certain indirect costs could not be claimed pursuant to FWS policy, providing additional budget detail for future agency costs, and providing justification to support a reduced claimed contingency. DOI also included a new scope of work for separate future contract work at a decreased cost in lieu of providing proof of payment for the past contracts costs claimed. DOI reduced the claim sum certain to \$1,306,783 via the November 4, 2015 correspondence to reflect the reduced labor costs associated with the rate sheets on file with the NPFC, the decrease in

¹ The trustees will also conduct two field studies and develop an oil spill trajectory model to provide inputs for the BBM.

² May 27, 2015 Email from NPFC to DOI

³ Certain direct costs for past labor were not supported by rate sheets on file.

⁴ Certain indirect costs for past labor were calculated using the bio-day methodology, while Fish and Wildlife Service (FWS) policy required the use of the Cost Documentation Tool (CDT) to calculate indirect costs.

⁵ DOI cumulatively claimed agency labor for both further injury assessment and restoration planning activities.

⁶ DOI claimed \$22,471 in past contract costs incurred as future costs.

⁷ October 22, 2015 Letter from DOI to NPFC

claimed contingency, and the reduction in cost associated with the newly claimed future contract work.

On March 24, 2016, the NPFC issued a determination with the following general findings:

1. The *Oregon/Washington Mystery* oil spill is an OPA incident that resulted in damages to natural resources. 33 U.S.C. §2702(b)(2)(A).
2. DOI is a federal trustee designated by the President with responsibilities to assess natural resource damages under its trusteeship and to develop and implement plans to restore, rehabilitate, replace, or acquire the equivalent of the natural resources under its trusteeship. 33 U.S.C. §2706(b)(2)); 33 U.S.C. §§2706(c)(1)(A) and (C), and 33 C.F.R. §136.207.
3. DOI presented its claim for uncompensated costs to implement its Natural Resource Damage Assessment Plan to the Fund within the period of limitations for claims. 33 U.S.C. §2713(h)(2); 33 C.F.R. §136.101(a)(1)(ii).
4. DOI's Natural Resource Damage Assessment Plan, which forms the basis of its claim, was developed and implemented after adequate public notice, opportunity for a hearing, and consideration of all public comments. 33 U.S.C. §2706(c)(5).
5. Direct costs in the amount \$540,439 for past costs and future assessment activities are compensable.

The NPFC's determination included further findings with respect to claimed costs by activity type.

With respect to past assessment and restoration planning costs the NPFC determined that:

1. The claimed activities for which costs were claimed were appropriate and provided assessment information of use in determining the type and scale of restoration in accordance with 15 C.F.R. §§990.27, 990.53, and 990.55.
2. Direct costs in the amount of \$181,245 and indirect costs in the amount of \$79,669 were compensable.
3. Indirect costs in the amount of \$23,972 were not appropriately documented in accordance with FWS policy, and were therefore denied.
4. Indirect costs in the amount of \$95,331 were not appropriately documented in accordance with a methodology (i.e. CDT-related) that had been demonstrated by FWS as being valid and reliable, and were therefore, denied.

With respect to future assessment costs the NPFC determined that:

1. Injury assessment activities for which costs were claimed were based on the use of an established model (BBM) and scaling methodology (REA) that, for other incidents, have provided valid and reliable information to help determine the type and scale of restoration in accordance with 15 C.F.R. §990.27(b) and may be reliable in this claim.
2. Direct costs in the amount of \$251,084 and indirect costs in the amount of \$28,441 were compensable,
3. Contingency costs in the amount of \$27,952 would be made available in accordance with NPFC Contingency Policy when, and if needed, and when supported by appropriate justification and cost documentation. Contingency was determined as 10% of direct (\$251,084) and indirect (\$28,441) costs determined to be compensable.

4. Indirect costs in the amount of \$78,096 were not appropriately documented in accordance with a methodology (i.e. CDT-related) that had been demonstrated by FWS as being valid and reliable and, therefore, denied.
5. Contingency costs in the amount of \$7,810 were denied, determined as 10% of indirect costs (\$78,096) determined not to be compensable.

