

U.S. Department
of Homeland Security

United States
Coast Guard



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

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16480

October 5, 2010

David Westerholm
Director, NOAA Office of Response and Restoration
1305 East West Highway
Silver Spring, MD 20910

Re: Claim Number P05005-OC1- *Athos I* Oil Spill Assessment and Restoration

Dear Mr. Westerholm:

The National Pollution Funds Center (NPFC) has reviewed the claim submitted by the National Oceanic Atmospheric Administration (NOAA) for natural resource damages resulting from the *Athos I* (hereinafter *Athos*) oil spill incident (Claim Number P05005-OC1). The claim totals \$37,106,991.35, representing \$2,939,560.35 for past assessment costs, \$27,495,751 to implement nine restoration projects to compensate for natural resource injuries resulting from the incident, and \$6,671,680 in contingency costs. Based on our review of the claim, we have determined that \$30,435,311.35 is compensable, \$27,495,751 to implement the nine restoration projects and \$2,939,560.35 in past assessment costs. We have also approved up to \$6,473,816 for contingency costs subject to NPFC review and approval of the trustees' justification and past expenditures. Our determination was made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. 2701 *et seq.*) and the OPA regulations found at 33 C.F.R. §136 and 15 C.F.R. 990 *et seq.* The basis of our decision follows.

Summary of Claim

On November 26, 2004, the tank vessel *Athos* struck submerged objects while maneuvering to its berth on the Delaware River near Paulsboro, New Jersey. The vessels' hull was breached, resulting in approximately 263,000 gallons of heavy Venezuelan crude oil discharging into the River. Over the following weeks and months, oil from the ruptured tanker spread downriver, threatening natural resources over 115 river miles (280 miles of shoreline), as well as its tributaries, from the Tacony-Palmyra Bridge to south of the Smyrna River in Delaware. The incident also forced the USCG to close the River to recreational and commercial traffic for over one week. Frescati

Shipping Company, Ltd. acknowledged that they are the responsible party (RP) for this incident¹.

NOAA, together with the U.S. Fish and Wildlife Service (USFWS), New Jersey Department of Environmental Protection (NJDEP), Delaware Department of Natural Resources and Environmental Control (DNREC), Pennsylvania Departments of Conservation and Natural Resources (PADCNR) and Environmental Protection (PADEP), Pennsylvania Fish and Boat Commission (PFBC), and Pennsylvania Game Commission (PGC) (collectively referred to as the trustees), conducted a natural resource damage assessment (NRDA) to determine the nature and extent of losses resulting from the spill and the type and scale of restoration necessary to compensate for the natural resources losses. Assessment and restoration planning activities were conducted cooperatively with RP representatives until the USCG determined that RP was entitled to a limit of liability², and are presented in the trustees' final Damage Assessment and Restoration Plan (Plan). In total, the trustees estimated that 412 acres of subtidal benthic habitat were impacted, 11,869 birds were either killed or lost as future production of those killed, 3,628 acres of shoreline were exposed to oil, and 41,709 recreational trips were affected. After evaluating a number of alternatives, the trustees selected nine restoration projects to compensate for these losses.

On October 5, 2009, the NPFC received a natural resource damage claim from NOAA, on behalf of the trustees. The claim totaled \$36,653,594, which included \$2,341,635.06 for past assessment costs, \$27,555,094 to implement nine restoration projects, and \$6,756,865 for project contingency costs. The trustees revised their claim on August 13, 2010. The new sum certain totaled \$37,265,055, which included \$3,097,624 for past assessment costs, \$27,495,751 to implement nine restoration projects and \$6,671,680 for project contingency costs. On September 28, 2010 the trustees revised their claim amending their past assessment costs from \$3,097,624 to \$2,939,560.35. The revised sum certain totals \$37,106,991.35.

The NPFC has reviewed the revised claim, including the trustees' Plan and Administrative Record (AR), as well as supplemental information provided by the trustees in response to NPFC requests. We have determined that \$30,435,311.35 is compensable under OPA and the NPFC claims regulation. The remainder of this determination presents the NPFC's analyses and determinations with respect to this claim and the claim requirements under OPA.

Jurisdictional Information

The NPFC first considered whether the claimed damages arose from an incident as defined under 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

¹ May 22, 2005 claim from Frescati Shipping Co, Ltd. to the National Pollution Fund Center for entitlement to limit of liability.

² See August 15, 2006, determination by the NPFC stating that Frescati Shipping Co., Ltd. is entitled to limit their liability to the amount provided under 33 U.S.C. 2704(a).

navigable waters of the United States after August 18, 1990. Based on information provided by the trustees summarized above, this incident resulted from the discharge of oil into the Delaware River, a navigable waterway, in November 2004. The NPFC therefore finds that this spill is an incident as defined by OPA.

Claimant Eligibility

Pursuant to 33 C.F.R. §136.207, natural resource trustees may present claims to the Oil Spill Liability Trust Fund (OLSTF) for uncompensated natural resource damages, which include the reasonable cost of assessing those damages. Natural resource trustees are designated according to OPA (33 U.S.C. §2706 (b)); specifically, federal trustees are designated by the President; state trustees are designated by their respective Governors. This claim for natural resource damages was submitted jointly by NOAA, USFWS, NJDEP, DNREC, PADCNr, PADEP, and PFBC. NOAA, under the authority of the Secretary of Commerce, and the USFWS, under the authority of the Secretary of the Interior, are appropriate federal natural resource trustees pursuant to the President's designation of federal trustees under OPA, Executive Order 12777 (56 Fed. Reg. 54757, October 22, 1991), and Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. §300.600). The NJDEP, DNREC, PADCNr, PADEP, PFBC, and PGC are also appropriate state natural resource trustees based on delegation letters on file at the NPFC. Accordingly, these claimants are eligible to present claims to the NPFC.

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). Trustees are assisted by the rebuttable presumption found at 33 U.S.C. §2706 (e)(2) and 15 C.F.R. §990.13 when they follow 15 C.F.R. 990 *et seq.* Trustee determinations made in accordance with 15 C.F.R. 990 *et seq.* are initially presumed correct, but the presumption of correctness may be rebutted if the rebuttal evidence is of sufficient weight.

