

U.S. Department
of Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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16480
September 22, 2017

MEMORANDUM

From: Richard Nance
CLAIMS MANAGER, NATIONAL POLLUTION FUNDS CENTER (NPFC)

To: Greg Siekaniec
AUTHORIZED OFFICIAL, DEPARTMENT OF THE INTERIOR (DOI)

Subj: Claim: **J05003-OI03 – M/V *Selendang Ayu* Oil Spill Assessment Costs**

1. On December 7, 2016, the NPFC received a claim from DOI, on behalf of itself, the National Oceanic and Atmospheric Administration (NOAA), and the State of Alaska, for costs to assess potential injuries to natural resource resulting from the M/V *Selendang Ayu* oil spill and to plan appropriate restoration to restore those injuries (J05003-OI03). The claim totaled \$3,840,985 for past (\$1,240,165) and future (\$2,600,820) assessment and restoration planning costs. On April 20, 2017, DOI increased their claimed costs to \$3,842,589.31.

2. Through the enclosed determination, the NPFC offers to pay \$3,699,059.47 for past (\$1,236,943.47) and future (\$2,462,117) assessment and restoration planning costs. This determination 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 Assessments Regulations (15 C.F.R. Part 990).

3. 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

4. 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 with the signed release form.

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

Claim Number: J05003-OI03

Subj: Claim: J05003-OI03 – M/V *Selendang Ayu* Oil Spill Assessment Costs

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

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Claim Number: J05003-OI03

National Pollution Funds Center Determination

Claim Number and Name:	J05003-OI03 , M/V <i>Selendang Ayu</i> Oil Spill Assessment Costs
Claimant:	Department of the Interior (DOI)
Claim Type:	Natural Resource Damage Assessment (NRDA), Past and Upfront Assessment Costs
Amount Requested:	\$3,842,589.31
Offer Amount:	\$3,699,059.47
Determination Date:	September 22, 2017

Summary of the Incident and Claim

The M/V *Selendang Ayu*, a 738-foot bulk freighter, was traveling through the Aleutian Islands on December 6, 2004 when it experienced mechanical problems and encountered severe weather conditions. After floating without use of its engine for two days, the vessel ran aground off the shore of Unalaska, Alaska between Skan Bay and Spray Cape on December 8, 2004. The grounding ruptured the vessel's bottom fuel tanks and, ultimately, 339,538 gallons of Intermediate Fuel Oil 380 and 14,680 gallons of marine diesel were released into the environment¹. The owner of the vessel, Ayu Navigation Sdn Bhd, and the operator, IMC Shipping Co. Pte. LTD., were both designated as responsible parties (RP) for the spill. The RPs conducted and funded removal activities for the incident.

Upon notification of the spill, the Department of the Interior, Fish and Wildlife Service (FWS), Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), along with the State of Alaska², acting as natural resource trustees designated under the Oil Pollution Act of 1990 (OPA) and appropriate state laws, initiated an assessment of natural resource damages resulting from the discharge and response to the discharge of oil. Through their assessment efforts following the spill³, the Trustees documented approximately 86 miles of beach, rocky shore, and vegetated shoreline habitats that were oiled and numerous marine resources within those habitats at risk of injury, including various forms of vegetation, invertebrates, and anadromous fish.⁴ The Trustees also documented the collection of 1,795 oiled bird carcasses, the observance of live oiled birds and harbor seals, and presence of other marine mammals in the impacted waters. The Trustees continue to work together to develop and implement plans to assess the nature and extent of these injuries and plan appropriate restoration alternatives.