With respect to future restoration planning costs, the NPFC determined that, since the spill occurred over 16 years earlier and the BBM relies on accurate incident-specific data inputs to provide a valid and reliable injury estimate, it would defer its adjudication of all future restoration planning costs (\$533,183) for a period of up to three years from the date of this determination to allow DOI to support and produce a valid and reliable estimate of injury.

	Claimed	Approved	Approved Contingency	Deferred	Denied
Past Costs	\$380,217	\$260,914	\$0.00	\$0.00	\$119,303
Future Assessment	\$393,383	\$279,525	\$27,952	\$0.00	\$85,906
Future Restoration	\$533,183	\$0.00	\$0.00	\$533,183	\$0.00
Total	\$1,306,783	\$540,439	\$27,952	\$533,183	\$205,209

On May 19, 2016⁸, DOI requested that the NPFC reconsider its determination to (1) deny claimed indirect costs and associated contingency costs in the amount of \$205,209, and (2) defer adjudication of future restoration planning costs in the amount of \$407,392⁹.

NPFC's Analysis on Reconsideration

When reconsidering the denial of a claim, the NPFC reviews the claim *de novo*; it incorporates the initial determination by reference. Thus, the NPFC adopts the general claim findings (1-5) issued in its initial determination that applied to the claim as a whole. The NPFC also adopts the findings approving payment of \$540,439 for past injury assessment and restoration planning costs incurred by DOI (\$260,914) and costs to implement approved injury assessment activities detailed in DOI's Plan (\$279,525), as well as the approval of \$27,952 in available contingency funding for future injury assessment activities contingent on demonstrated need.

The NPFC determination with respect to the two specific items that DOI requests NPFC reconsideration follows.

(1) Denied claimed indirect costs and associated contingency in the amount of \$205,209

The NPFC denied payment of \$205,209 claimed as indirect costs and associated contingency for injury assessment activities. The denial was based on the NPFC's determination that \$173,427 in certain future assessment costs using FWS's CDT-related methodology was not adequately documented as an appropriate methodology. The NPFC also determined that \$23,972 in certain

⁸ Letter from DOI to NPFC on May 19, 2016

⁹ DOI only seeks reconsideration of the NPFC's determination to defer adjudication of \$407,392 of the \$533,183 in future restoration planning costs. DOI states that the \$407,392 is for restoration project planning and scoping, while the remaining \$125,791 is for drafting the DARP.

past costs, was calculated by using an outdated bio-day methodology. Claimed contingency associated with the indirect rates applied to denied future indirect costs (\$7,810) were also denied.

DOI's request for reconsideration included documents that describe how the CDT calculates indirect rates and how the methodology complies with federal accounting practices and principles, a letter from the authorized FWS official certifying that this methodology is the one and only appropriate approach for calculating FWS indirect costs, and a summary of a meeting between FWS and the NPFC, whereby FWS staff and contractors provided detailed explanations and justification to support the basis for how the CDT-related methodologies are calculated and the types of costs included. Based on the additional information and the meeting between FWS and the NPFC, the NPFC finds that the indirect methodology was approved by the appropriate person with financial responsibility within the FWS, and that it is reasonable and appropriate for the NPFC to pay FWS's indirect costs incurred pursuant to their new methodology. Claimed costs in the amount of \$173,427 are, upon reconsideration compensable. Accordingly, denied costs for associated contingencies totaling \$7,810 will be available to DOI for future injury assessment activities in accordance with the NPFC Contingency Policy.

With respect to the \$23,972 of previously denied indirect costs that were calculated by the outdated bio-day methodology¹⁰, DOI's request did not provide any additional justification to support payment of these costs. Thus, there is no basis for reconsidering the decision to deny these claimed costs, and our decision to deny these claimed costs stands.

(2) NPFC's decision to defer adjudication of future restoration planning costs in the amount of \$407,392

The NPFC's initial determination deferred adjudication for \$533,183 of future restoration planning costs for a period of up to three years of the date of this determination to allow DOI sufficient time to complete its BBM and to determine the extent of the bird injury resulting from the 1999 spill. This decision recognized that while the BBM is a tool that is capable of providing assessment information of use in determining the type and scale of appropriate restoration, the model relies on (and is sensitive to) accurate estimates of several spill-specific and environmental parameters (e.g., search effort¹¹, carcass persistence, background deposition rates¹², wind, and current conditions), and that it may be able to develop a valid estimate of the injury if the actual incident-specific and environmental conditions that occurred when the spill happened 16 years ago can be recreated.