After careful review of the claim and supporting documents, the NPFC finds that the trustees followed 15 C.F.R. 990 *et seq.* Specifically, the trustees: coordinated actions to ensure that full restoration is achieved without 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 draft and final Plan that was reviewed by the public; and maintained an AR that was made available for public review. The trustees were not required to present to the RP because the RP met their limit of liability³.

³ The Coast Guard determination on August 15, 2006 that Frescati Shipping Co., Ltd. had exceeded their OPA liability meant that they are not liable for further removal costs or damages resulting from the *Athos* incident. Therefore, the trustees did not need to first present their claim to the RP.

Claim Presentation

This natural resource damage claim was submitted to the NPFC by NOAA, acting as the Lead Administrative Trustee (LAT). It included a cover letter and AR documents, including the final Plan, and documentation of claim components and associated costs. On January 6, 2009, the trustees posted a copy of the draft Plan on NOAA's website to allow public review and responded to public comments in the final Plan. This claim meets the general requirements for a claim set out in the NPFC claims regulations (33 C.F.R. §136.105).

Natural resource damage claims under OPA must be based on the reasonable cost of assessing natural resource damages and implementing a plan to restore, rehabilitate, replace, or acquire the equivalent of the natural resources damaged (33 C.F.R. §136.207). Claimants have three years from the date that the injury was reasonably discovered or the completion of the NRDA, whichever is later, (33 U.S.C. §§2713(h)(2) and 2717(f)(1), 33 C.F.R. §136.101, 15 C.F.R. §990.64(b)) to submit a natural resource damage claim to the NPFC. The last step in a NRDA process is the development of a final Plan. The NPFC received this claim on September 30, 2009, less than three years from the date the NRDA was completed. The claim was, therefore, prepared pursuant to a plan and presented within the statute of limitations set out in OPA and its implementing regulations.

Injury Determination and Quantification

Following 15 C.F.R. 990 *et seq.*, the trustees used information collected during their preassessment efforts to identify four types of natural resource injuries that likely resulted from the incident: aquatic, bird and wildlife, shoreline, and recreational use. The link and pathway to the *Athos* were documented through fingerprint analyses matching the source oil with oil on recovered habitat and wildlife. Specific assessments were then conducted for each of these types of injury to determine the need for, type of, and scale of restoration required to compensate for the losses. Each injury assessment study was then peer reviewed by outside experts before being finalized and used as the basis for restoration planning.

Aquatic Injury Assessment

The trustees determined that 412 acres of subtidal benthic habitat were exposed to oil from the *Athos* tanker⁴, based on intertidal and subtidal sediment samples and information from shoreline assessments and V-SORS and snares deployed to detect presence of oil in the water column and river bottom. Injuries to benthic habitat services from physical smothering, fouling, and toxicity were then quantified using a Habitat Equivalency Analyses (HEA) model. First, the trustees considered that the spill occurred in a degraded environment with a background service loss of 10 percent. Initial injury and the recovery rate for the affected area was then estimated from toxicity, PAH levels,

⁴ Aquatic Technical Work Group, 2007. Final Report Aquatic Injury Assessment. M/T *ATHOS* 1 Oil Spill, Delaware River System. *Athos* Trustees.

and benthic community information from sediment samples. Based on this approach, the trustees determined that recovery to baseline within the 412 acre oiled area was reached in 14 months, with a total injury quantified as 97 discounted service acre years (DSAYs) of benthic habitat services (Table 1).

Table 1. HEA Model Inputs and Aquatic Injury.		
Injured Area	Service Loss ^a	Injury
412 acres of benthic habitat	51% at 1 month	97 DSAYs of benthic habitat services
	28% at 3 months	
	10% at 10 months	
	0% at 14 months	
^a Service loss is presented as loss resulting from the <i>Athos</i> spill (i.e., above background levels)		

The NPFC has reviewed the trustees' assessment of injuries to aquatic resources resulting from the *Athos* incident. We find that the trustees used a reliable and valid assessment method (HEA), accounted for background contamination, and used model inputs that are reasonably based on the available data and professional judgment. The NPFC therefore accepts the trustees' injury estimate of 97 DSAYs.

Bird and Wildlife Injury Assessment

Following the spill, the trustees collected 206 dead oiled birds, and rehabilitated and released alive an additional 337 oiled birds. Using risk-based assessment methods, the total injury resulting from the spill was estimated to be 11,869 birds (Table 2).

Table 2. Total (direct and indirect) Estimated Bird Injury by Guild.				
Guild	Direct Injury (dead adults)	Discounted Indirect Injury (fledged young)		Total Injury (adult and fledged young)
		Lost Productivity (mortality)	Lost Productivity (reproductive failure)	
Dabbling Ducks	605	1,187	577	2,369
Diving Ducks	82	163	24	269
Diving Birds	64	92	2	158
Gulls	1,072	1,543	331	2,946
Shorebirds	55	79	0	134
Wading Birds	10	14	3	27
Swans & Geese	1,416	3,369	1,171	5,956
Kingfishers	4	6	0	10
Total	3,308	6,453	2,108	11,869

The trustees' injury report⁵ describes the risk based assessment. In summary, data from ground and aerial surveys conducted by the trustees following the spill were used to estimate the number of oiled birds in the area, by guild and degree of oiling. Mortality rates based on degree of oiling were then derived from literature and expert opinion and applied to the number of birds in the area to estimate the number of non-recovered birds that were oiled and died, or that survived with potentially sub-lethal impacts. Direct injury was then determined as the sum of recovered and non-recovered dead birds. Using literature-based values of reproductive potential and age specific survival rates, indirect injury was determined as the discounted loss of production from dead individuals (projected to last 7 to 9 years) plus the discounted loss of production due to individuals that were oiled and survived, but failed to breed in the subsequent year. Total injury was then calculated as the sum of direct and indirect injury (Table 2).

