



July 6, 2010

CERTIFIED MAIL Number:

Susan Moore, Field Supervisor
U.S. Department of the Interior
Sacramento Fish and Wildlife Office
2800 Cottage Way W-2605
Sacramento, CA 95825

Re: *S.S. Jacob Luckenbach* Natural Resource Damage Claim
Claim Number: A02005-OI2

Dear Ms. Moore:

The National Pollution Funds Center (NPFC) has reviewed the claim submitted by the U.S. Fish and Wildlife Service (USFWS) for natural resource damages (NRD) resulting from the sunken *S.S. Jacob Luckenbach* (hereinafter *Luckenbach*) and other unknown sources. This third, and final, partial determination for this claim approves \$2,547,341 to implement two projects described in the trustees' damage assessment and restoration plan (DARP). This includes \$810,000 to acquire and monitor Marbled Murrelet nesting habitat, \$1,596,000 to reduce corvid predation on Marbled Murrelets, and \$141,341 for trustee oversight of the two projects. This determination also approves \$246,900 of contingency funds for the two projects, subject to further justification and documentation of the need for additional funds. This third partial 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. Part 990.

Summary of Claim

On December 4, 2006, the NPFC received a NRD claim from the USFWS, on behalf of itself, the National Park Service, National Oceanic and Atmospheric Administration, and California Department of Fish and Game (collectively, the trustees). The claim totaled \$25,514,774, representing \$25,012,038 to implement 14 projects to compensate for natural resource losses resulting from the *Luckenbach* vessel incident and \$502,736 for past assessment costs. The NPFC received a revised NRD claim from the USFWS on September 4, 2007 that totaled \$24,748,525, which included \$24,127,216 to implement the same 14 restoration projects and \$621,309 for past assessment costs.

On October 2, 2008¹ and January 4, 2010, the NPFC issued partial determinations to enable implementation of those projects for which our evaluation was complete. These two partial determinations provided the NPFC findings that the:

1. claimants are eligible to present the claim (33 C.F.R. §166.207);
2. claim was presented within the statute of limitation (33 U.S.C. §§2713(h)(2) and 2717(f)(1), 33 C.F.R. §136.101, 15 C.F.R. §990.64(b));
3. discharges that occurred after OPA's date of enactment (August 18, 1990) from the *Luckenbach* are an OPA vessel incident for which the trustees have jurisdiction (15 C.F.R. §990.41);
4. claim was presented pursuant to a plan developed under the NRDA regulations at 15 C.F.R. Part 990;
5. trustee estimates of direct species mortality and lost bird-years for waterfowl, Grebes, Procellarids, Brown Pelicans, Cormorants, Gulls, other shorebirds, Common Murres, other Alcids, Snowy Plovers, and Marbled Murrelets are reasonable and comply with 15 C.F.R. §990.27, 15 C.F.R. §§990.51-52, and 15 C.F.R. §990.53(d);
6. \$703,661.08 of claimed past assessment costs are reasonable and appropriate;
7. \$18,980,707 of claimed restoration costs is reasonable and appropriate to implement 12 preferred projects to compensate for injuries resulting from the *Luckenbach* vessel incident, as follows -
 - a. Reading Rock Colony Restoration (\$250,000), Common Murre Colony Protection (\$11,264,140), and Corvid Management at Point Reyes (\$400,000) to compensate for Common Murre losses,
 - b. Grebe Colony Protection at Northern California Lakes to compensate for Grebe losses (\$774,060),
 - c. Protection of Nesting Areas in Kokechik Flats, AK to compensate for waterfowl and other seabirds losses (\$600,000),
 - d. Nesting Habitat at Ano Nuevo Island to compensate for Rhinoceros Auklet losses (\$1,024,000), and
 - e. Sea Otter Pathogen and Outreach to compensate for Sea Otter losses (\$121,155);
 - f. Mouse Eradication on the Farallon Islands (\$972,313) and Shearwater Colony Protection at Taiaroa Head, New Zealand (\$55,649) to compensate for Procellarid losses,
 - g. Seabird Colony Restoration and Protection at Baja Islands, Mexico to compensate for losses of Brown Pelicans, Cormorants, and Cassin's Auklets (\$2,955,116),
 - h. Dune Habitat Restoration at Point Reyes National Seashore (PRNS) to compensate for Snowy Plover losses (\$370,835), and
 - i. Rat Eradication in the Queen Charlotte Islands, Canada to compensate for Ancient Murrelet losses (\$193,439);
8. \$937,985 of claimed trustee oversight costs for the 12 restoration projects is reasonable and appropriate;
9. \$2,847,105 of claimed contingency costs is available under the NPFC contingency policy to implement the 12 restoration projects, and