DOI seeks reconsideration of the NPFC's determination to defer adjudication of \$407,392 of the \$533,183 in future restoration planning costs. DOI states that the \$407,392 is for restoration project planning and scoping, while the remaining \$125,791 is for drafting the DARP. In support of this request, DOI provided the following statements in support of immediate adjudication and payment of these costs: (1) the quality of the data inputs for the BBM determine

¹⁰ DOI applied bio-day and 29.5% rates to direct labor, which was not consistent with DOI policy at that time.

¹¹ DOI states that carcasses were not searched for systematically during the response which, while the spill is of limited time period and scope, will still necessitate that DOI reconstruct this search effort from the records of various untrained responders who searched with varying levels of intensity

¹² Field studies to replicate carcass persistence and background deposition rates could also be affected by the 16 years that have elapsed since the spill occurred. Potential changes to oceanography, beach topography, bird populations, and land usage, among other factors, could influence the results of these studies.

the validity and reliability of the injury estimate, not the time elapsed since the spill; (2) they already have or can obtain the necessary data inputs for the BBM to produce a valid and reliable injury estimate; (3) there is already documented evidence of significant injury and that feasible restoration projects exist to pursue compensatory restoration, and (4) the deferment of further restoration planning would result in delay to restoration and increased costs.

After reviewing DOI's justification, the NPFC finds that the adjudication of future restoration planning costs for which reconsideration has been requested (\$407,392 of the total of \$533,183 claimed for future restoration) will remain deferred. As stated in the initial determination, the NPFC believes that quality data inputs are required for the BBM to produce a valid and reliable injury estimate. The claim record, however, does not establish that DOI has or can obtain the necessary data inputs¹³.

The NPFC understands that DOI has documented a level of bird injury from recovered carcasses, and that it is reasonable to believe that additional injury resulted from the incident. The NPFC's decision to defer focuses on DOI's ability to extrapolate the injury determined by the recovered carcasses to account for such factors as carcasses scavenged or lost at sea, and accounting for environmental conditions that occurred 16 years ago.

Additionally, because this is a mystery spill and the point of origin is unknown, the trustees must conduct a hindcasting model to inform the BBM data inputs that analyze the path bird carcasses took to shore, estimate the number of seabirds at risk of coming into contact with the oil, and quantify the amount of birds lost at sea. Because bird carcasses were found on the beaches directly north and south of the Columbia River outflow in the Pacific Ocean, it is undetermined at this point whether the spill originated offshore or at an upstream location of the Columbia River¹⁴. The results of the hindcasting could have a significant effect on the number of birds included in the injury estimate provided by the BBM.

Furthermore, the potential restoration projects identified by the trustees, to date, all require the removal of invasive species on remote island habitats¹⁵, which could provide restoration benefits that exceed the current threshold of established injury¹⁶.

Therefore, the NPFC reaffirms its initial determination to defer further adjudication of future restoration planning costs until DOI establishes a valid and reliable injury estimate and that the development of restoration projects are justified by those injury assessments. As stated in the NPFC's earlier determination, the NPFC will hold the \$533,183 (including the \$407,392 requested for reconsideration) in a contingency account for a period of three years from the date of this reconsideration determination. Before the end of this period, DOI shall present a description and findings of the assessment efforts in sufficient detail for the NPFC to determine that the estimate of total injury is reliable and valid. The NPFC will issue its determination with respect to these claimed costs at that time based on the results of the documentation submitted. If DOI fails to submit such findings within the three year period stated above, these claimed costs are denied.

¹³ For example, letter from DOI to NPFC dated May 19, 2016 DOI states that it has yet to conduct some of the interviews necessary to help reconstruct the various accounts from untrained responders who searched with varying levels of skill and intensity.

¹⁴ DOI Assessment Plan, page 61

¹⁵ Destruction Island, Seabird, Rocks, and Scott Islands

¹⁶ 272 birds – DOI Assessment Plan, page 7

Summary

DOI requested that the NPFC reconsider decisions provided in its March 24, 2016 determination for the *Oregon/Washington Coast Mystery* oil spill claim to (1) deny claimed indirect costs and associated contingency in the amount of \$205,209, and (2) defer adjudication of future restoration planning costs. The NPFC reviewed the information DOI provided with this request, determining to pay an additional \$173,427 and approve additional contingency of \$7,810 (Table 2). The NPFC denies payment of \$23,972 based on indirect rates calculated according to the outdated bio-day methodology.