Given the relatively large area exposed to oil and likelihood that many oiled birds were not found by search teams, the NPFC finds that it is reasonable to assume that not all birds injured by the spill were recovered. The trustees' risk-based assessment method is considered one of several standard accepted methodologies used to determine bird injury, and is appropriate for this spill since the trustees had extensive aerial and ground survey data that this approach requires. This approach relies heavily on mortality rates, and foregone production estimates, and the trustees sourced these rates from peer-reviewed literature combined with expert opinion. Therefore, the method used was applied in a reasonable manner. This approach did result in a relatively high estimate of birds lost due to the spill, but given the large geographic extent and timing of the spill, combined with evidence presented via the extensive site specific data collected by the trustees, the NPFC finds there is not sufficient evidence in the record to rebut the presumed correctness of the trustees' bird injury determination. The NPFC therefore accepts the trustees estimate of 11,869 lost birds (3,308 direct and 8,561 indirect).

The NPFC notes that one of the public comments on the draft DARP suggested that the bird injury estimate be reduced to account for hunting restrictions imposed by state officials following the spill. The NPFC requested that the trustees provide additional information about how such restrictions were considered by the trustees during their assessment. The trustees responded that any temporary benefits that hunting reductions might have had on bird survival were limited in magnitude and too uncertain to incorporate into restoration scaling calculations. The trustees further responded that granting credit for birds not killed due to hunting closures would create perverse incentives for polluters, and would contradict the legislative intent of OPA. After reviewing this response, the NPFC finds that there is not sufficient evidence in the record to rebut the presumed correctness of the trustees' assessment. Further, the NPFC understands the trustees' position that it would be inappropriate to consider oil discharges as having a beneficial or "restoration" value under OPA.

⁵ Bird and Wildlife Technical Work Group, 2007. Final Report, Bird and Wildlife Injury Assessment. M/T *Athos 1* Oil Spill, Delaware River. *Athos* Trustees.

Shoreline Injury Assessment

The trustees used data from assessment surveys to determine the geographic extent and degree of shoreline oiling by habitat type. HEA was then used to quantify the ecological service losses by habitat type based on degree of oiling and expected rate of recovery. In total, the trustees determined that 1,729 acres of shoreline habitat were oiled, resulting in an injury estimate of 1,334 DSAYs (Table 3). The trustees also determined that 1,899 acres of tributary habitat (i.e., tributary shorelines, wetlands, intertidal flats, and shallow benthic habitats) were exposed to *Athos* oil, resulting in an injury estimate of 524 DSAYs (Table 3).

Table 3. Shoreline Injury Estimate.				
Shoreline Type	Acres Exposed to Oil	Recovery at 1 yr (%)	Injury Duration (yr)	DSAYs
Seawalls	59.38	93	2	30.32
Sand/Mud Substrates	1415.83	63	3	1,117.24
Coarse Substrates	137.23	65	5	126.84
Marsh	116.47	74	4	60.02
Subtotal	1,728.91			1,334.42
Tributaries	1899.23	100	1	523.53
Total	3628.14			1,857.95

The trustees' injury report⁶ describes the HEA modeling approach, including shoreline and tributary oiling data and recovery rate parameters. The NPFC has reviewed this report, along with additional information submitted by the trustees as part of their claim, and finds that the trustees' shoreline injury estimate was based on a reliable and valid assessment modeling approach (HEA) and accepted data collection and analytical techniques. Further, model input parameters are reasonably based on shoreline oiling data collected by the trustees and available literature. The NPFC therefore accepts the finding of 1857.95 lost shoreline DSAYs.

Recreational Use Injury Assessment

Following the spill, the states of Delaware and New Jersey restricted hunting for about two weeks in the area from the spill site south to Cedar Swamp Wildlife Area (DE) and the Salem nuclear power facility (NJ). The USCG also closed a portion of the River to boat traffic. The trustees collected data to assess loss of recreational resulting from the restricted access to the River and near shore areas, determining that 41,709 recreational trips (i.e., hunting, fishing, boating, crabbing, and beach and other shoreline use) were affected, either as lost, substituted (change in location), or degraded trips (reduced quality of the trip) (Table 4).

⁶ Shoreline Assessment Team, 2007. Final Report Shoreline Injury Assessment. M/T *Athos* 1 Oil Spill, Delaware River. *Athos* Trustees.

The trustees' injury assessment report⁷ details the survey data and methods used to quantify recreational losses resulting from the spill. In summary, the number of affected trips was determined by surveys of recreational users. Hunters were contacted by phone, while boaters, anglers and crabbers were contacted by on-site surveys. A benefits transfer model was then used to determine the total value of affected trips (either lost or substituted to an alternative site), with per trip values determined as the change in consumer surplus⁸ derived from published literature⁹ (Table 4).

Table 4. Summary of Recreational Use Injury.				
	Fishing/Crabbing	Waterfowl Hunting	Boating	Total
Affected Trips (lost, substituted, and diminished value)	20,652	15,559	5,498	41,709
Lost Value	\$762,762	\$450,435	\$105,900	\$1,319,097

Based on a review of the trustees' assessment report and subsequent information about the economic value used for lost and substituted trips, the NPFC finds that the assessment of recreational losses was based on reasonable survey data and an accepted and cost-effective method for assessing lost recreational use¹⁰. Further, the dollar values for affected trips are reasonably based on published literature¹¹. The NPFC therefore accepts the trustees' estimate of recreational injury as \$1,319,097.

Restoration Alternatives

The trustees considered a range of restoration alternatives to compensate for each of the injury categories (aquatic, bird and wildlife, shoreline, and recreational use). They evaluated each alternative using the criteria provided at 15 C.F.R. §990.54, scaled the projects to compensate for the quantified injury, and selected a preferred alternative for each injury category.

⁷ Athos/Delaware River Lost Use Technical Working Group, 2007. Athos/Delaware River Lost Use Valuation Report M/T *Athos 1* Oil Spill, Delaware River. Athos Trustees.

⁸ The value of a recreational trip is the average consumer surplus per trip. In this case, consumer surplus is the measure of an individual's value of a trip, above and beyond any payments that are necessary for that trip. The change in consumer surplus resulting from the spill is the measure of economic loss.