¹ NPFC determination letter dated September 29, 2008

10. claimed costs to report on approved project implementation and expenditures (\$211,198) are reasonable and appropriate.

The partial determinations issued by the NPFC on October 2, 2008¹ and January 4, 2010 presented NPFC findings on all aspects of the trustees' claim except for compensation of Marbled Murrelet injuries. At the time of the second determination, the trustees had selected Old Growth Habitat Acquisition and Protection in the Santa Cruz Mountains and Corvid Management (to reduce predation of Marbled Murrelets) as preferred restoration alternatives, but needed additional time to identify and evaluate specific parcels of land available for acquisition.

On December 16, 2009, the NPFC received a revised plan to compensate for Marbled Murrelet injuries resulting from the *Luckenback* incident that identified and evaluated a specific land acquisition. The remainder of this determination presents the NPFC findings with respect to this revised plan.

Restoration of Marbled Murrelet Losses

The trustees estimated that 45 Marbled Murrelets were killed, resulting in a total (direct and indirect) loss of 451 Marbled Murrelet-years. The NPFC accepted this injury estimate in the January 2010 determination.

The trustees evaluated several alternatives to restore Marbled Murrelet injuries in their DARP, including Old Growth Forest Acquisition and Protection in the Santa Cruz Mountains, Corvid Management, Silviculture of Second Growth Forest (to create nesting habitat), Captive Breeding, and Artificial Nest Platforms. The trustees selected two projects as preferred: Corvid Management and Old Growth Forest Acquisition and Protection. The Silviculture project was not selected because it would not begin to provide benefits for over a hundred years. Captive breeding and the use of Artificial Nest Platforms were also not selected because these actions have never been done with this species and their feasibility is unknown.

The Old Growth Forest Acquisition and Protection project will preserve and protect habitat that contains the most isolated and vulnerable population of Marbled Murrelets. Although murrelet nesting habitat has been preserved on public lands, preservation of private lands is especially important because they are often located far from campgrounds and may have lower densities of corvids, which are known predators of Marbled Murrelets. Project costs include \$760,000 for acquisition and \$50,000 for five years of monitoring. The trustees claim that once the land is acquired and protected, the likelihood of project success is high based on similar acquisition and protection projects done in the past (e.g., by the *Apex Houston* and *Command Oil Spill* Trustee Councils).

The Corvid Management project seeks to minimize corvid predation on murrelet nests in old growth forests near human habitations and campgrounds in state parks. The trustees claim nest predation by corvids is a primary cause for the lack of Marbled Murrelet reproduction in the Santa Cruz Mountains, and campgrounds present in old growth attract corvids due to inadequate trash and food removal. This is an ongoing project that has demonstrated success in reducing corvid populations through changes in trash removal

and storage, education of campground users and park staff, and targeted corvid removal. Claimed costs to continue these efforts are \$133,000 per year.

On May 12, 2008, the trustees provided the NPFC with additional information about how they scaled the selected restoration alternatives to the Marble Murrelet injuries. Specifically, the trustees claimed old growth habitat in the Santa Cruz Mountains can support one nest per 20 acres, and that each nest generates 10 to 35 bird-years. For Corvid Management, the trustees' analyses indicate that 22 to 39 marbled murrelet bird-years per year will be gained. Thus, the injury can be compensated by a land acquisition project that protects 13 to 49 nests (and is 260 to 974 acres in size, assuming 20 acres per nest), or a Corvid Management project that lasts 12 to 20 years, or some combination of the two.