Thus, the NPFC offers to pay \$713,866 (\$356,245 in past costs) and (\$357,621 in future assessment costs) and approves contingency in the amount of \$35,762 (future assessment costs). The NPFC denies payment of \$23,972 in indirect costs. This offer constitutes final agency action for the offer to pay and the denied costs.

Lastly, the NPFC defers its decision for \$533,183 of future restoration planning costs, which will be available for a period of up to three years until DOI has submitted documentation that supports a valid and reliable injury estimate.

	Claimed	Approved	Approved Contingency	Deferred	Denied
Past Costs	\$380,217	\$356,245	\$0.00	\$0.00	\$23,972
Future Assessment	\$393,383	\$357,621	\$35,762	\$0.00	\$0.00
Future Restoration	\$533,183	\$0.00	\$0.00	\$533,183	\$0.00
Total	\$1,306,783	\$713,866	\$35,762	\$533,183	\$23,972

Revolving Trust Fund and Return of Unused Funds to the OSLTF

As established by OPA (33 U.S.C. §2706(f)) and the NRDA regulations (15 C.F.R. §990.65), sums recovered by trustees for natural resource damages must be retained in a non-appropriated revolving trust account for use only to implement the assessment and restoration planning activities addressed in this determination in accordance with DOI's Plan. For this claim, the NPFC will deposit \$713,866 into DOI's Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund). DOI has demonstrated that the NRDAR Fund is a non-appropriated account that meets these requirements¹⁷. DOI shall reimburse the Fund for any amounts received from the Fund in excess of that amount required to accomplish the activities for which the claim was paid. 33 U.S.C. §2706(f) and 33 CFR 136.211(b).

¹⁷ The Department of the Interior and Related Agencies Appropriation Act, 1992 (H.R. 2686/P.L. 102-154) permanently authorized receipts for damage assessment and restoration activities to be available without further appropriation until expended. The Dire Emergency Supplemental Appropriations for Fiscal Year 1992 <<http://www.doi.gov/restoration/hjres157.cfm>> (H.J.RES. 157/P.L. 102-229) provides that the fund's receipts are authorized to be invested and available until expended. Additionally, the Department of the Interior and Related Agencies Appropriation Act, 1996 <<http://www.doi.gov/restoration/upload/pl104-134.pdf>> (P.L. 104-134) provides authority to make transfers of settlement funds to other Federal trustees and payments to non-Federal trustees.

Cost Documentation, Progress Reporting, and Final Report

As the claimant, DOI shall ensure that all expenditures of OSLTF funds for future activities are documented appropriately and spent according to the Plan for the activities approved in this determination. Any funds not spent or appropriately documented shall be returned to the Fund. 33 U.S.C. §2706(f).

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

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

DOI shall submit a final progress report within 120 days from the date all claim approved activities are complete. This report should include:

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 findings;
3. Copies of final reports and/or studies;
4. Documentation of OSLTF funds remaining in the Revolving Trust Fund for this claim, including account balance and interest earned; and
5. Documentation of all expenditures as follows:
 - a. Labor: For each employee –
 - i. A narrative description of the work accomplished by each individual and how that work fit into the plan. Enough detail should be included to determine reasonableness of costs; and
 - ii. The number of hours worked, labor rate, and indirect rate. An explanation of indirect rate expenditures, if any, will be necessary;
 - b. Travel: Paid travel reimbursement vouchers and receipts;
 - c. Contract: Activities undertaken, lists of deliverables, and contract invoices and receipts;
 - d. Purchases/Expendables: Invoices and receipts, along with an explanation of costs; and
 - e. Government Equipment: Documentation of costs, including the rate (i.e., hourly, weekly) and time for all equipment used for which costs were incurred.

With the final report(s), the NPFC will reconcile costs and all remaining funds and/or inadequately documented costs will be returned to the OSLTF.

The NPFC has prepared standardized templates with instructions to facilitate final cost reporting (enclosed).