⁹ Consumer surplus values for recreational fishing and crabbing were determined at \$42.60/lost or substituted trip and \$8.52/diminished trip; values for waterfowl hunting were determined at \$43.88/lost or substitute trip and \$8.75/diminished trip; values for boating were determined at \$47.51/lost or substitute trip and \$9.50/diminished trip; (Rosenberger and Loomis, 2001) see footnote 11 for full reference.

¹⁰ Benefits transfer methods use value estimates previously generated for other similar resources or services to estimate a value for the specific resource or service, as opposed to conducting new surveys and studies to measure the value of a resource or service. Benefits transfer is suggested as an assessment method in Appendix B to the preamble of NOAA NRD regulation (15 C.F.R. Part 990) and the Department of the Interior uses benefits transfer in its Type-A model to value the loss of natural resources resulting from the release of oil and other substances covered by 42 U.S.C. 9601 *et. seq.*

¹¹ Rosenberger, R.S., and J.B. Loomis, 2001. Benefit Transfer of Outdoor Recreation Use Values. A Technical Document Supporting the Forest Service Strategic Plan (2000 Revision), USDA Forest Service General Technical Report RMRS-GTR-72.

Aquatic Restoration

The trustees selected Oyster Reef Enhancement and Restoration as the preferred alternative to compensate for the aquatic resource loss of 97 DSAYs of benthic habitat. The restoration objective is to enhance benthic productivity through both increased oyster populations and non oyster biota associated with oyster bed habitat to compensate for the lost benthic services resulting from the *Athos* spill.

The selected project is located on both the New Jersey (Middle Seed Bed) and Delaware sides of the River (Over the Bar). Both states have established programs that create and enhance oyster beds either by direct placement of shell for natural spat settlement (DE), or a two step process whereby shell is placed in high spat recruitment areas and then moved to areas that exhibit higher spat growth and survival (NJ). Based on the success of these two state programs, the trustees believe that the project has a high probability of producing a functioning oyster reef that will generate additional benthic biomass.

The trustees determined the amount of new oyster reef required to compensate for the lost benthic biomass by converting the estimate of lost benthic habitat area (97 DSAYs) to units of benthic biomass. Expected additional benthic resources (i.e., oysters, as well as shrimp, clams, snails, crabs, etc.) resulting from the oyster reef were then scaled to the loss. These calculations, which are detailed in the trustees' Aquatic Injury Report, indicate that 4.5 acres of oyster reef will compensate for the loss. Costs of project planning and design, implementation, and oversight total \$39,677.

After reviewing the trustees' methods of scaling and evaluating the restoration alternative, the NPFC finds that the Oyster Reef Enhancement and Restoration project is reasonable and appropriate under OPA. The project provides in-kind compensation, is cost-effective, and takes advantage of established restoration programs that have a record of success. Thus, the NPFC approves \$39,677 to implement this project.

Bird Restoration

The trustees selected three projects to restore the direct loss of 3,308 adult birds and indirect loss of 8,561 fledged young birds: Oyster Reef Enhancement and Restoration, Habitat Improvement at Blackbird Reserve, and Habitat Restoration at Mad Horse Creek. The objective of these projects is to enhance or create additional habitat that will serve as food sources expected to enhance bird biomass.

The trustees used the trophic transfer approach (McCay and Rowe, 2003)¹² to determine the size of each restoration project required to compensate for the bird loss. Under this approach, the injury is first converted from individuals lost to biomass lost by multiplying the number of lost birds by the estimated weight per bird. The trustees' then determined the size of the habitat restoration by scaling the lost bird biomass to biomass expected to

¹² French McCay, D.P and J.J. Rowe. 2003. Habitat Restoration as Mitigation for Lost Production at Multiple Trophic Levels. Marine Ecology Progress Series. 264:233-247.

be gained from the restoration project using literature values for similar types of projects and accounting for energy transfer efficiencies between trophic levels.

Oyster Reef Enhancement and Restoration

The trustees propose to restore and enhance oyster reef to compensate for injuries to diving ducks, diving birds, gulls, and wading birds. The restoration objective is to increase subtidal productivity through increased oyster populations and non-oyster biota associated with reef habitat, which will serve as additional food sources and increase biomass of these birds.

Oyster reef restoration would occur as additional acres at the same two sites (Middle Seed Bed (NJ) and Over the Bar (DE)) planned for aquatic restoration (see section above on Aquatic Restoration). Using the trophic transfer scaling approach, the trustees determined that 73.5 acres will compensate for the losses to diving ducks, diving birds, gulls, and wading birds. Costs of project planning, implementation, oversight and monitoring are \$663,813.

After reviewing the trustees' methods of scaling and evaluating the restoration alternative, the NPFC finds that the Oyster Reef Enhancement and Restoration project is reasonable and appropriate under OPA. The project is cost effective, takes advantage of established restoration programs that have a record of success, and can reasonably be expected to produce a community of benthic organisms that will be consumed by diving ducks, diving birds, gulls, and wading birds, resulting in increased bird biomass. For these reasons, the NPFC approves \$663,813 for this project.

Habitat Improvement at Blackbird Reserve

This project will create forested areas, shallow water ponds, wildlife pastures, and food plots on agricultural lands within the Blackbird Reserve Wildlife Area in Delaware. The restoration objective is to increase aquatic and grassland vegetation that will be consumed by geese and enhance bird biomass to compensate for a portion of the losses. This project would compensate for approximately 20 percent of total goose injury (1,191 of the 5,956 geese injured).

In total, 2.2 acres of ponds, 16 acres of pasture, and 4.7 acres of food plots¹³ would be established, providing increased foraging opportunities on corn crops, aquatic vegetation, white clovers, and fescue, as well as resting habitat along the migration path. The land is owned and managed by the state. Costs total \$104,891 for project planning and design, construction, monitoring, and operations and maintenance.

After reviewing the trustees' description and evaluation, the NPFC finds that the Blackbird Reserve project is reasonable and appropriate to restore injuries to geese. The project will provide in-kind restoration in the same geographic area (in-place). It is on

¹³ The active agriculture component is 23.6 acres; 20 percent, or 4.7 acres, will be left unharvested.

state-owned land, giving it protection from development and making it a cost-effective approach to restoring a portion of the goose injury. For these reasons, the NPFC approves \$104,891 to implement this project.