On December 15, 2009, the trustees notified the NPFC that they have an opportunity to preserve and protect through an agreement with a partnering non governmental organization (the Sempervirens Fund), 160 acres of land, of which 27 acres are suitable Marbled Murrelet nesting habitat. Referred to as the Sinnott parcel, this property is located along one of the four major murrelet flight corridors in the Santa Cruz Mountains, and contains old growth forest that is contiguous with stands protected through an easement on adjacent parcels. The owner of the parcel, Red Tree Lumber, has agreed to sell the parcel for \$760,000 to the Sempervirens Fund, a non governmental organization that assists in preserving land for conservation purposes. The trustees proposed to negotiate an agreement with the Sempervirens Fund that would obligate it, and any successor owner, to maintain and enhance the parcel primarily for the benefit of Marbled Murrelets, in perpetuity.

The trustees estimate that the Sinnott parcel likely contains two murrelet nests. Given their estimate that each nest would generate 10 to 35 bird-years, this parcel would provide 20 to 70 bird-years. Taking a midpoint of this range, the trustees claim that the Sinnott parcel would compensate for 45 of the 451 lost bird-years. To compensate for the remaining 406 bird-years, the trustees further claim 12 years of Corvid Management (using the midpoint (30.5) of the estimated 22 to 39 marbled murrelet bird-years per year gained) at a total cost of \$1,596,000 (12 years x \$133,000/year).

During review of the claim, the NPFC requested more information about the assumption of two existing murrelet nests on the parcel, and the trustees responded that audio visual surveys of the property had indicated two likely existing nests. The NPFC also requested additional information on the proposed monitoring of the parcel, which the trustees indicated would be used for continued audio visual monitoring of murrelet use of the parcel. The trustees stated that if the audio visual surveys indicated a lack of nesting on the parcel, any management actions taken to improve nesting habitat would be funded by the trustees and/or the land owner. The NPFC also asked who the eventual owner of the property would be, if the Sempervirens Fund chose to sell the property, and the trustees indicated the Sempervirens Fund would continue as the land owner unless a state park is developed in the future adjacent to the parcel. Finally, the trustees provided a property appraisal supporting the acquisition price of \$760,000.

The NPFC also requested additional information about the existing Corvid Management project that is proposed to be extended. The trustees provided monitoring reports that indicated fewer corvids in parks where all of the proposed management actions were implemented.

After reviewing the trustees’ evaluation of alternatives and additional information provided by the trustees, the NPFC finds that the acquisition of the Sinnott Parcel and extending the current corvid management program by 12 years will compensate for injuries to Marbled Murrelet and is reasonable and appropriate (15 C.F.R. §§990.53-54, 33 U.S.C. §2706 (d)(1), 33 C.F.R. §136.211). All claimed costs to restore Marbled Murrelet injuries via the Sinnott Parcel Acquisition (\$810,000) and Corvid Management (\$1,596,000) are compensable.

Trustee Oversight

The trustees claim \$1,079,326 to oversee implementation of the 14 selected restoration projects. Through the October 2008¹ and January 2010 determinations, the NPFC provided \$937,985 for oversight of the 12 projects approved in those determinations. This determination approves an additional \$141,341 for oversight of the two Marbled Murrelet projects approved in this determination.

NPFC Treatment of Contingency

For each selected restoration project, the trustees claim 15 percent of project costs for contingency funding to cover “unforeseen” future costs. The NPFC recognizes that costs of approved projects are estimates and may unexpectedly increase as a result of new and/or unforeseeable circumstances. However, the NPFC’s policy is to pay contingency when and if needed, and supported by appropriate justification and documentation of costs incurred to date.

The NPFC has reviewed the trustees’ request for contingencies funds for the two projects approved in this determination. Accordingly, the NPFC approves \$246,900, determined as \$239,400 for Corvid Management (15 percent of claimed project costs) and \$7,500 for Old Growth Forest Acquisition and Protection (15 percent of the project monitoring costs) (Table 1). The NPFC denies the trustees’ request for contingency funding allocated to the property acquisition costs because the purchase price is a fixed rate cost that will not change over the span of the project.