Habitat Restoration at Mad Horse Creek

The trustees propose to restore 160 acres within New Jersey's Mad Horse Creek Wildlife Management Area by lowering marsh elevation to establish natural tidal inundation and creating wet meadow and upland grassland habitat on land now used for agriculture. Increase production resulting from the restored marsh will compensate for losses of dabbling ducks and shorebirds, while increased production from the wet meadow and grassland will compensate for the remaining injuries to geese and swans.

Using the trophic transfer approach¹⁴, the trustees relied on existing literature and past experience to determine that restored marsh will produce 1,153 kg per acre annually for 50 years. Restored wet meadow habitat will produce 7,155 kg per acre annually for 50 years. Grassland annual productivity is 2,120 kg per acre for 50 years. Annual productivity for grasslands is 2,120 kg per acre for 50 years. Using these parameters the trustees determined that 25.4 acres of restored marsh will compensate for the dabbling duck and shorebird injury, 35 acres of wet meadow and 100 acres of grassland restoration will restore approximately 80 percent of the total injury to swans and geese (4,765 of the 5,956 geese injured).

Project costs for the 160 acres of marsh, wet meadow, and grassland restoration total \$12,353,056, which includes project planning and design, construction, monitoring, and operations and maintenance for the marsh and wet meadows restoration components. The trustees included the costs of grassland restoration in the marsh and wet meadow restoration costs because the grassland will be established from upland disposal of sediments excavated from the marsh and wet meadows. Thus, there is no additional cost associated with the grassland component of this project (which is scaled to 80 percent of the goose injury).

After reviewing the trustees' evaluation of the Mad Horse Creek project, the NPFC finds that it is reasonable and appropriate for restoration of injuries to dabbling ducks, shorebirds, and geese and swans. The proposed project is based on established ecological restoration practices that have been successfully applied to similar projects in the region. It is located in the same geographic area of the spill, and on land already owned by the state. The project is consistent with existing federal, state, and local restoration goals established by the Delaware Bay Estuary Program and costs are in line with similar projects in the New Jersey/New York region¹⁵. For these reasons, the NPFC approves \$12,353,056 for this project.

¹⁴ See DARP

¹⁵ For example, The U.S. Army Corps project at Woodbridge Creek Marsh that involved dredging and regrading to restore tidal flow and recreate native salt marsh averaged \$250,000/acre. By comparison the marsh and wet meadow restoration costs at Mad Horse Creek are about \$205,000 per acre.

Shoreline Restoration

The trustees determined that 1,729 acres of seawalls, sand/mud substrate, marsh, and coarse substrate (1,334 DSAYs), and 1,899 acres of tributary habitat (525 DSAYs) were exposed to *Athos* oil, with total injury determined as 1,858 DSAYs of lost shoreline habitat services. As described below, the trustees identified two projects to compensate for the non-tributary losses and two projects to compensate for the tributary losses.

Non-Tributary Shoreline Restoration

The trustees selected two habitat restoration projects to compensate for the 1,729 acres (1,334 DSAYs) of shoreline habitat that were injured by the *Athos* spill: (1) restore an additional 34 acres of marsh at Mad Horse Creek in New Jersey; and (2) restore 0.9 acre of freshwater tidal wetland/wet meadows at Lardners Point in Pennsylvania. Both projects are proposed as in-kind restoration. Lardners Point is also considered in-place, located within the spill zone.

To determine the appropriate size of restoration to compensate for the non-tributary shoreline losses, the trustee adjusted the injury downward by 10 percent to reflect the degraded baseline condition of the spill impact area relative to the proposed restoration sites. This resulted in 1202 DSAYs. The trustees then “normalized” losses of different habitat types using habitat equivalency ratios presented in Peterson et al. (2007)¹⁶. This resulted in the 1202 DSAYs of shoreline loss being adjusted to 471 wetland equivalent DSAYs as the restoration requirement.

Habitat Restoration at Mad Horse Creek

This project restores an additional 34 acres of degraded marsh at the Mad Horse Creek project site identified for restoration of dabbling ducks and shorebirds. The trustees propose to lower marsh elevation to restore natural tidal inundation, thereby creating functioning shoreline marsh habitat to compensate for the loss of shoreline habitat resulting from the *Athos* incident.

The trustees used HEA to scale the proposed marsh restoration project, relying on professional experience with creating wetlands in this region, data from other damage assessments, and scientific literature, to determine that the project will achieve a maximum service level of 85 percent in 15 years. The project life span is expected to last for 50 years, producing an average of 13.4 service acre-years. Based on these

¹⁶ The equivalency ratios used are 2.5:1 for converting intertidal/tidal flats and sand/mud substrates to marsh and 10:1 for converting rip rap, seawalls and coarse substrates to marsh. Peterson, C.H., M. Wong, M.F. Piehler, J.H. Grabowski, R.R. Twilley, and M.S. Fonseca. 2007. Estuarine Habitat Productivity Ratios at Multiple Trophic Levels. Final Report to NOAA Office of Response and Restoration, Silver Spring, MD. 45 pp

assumptions, 34 acres of restored marsh will compensate for approximately 457 DYSAYs, or 97 percent of the total shoreline injury. The cost to implement the 34 acre project is \$6,994,611, which includes project planning and design, construction, monitoring, and operations and maintenance.

After reviewing the trustees' evaluation of this project, the NPFC finds that the proposed restoration is reasonable and appropriate compensation for shoreline injuries resulting from the *Athos* incident. Tidal inundation can reasonably be expected to increase the abundance and diversity of plant species. The project relies on feasible and proven techniques that the trustees have successfully implemented in nearby areas, consistent with existing federal, state, and local restoration goals established by the Delaware Bay Estuary Program, and is reasonably cost-effective. For these reasons, the NPFC approves \$6,994,611 for an additional 34 acres of marsh restoration at Mad Horse Creek.

Habitat Restoration at Lardners Point

To compensate for the remaining shoreline habitat injury (14 adjusted, "marsh equivalent" DSAYs, or three percent of the total injury), the trustees propose to restore a four acre industrial site owned by the city of Philadelphia near the Tacony-Palmyra Bridge. Shoreline restoration includes demolishing existing structures, removing concrete debris, importing fill material, regrading the site to restore tidal inundation, planting intertidal marsh, and creating wet meadow habitat.

The trustees used HEA to determine size of restoration at Lardners Point needed to compensate for the 14 adjusted, "marsh equivalent" DSAYs. Based on trustee experience and scientific literature, the trustees assumed the following input parameters; zero ecological baseline services, 85 percent maximum service levels, and 50 year project life span. Using these model inputs, the trustees determined that 0.9 acres of restored marsh will compensate for the remaining portion of non-tributary shoreline injury. Costs to implement the project total \$643,271, which include project planning and design, construction, monitoring, and operations and maintenance.

After reviewing the trustees' evaluation, the NPFC finds that the Habitat Restoration Project at Lardners Point is feasible and reasonably likely to compensate for shoreline injuries resulting from *Athos* incident. Similar projects in the region have been implemented successfully, and the project is part of a larger regionally supported plan by the Delaware River City Corporation, Pennsylvania Environmental Council, and Fairmount Park Commission to establish a Delaware River Greenway. The project addresses fragmentation of riparian and upland habitat on the heavily industrialized Philadelphia waterfront, and restores the same shoreline habitat that was affected by the *Athos* spill (i.e., in-kind, in-place). For these reasons, the NPFC approves \$643,271 for this project.

Tributary Shoreline Restoration

The Trustees determined that 1,899 acres (524 DSAYs) of shoreline tributary habitat (i.e., tributary shorelines, wetlands, intertidal flats, and shallow benthic habitats) were injured by the *Athos* oil spill. To compensate for this loss, the trustees propose two restoration

projects: Habitat Restoration at John Heinz National Wildlife Refuge (NWR) and Dam Removal and Habitat Restoration at Darby Creek. As described below, these two projects provide 457 of the 524 DSAYs lost. The trustees, however, propose these two projects as full compensation for the tributary injury.

Habitat Restoration at John Heinz NWR

This project involves removing invasive vegetation (*Phragmites*) and restoring degraded wetlands by excavating a series of channels and pools to restore tidal flushing that will enhance export of productivity to the Darby Creek tributary habitat. The Project is planned to restore approximately seven acres of habitat¹⁷ that will function similar to tributary habitat; and with an additional 49 acres enhanced by tidal inundation during storm surges and other high tide events.

The trustees used HEA to determine the tributary services resulting from the restored seven acres. Key input parameters determined from professional experience and the scientific literature included a maximum 70 percent increase of services and 50 year project lifespan. A separate HEA was then developed for the additional 49 acres, with the trustees determining that a maximum 10 percent increase in services over the 50 years project lifespan. Together, the HEA calculations indicate that the project will generate 222 DSAYs.

The total cost to implement this project is \$2,968,517 which includes planning design, construction, monitoring, operation, and maintenance.

After reviewing the trustees' description and evaluation, the NPFC finds that John Heinz NWR project is reasonable and appropriate to restore injuries to tributary habitat. This restoration approach is consistent with the trustees' injury calculations, which combine tributary subtidal, intertidal, and a small width of adjacent shoreline acreage into the total acreage of total injured tributary habitat. The project is located within an existing NWR, where similar projects have been successfully implemented. For these reasons, the NPFC approves \$2,968,517 to implement the Habitat Restoration Project at John Heinz NWR to compensate for losses of tributary habitat injured by the *Athos* incident.

Darby Creek Dam Removal and Habitat Restoration

This project involves removing three dams and a remnant bridge pier from Darby Creek, a tributary of the Delaware River in southeastern Pennsylvania, followed by restoration of nearby riparian areas. The objective of the dam removal and riparian restoration is to restore normal stream channel flows, improve the general health of the creek's plant and macroinvertebrate communities, and decrease localized flooding during high water events.

Habitat index values described in Doyle et al. 2005¹⁸ were used to estimate the relative value of habitat following dam removal. The trustees estimated ecological service gains

¹⁷ 4.5 acres of shallow pools, 1.2 acres of channels, and 1.2 acres of channel buffer habitat.

resulting from the project four areas increased: (1) 6.6 acres of creek in the immediate vicinity of the dams would see a 50 percent service increase; (2) 3.1 acres of creek tributaries within the immediate vicinity would see a 15 percent service increase; (3) 4.5 acres of active riparian restoration would see a 75 percent service increase; and (4) 2.3 acres in the immediate vicinity of the active restoration would see a 37.5 percent service increase. Using these estimates and other parameters from the scientific literature and past experience in a HEA model, the trustees then determined that dam removal and riparian restoration would produce 234 DSA Ys. The cost to implement this project, which includes project planning and design, construction, and monitoring, is \$1,328,194.

After reviewing the trustees alternative analysis and scaling approach, the NPFC finds that this project is reasonably likely to restore shoreline tributary habitat. The trustees and other partners have successfully removed about 15 dams in the region, documenting enhanced in-stream and riparian habitat conditions. In addition, all of the dams proposed to be removed are owned by public utilities that support removal efforts. The NPFC therefore approves \$1,328,194 for this project.

Recreational Use Restoration

The trustees selected three projects to compensate for lost recreational use, determined as the dollar value (\$1,319,097) of 41,709 lost and diminished value trips: Stow Creek Boat Ramp, Augustine Boat Ramp, and Little Tinicum Island Trail and Habitat Enhancement. Each of these alternatives is proposed to compensate for lost recreational opportunities resulting from the spill by increasing recreational access to the Delaware River.

At Stow Creek, the trustees propose to widen, lengthen, and pave an existing ramp on state property in Cumberland County, New Jersey. These improvements will accommodate fishermen and hunters by facilitating loading and unloading boats, improve safety, and increase disabled persons' access. The total cost of this project is \$466,536, which includes planning, design, and construction.