Table 1. NPFC Approved Contingency Amounts.			
Restoration Project	Approved Cost	Contingency	Amount
Corvid Management	\$1,596,000	15%	\$239,400
Old Growth Forest Acquisition and Protection in the Santa Cruz Mountains (monitoring only)	\$50,000	15%	\$7,500
TOTAL			\$246,900

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 that all funds provided by the NPFC for the project were: (1) spent according to the approved project plan and (2) reasonable and appropriate.

Finally, the NPFC notes that, claimed implementation costs for multiyear restoration projects were not adjusted for inflation². To the extent that inflation costs result in project shortfalls and the NPFC determines that at all project funds have been spent according to the approved project plan and are reasonable and appropriate, the NPFC will approve additional funds necessary to cover inflation as a contingency cost³.

Cost Documentation and Progress Reporting

As the designated LAT for this claim, DOI shall ensure that all expenditures of NPFC funds (including interest earned) are documented appropriately, spent according to the DARP as approved by this determination, and reported to the NPFC. Any funds not spent or appropriately documented shall be returned to the Fund. Complete, accurate, and timely cost documentation is also required to support any requests for contingency funds.

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

1. certification by DOI that all expenditures of NPFC funds were in accordance with the DARP as approved by the NPFC;
2. a summary of work accomplished, the timeline for future activities, and any unexpected problems incurred during implementation;
3. a summary of expenditures by category (labor, contracts, purchases/expendables, travel, government equipment);
4. a 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;
5. available project implementation photos showing pre-construction and various phases of construction;
6. statements from the NRDAR fund showing principle balance and interest earned on NPFC funds, and
7. remaining project funds.

A final report should be submitted to the NPFC for each approved project within 120 days of project completion. This report shall include:

² Except for funds for Cost Documentation and Reporting provided in the January 2010 determination that were adjusted for inflation.

³ Email dated June 26, 2007 from Steve Hampton to Chris Abrams stating that inflation costs would be dealt with as a contingency request.

1. certification by DOI that all expenditures of NPFC funds (including interest earned) were in accordance with the DARP as approved by the NPFC.
2. a summary of project implementation and restoration benefits achieved;
3. copies of final reports and/or studies;
4. available final project implementation photos;
5. documentation of NPFC funds remaining in the Revolving Trust Fund established for this claim, including account balance and interest earned;
6. 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.
 - 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 NPFC.

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.

Summary of Third Partial Determination

The NPFC has reviewed the revised claim for natural resource damages resulting from the *Luckenbach* vessel incident in accordance with OPA (33 U.S.C. §§2701 et seq.) and its implementing regulations (15 C.F.R. Part 990 and 33 C.F.R. §136). Through this third partial determination, we have determined that \$2,547,341 is reasonable and appropriate for restoration of injuries to Marbled Murrelets that resulted from the *Luckenbach* vessel incident, as follows:

\$810,000 to acquire and monitor the Sinnott Parcel;
\$1,596,000 to extend the existing Corvid Management program; and
\$141,341 for trustee oversight of the two projects.

The NPFC has also approved \$246,900 for future contingency costs, subject to appropriate justification and documentation of past costs.

Revolving Trust Fund and Return of Unused Funding to the OSLTF

As established by OPA (33 U.S.C. §2706(f)), the NPFC claims regulations (33 C.F.R.

§136.211), and the NRDA regulations (15 C.F.R. §990.65), sums recovered for NRD must be retained by the trustees in a revolving trust account. Accordingly, the NPFC will deposit \$2,547,341 into the DOI Restoration Fund codified at 43 U.S.C. §1474 (b), which DOI has demonstrated to be a non-appropriated, revolving trust fund. All unused funds, including interest earned, shall be returned to the OSLTF in accordance with section 1006(f) of OPA and 15 C.F.R. §990.65(f).