The Augustine Boat Ramp project involves building a rock jetty north of the existing boat ramp to enhance boat use and safety at this popular launch on the Delaware River for hunters and fishermen. Installing the jetty is expected to reduce the need for periodically dredging of sediments that accumulate near the launch that limit use during low tides. The total cost to plan, design, and construct this project is \$1,844,768. The trustees propose to apply \$818,687 of *Athos* recreational use damages, with the state of Delaware, funding the remaining amount. If the state is unable to fund the remaining portion, the trustees will initiate the public process to find a suitable alternative and no OSLTF funds will be applied to the project.

Little Tinicum Island Trail and Habitat Enhancement project involves constructing a permanent trail, two observation decks, and a "breakaway bridge" to cross a small wet area. The Trustees believe this project would provide recreational opportunities similar

¹⁸ Doyle, M.W., E.H. Stanley, C.H. Orr, A.R. Selle, S.A. Sethi, and J.M. Harbor, 2005. Stream Ecosystem Response to Small Dam Removal: Lessons from the Heartland. *Geomorphology*, 71(2005):227-244.

to those lost during the spill, including shoreline activities such as wildlife viewing, hiking, fishing, and picnicking. The project is located in Delaware County, Pennsylvania on the Delaware River. Much of the island's shoreline was moderately and heavily oiled during the spill. The total cost to implement this project is \$33,874, which includes planning, design, construction, operation, and maintenance.

As described above, the NPFC has approved recreational use damages totaling \$1,319,097. The NPFC further finds that the three recreation projects that the trustees have identified for these funds are reasonably likely to enhance recreational use.

Past Assessment Costs

The trustees claim \$2,939,560.35 as their assessment costs for the *Athos* incident. The assessment included: (1) evaluating the nature, extent, and severity of natural resource injuries; (2) planning appropriate restoration projects; and (3) preparing draft and final restoration plans. The NPFC reviewed the documentation of these costs and finds that \$2,939,560.35 is reasonable, appropriate, and compensable under OPA (33 U.S.C. §2706 (d)(1), 15 C.F.R. §990.30, 33 C.F.R. §136.211).

Trustee Administration and Oversight of Approved Restoration Projects

The trustees claim \$1,080,624 for future costs of a Trustee Council, composed of representatives from each trustee entity, which will administer and oversee implementation of the selected restoration projects (Table 5). NOAA will serve as the lead administrative trustee (LAT), responsible for tracking expenditures for each restoration projects and reporting this information to the NPFC. The NPFC finds the claimed administrative oversight costs to be reasonable and compensable given the number of trustees involved and complexity of restoration projects approved by the NPFC in this determination.

Table 5. Trustee Administration and Oversight Costs.	
Trustee	Approved Amount^a
NOAA	\$884,653.79
U.S. Fish and Wildlife Service	\$69,890.85
New Jersey Department of Environmental Protection	\$49,364.64
Delaware Department of Natural Resources and Environmental Control	\$37,208.91
Pennsylvania (multiple natural resource agencies)	\$39,505.82
Total	\$1,080,624
^a administration and oversight costs estimates are for seven years.	

Contingency Funding

The trustees requested \$6,671,680 as contingency funding to cover the "risks that costs of the project turn out to be higher than expected, and/or that the projects would not result in

the expected magnitude of benefits and need augmentation”¹⁹. The NPFC recognizes the uncertainties inherent in the preliminary cost estimates of the approved projects 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.

Table 6 identifies the requested contingency amount, as well as the amount approved, determined by the NPFC based on the degree of each project’s complexity or potential for unknown events. In total, the NPFC approves \$6,473,816 of the \$6,671,680 requested.

Table 6. Contingency Costs per Project.		
Restoration Project	Requested	Approved^a
Oyster Reef Enhancement and Restoration (78 acres)	\$105,524	\$105,524
Habitat Improvement at Blackbird Reserve	\$26,223	\$26,223
Habitat Restoration at Mad Horse Creek (194 acres)	\$4,836,917	\$4,836,917
John Heinz Habitat Restoration	\$742,129	\$742,129
Darby Creek Dam Removal and Habitat Restoration	\$332,049	\$332,049
Lardner’s Point Shoreline Restoration	\$160,818	\$160,818
Stow Creek Boat Ramp	\$69,980	\$0
Augustine Boat Ramp	\$122,803	\$0
Little Tinicum Island Trail and Habitat Enhancement	\$5,081	\$0
Administrative and Oversight Costs	\$270,156	\$270,156
Total	\$6,671,680	\$6,473,816
^a Contingency funding subject to NPFC review and approval of appropriate justification, documentation of expenditures and NPFC contingency policy.		

Denied contingency costs include \$197,864 claimed for the three recreational restoration projects. NPFC has approved the full damage amount claimed, determined by the trustees with a “value to cost” method, whereby the loss is the dollar value of what the public is willing to pay to use the natural resource. The NPFC has determined to compensate the full damages as the dollar amount claimed, notwithstanding those dollars amounts are to be applied to a restoration project. Accordingly, any funds paid beyond the \$1,319,097 would be over compensation.

Contingency funding will be made available in accordance with the NPFC Contingency Policy (attached), when and if needed, and when supported by appropriate justification and documentation of costs incurred to date. If the need for contingency funds arises, NOAA 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.

¹⁹ DARP, section 5.7.

Summary of NPFC Determination

Table 7 summarizes the funding amounts approved in this determination.

Table 7. NPFC Summary Determination Findings.		
Injured Resources	Restoration Alternative	Approved Amount
Aquatic	Oyster Reef Enhancement and Restoration (4.5 acres, Aquatic; 73.5 acres Birds and Wildlife)	\$703,490
Bird and Wildlife	Habitat Improvement at Blackbird Reserve	\$104,891
	Habitat Restoration at Mad Horse Creek (160 acres, Birds and Wildlife; 34 acres, Shoreline)	\$19,347,667
Shoreline	Lardners Point Shoreline Restoration	\$643,271
	John Heinz Habitat Restoration	\$2,968,517
	Darby Creek Dam Removal and Habitat Restoration	\$1,328,194
Recreational Use	Stow Creek Boat Ramp	\$466,536
	Augustine Boat Ramp	\$818,687
	Little Tinicum Island Trail and Habitat Enhancement	\$33,874
Subtotal		\$26,415,127
Trustee Council Administrative and Oversight		\$1,080,624
Trustee Past Assessment Costs		\$2,939,560.35
Total		\$30,435,311.35

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. Sums recovered for past assessment costs may be used to reimburse the trustees. All other sums must be used to implement the final restoration plan, as approved by this determination. For purposes of this claim, the NPFC will deposit funds into a non-appropriated account that meets these requirements.

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.

Cost Documentation, Progress Reporting, and Final Report

As the designated LAT for this claim, NOAA shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the *Athos* Restoration Plan as approved in this determination. Any funds not spent or appropriately documented shall be returned to the Fund.

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

1. Certification by NOAA that all restoration activities have been conducted in accordance with the *Athos* Restoration 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); and
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.

In addition to these annual reporting requirements the LAT shall submit a final progress report within 120 days of the date project implementation is completed. This report should include cost documentation for all project expenditures, as well as a summary of project implementation and restoration benefits achieved as follows:

1. Certification by NOAA that all expenditure of OSLTF funds (including interest earned) were in accordance with the Plan as approved by the NPFC;
2. A summary of project implementation and restoration benefits achieved;
3. Copies of final reports and/or studies;
4. "As-built" construction and landscaping plans, as available (e.g., plans approved or accepted by the local or state permitting authority);
5. Available final project implementation photos;
6. Documentation of OSLTF funds remaining in the Revolving Trust Fund established for this claim, including account balance and interest earned; and
7. 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 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 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.

Conclusion

The NPFC has reviewed the claim for natural resource damages resulting from the *Athos* incident in accordance with OPA (33 U.S.C. 2701 *et seq.*) and its implementing regulations (15 C.F.R. 990 *et seq.* and 33 C.F.R. §136). We have determined that \$2,939,560.35 for past assessment activities and \$27,495,751 for future restoration activities is compensable. We have also approved up to \$6,473,816 for potential contingency costs subject to NPFC review and approval of appropriate justification and documentation of expenditures. This offer constitutes full and final payment for all natural resource damages resulting from the *Athos* spill.

If you accept this offer, please complete the enclosed Acceptance/Release Form and return to:

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

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the offers are void. If the settlements are accepted, your payment will be mailed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds to your trustee account when you submit the Release Form.

If you have any questions regarding this determination, please feel free to contact me at 202-493-6623.

Sincerely,



Fredy Hernandez
Claims Manager
Natural Resource Damage Claims Division

Encl: (1) Acceptance/Release Form
(2) 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
National Pollution Funds Center
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100
Phone: 202-493-6623
E-mail: Fredy.E.Hernandez@uscg.mil

This settlement is full and final compensation for the Athos I oil spill natural resource damage assessment and restoration claim submitted by the National Oceanic Atmospheric Administration (NOAA) on behalf of the U.S. Fish and Wildlife Service (USFWS), New Jersey Department of Environmental Protection (NJDEP), Delaware Department of Natural Resources and Environmental Control (DNREC), Pennsylvania Departments of Conservation and Natural Resources (PADCNR) and Environmental Protection (PADEP), Pennsylvania Fish and Boat Commission (PFBC), and Pennsylvania Game Commission (PGC) (collectively referred to as the trustees). The amount offered is \$30,435,311.35, which represents \$27,495,751 for future restoration activities and \$2,939,560.35 for trustee past assessment activities as laid out in Table 7 of the NPFC determination. The NPFC approved \$6,473,816 in contingency funds, in order to access contingencies the trustees must first submit a justification and cost documentation supporting the need for additional funds.

We, the trustees, certify that to the best of our knowledge and belief the information contained in this claim represents all material facts and is true. We, the trustees, understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§287 and 1001).

We, the trustees accept \$30,435,311.35 as full and final compensation for the damages claimed and the terms set forth to receive contingency funding in the future.

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

David Westerholm, Director
NOAA Office of Response and Restoration

Date

FOR THE U.S. DEPARTMENT OF THE INTERIOR

Marvin E. Moriarty, Regional Director
Northeast Region, U.S. Fish and Wildlife Service

Date

FOR THE STATE OF NEW JERSEY

Amy Cradic, Assistant Commissioner

Date

Natural and Historic Resources

Acting on behalf of the Commissioner of the New Jersey Department of Environmental
Protection

FOR THE STATE OF DELAWARE

Collin P. O'Mara, Secretary

Date

Department of Natural Resources and Environmental Control

FOR THE COMMONWEALTH OF PENNSYLVANIA

John Hanger, Secretary
Department of Environmental Protection

Date

FOR THE COMMONWEALTH OF PENNSYLVANIA

John A. Arway, Executive Director
Pennsylvania Fish and Boat Commission

Date

FOR THE COMMONWEALTH OF PENNSYLVANIA

John Quigley, Secretary
Department of Conservation and Natural Resources

Date

FOR THE COMMONWEALTH OF PENNSYLVANIA

Carl Roe, Executive Director
Pennsylvania Game Commission

Date



NATIONAL POLLUTION FUNDS CENTER POLICY CN05

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 and that division SOPs are updated to reflect this policy, and that the *Funding Guidelines* and relevant Web pages inform claimants of the policy.
3. POLICIES AFFECTED. None.
4. BACKGROUND. An OPA natural resource damage that may be compensated from the OSLTF is unique among OPA damages to the extent the damage 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 and the OSLTF have 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) subject of a claim 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 of limitation 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. Contingencies that may be authorized by the NPFC in adjudicating a claim, and ultimately approved for payment are:

- (1) the potential in complex project plans to overlook certain activities/costs which nevertheless are later found to be necessary to complete the project, and
 - (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 in the first instance 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 as part of the payment agreement.
- d. The contingency shall be payable at a future date (up to 6 years), up to the maximum amount, provided a claimant trustee provides documentation to establish 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.
- 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.

//s//
JAN P. LANE