Conclusion

The NPFC offers \$2,547,341 as full and final payment for injuries to Marbled Murrelets that resulted from the *Luckenbach* vessel incident and other unknown sources.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and include the factual or legal basis of the request and any additional support for the claim. Reconsideration will be based upon the additional information provided. Disposition of the reconsideration will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action.

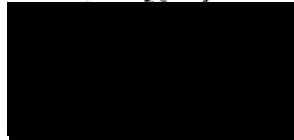
If you accept this offer, please sign and return the enclosed Acceptance/Release Form. Reconsideration requests and/or signed Acceptance/Release Forms must be submitted to:

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 original signed 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 Release Form. Please provide account information and instructions for transferring funds to your trustee account when you submit the Release Form.

If you have any questions about this determination, please contact me at the above address or by phone at (202) 493-6865.

Sincerely,



Division

Enclosure: Acceptance/ Release Form
Standardized Template for Progress and Cost Reporting (CD)



RE: Claim Number: A02005-O12

On behalf of the U.S. Fish and Wildlife Service, National Park Service, National Oceanic and Atmospheric Administration, and California Department of Fish and Game, we, the undersigned, ACCEPT the payment/settlement offer of \$2,547,341 as set forth in the National Pollution Fund Center's (NPFC) Determination, dated July 6, 2010. We hereby fully and finally release forever any further damages and costs, except for the contingency amounts discussed below, that may have resulted from the (1) discharge of an unknown quantity of oil from the sunken *S.S. Jacob Luckenbach* between 1990 and December 2003, and (2) "mystery" spills from unknown anthropogenic sources (the Incident) as described in the trustees' November 30, 2006 claim (as amended). The trustees' claim arises under the Oil Pollution Act of 1990 (33 U.S.C. 2712(a)(2)) for natural resource damages caused by the oil discharges during the Incident.

Although this settlement and release does not actually pay the contingency amounts, the trustees acknowledge that any future contingency payments for these projects will be limited to fifteen percent of the amount awarded by NPFC for each project as detailed in the NPFC's Determination of the trustees' claim. The NPFC will authorize actual payment of these contingency awards from the Oil Spill Liability Trust Fund if and when a permissible contingency actually occurs during the implementation of the above projects. To support a request for contingency payment, the trustees acknowledge that they will have to fully document that the request for payment complies with NPFC's policy for Natural Resource Damage Contingency Payments. Because no contingency amount is actually being determined at present, the trustees reserve the right to challenge the NPFC's future determinations as to whether permissible contingencies have occurred.

This settlement is not an admission of liability by any party. We, the trustees, hereby assign, transfer, and subrogate to the NPFC all rights, claims, interests and rights of action, that the trustees may have against any party, person, firm or corporation that may be liable for the costs and damages reimbursed pursuant to NPFC's Determination. We, the trustees, authorize the NPFC to request that the United States Department of Justice sue, compromise or settle in the name of the trustees and agree that the NPFC be fully substituted for the trustees and subrogated to those claims reimbursed pursuant to NPFC's Determination.

We, the trustees, agree that upon acceptance of any damages or compensation from the Fund, the trustees will cooperate fully with the NPFC and the United States Department of Justice in any claim and/or action by the United States against any person or party to recover the damages or compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any damages or compensation received from

any other source for the same claim, providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

This Agreement is not intended to, nor shall it, vest rights in persons who are not parties to it. 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).

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DUNs/TIN/EIN Number

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Bank Routing and Account Number

(The release may be signed in counterparts.)

Ren Lohofener
Regional Director, Pacific Southwest Region
U.S. Fish and Wildlife Service
2800 Cottage Way, Room W-2605
Sacramento, CA 95825-1888

Date

Craig R. O'Connor
Special Counsel for Natural Resources
NOAA/GCNR-DACNW
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Seattle, WA 98115-6349

Date

Stephen L. Edinger
Administrator, California Department of Fish and Game
Office of Spill Prevention and Response
1700 K Street, Suite 250
Sacramento, CA 95811

Date