On December 7, 2016, DOI, as federal lead administrative trustee (FLAT), presented the National Pollution Funds Center (NPFC) with a claim that totaled \$3,840,985 for the past costs incurred and future costs to implement their "Natural Resource Damage Assessment Plan for the

¹ Notice of intent to conduct restoration planning, Fed. Reg. 72, No 61, Mar. 30, 2007

² Represented by Alaska's Departments of Law, Natural Resources, Environmental Conservation, and Fish and Game

³ The Trustees posted reports detailing their preassessment findings in Section III of their Administrative Record at: https://www.fws.gov/alaska/fisheries/contaminants/spill/sa_record.htm

⁴ Natural Resource Damage Assessment Plan for the M/V *Selendang Ayu* Oil Spill, page ES-2

M/V *Selendang Ayu* Oil Spill” (the Plan).⁵ The Plan describes the Trustees’ activities to assess injury to marine resources, marine mammals, marine birds, and human uses, as well as costs necessary for restoration planning, trustee coordination, and public outreach.

This determination presents the NPFC’s findings with respect to claimed costs for all assessment and restoration planning activities presented in the claim.

Claimant Eligibility

Natural resource trustees are designated pursuant to OPA. Federal trustees, NOAA and DOI, are designated by the President⁶ and State trustees by their respective Governors. 33 U.S.C. § 2706 (b)(2) and (3). In this case the designated Alaska State trustees are Alaska’s Departments of Law (ADOL), Natural Resources (ADNR), Fish and Game (ADFG) and Environmental Conservation (ADEC).⁷ Their responsibility is to assess damages to natural resources under their trusteeship and develop and implement plans to restore, rehabilitate, replace, or acquire the equivalent of those injured natural resources. 33 U.S.C. §§2706(c)(1)(A) and (C).

The Claim

Natural resource trustees may present claims to the Oil Spill Liability Trust Fund (OSLTF or the Fund) for uncompensated natural resource damages (NRD), which include the reasonable cost of assessing those damages. 33 U.S.C. §2706(d)(1)(C). In the event of an incident where several trustees are involved and in order to prevent double recovery trustees should select a lead administrative trustee who will present a consolidated claim to the Fund. 33 C.R.F. § 136.207(a).

This claim for natural resource damage assessment (NRDA) costs was submitted by DOI on behalf of itself, NOAA and the Alaska State trustees.

Jurisdictional Information

Claims to the NPFC must arise from an incident as defined by OPA. 33 U.S.C. §2701 *et seq.* To be covered, the incident must involve a discharge, or a substantial threat of discharge, of oil from a vessel or facility into navigable waters of the United States after August 18, 1990. In this case the incident occurred on December 8, 2004; therefore, the claimed activities are for natural resource damages resulting from an OPA incident.

⁵ The NPFC notes that DOI presented a substantially similar claim (J05003-OI02) to the NPFC on February 25, 2016. DOI later withdrew this claim on July 25, 2016. At the request of DOI, all claim materials submitted with J05003-OI02 were incorporated into the Administrative Record for this claim.

⁶ DOI, under the authority of the Secretary of the Interior, and NOAA, under the authority of the Secretary of Commerce, are appropriate federal natural resource trustee 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) and Section 1006(b)(2) of OPA. 33 U.S.C. §2706(b)(2)

⁷ Letter from Tony Knowles, Governor of Alaska, to the President of the United States on March 10, 1999.

General Claim Requirements

This NRD claim submitted by DOI was received on December 7, 2016. It was presented in writing to the Director, NPFC, composed of a Plan that describes the assessment and restoration planning activities, need for the activities and how they connect to the NRDA process, deliverables to be produced, level of effort, timeframe, cost estimates for contractors and agency personnel, and provided a sum certain.

Claims to the Fund must be presented to the NPFC within three years after the date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care, or within three years from the date of completion of the natural resource damage assessment under OPA (33 U.S.C. §2706(e)), whichever is later. 33 U.S.C. §2712(h)(2), 33 C.F.R. §136.101(a)(1)(ii). This claim is for costs to assess the nature and extent of NRD resulting from the December 2004 incident. The assessment was not complete when the claim was received on December 7, 2016; therefore, the claim was received within the period of limitations for claims.

In accordance with OPA, the OSLTF is available to pay claims for uncompensated removal costs and damages. 33 U.S.C. §2712(a)(4). Covered damages include NRD, 33 U.S.C. §2702(b)(2)(A), which are for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs to assess those damages. 33 U.S.C. §2706(d)(1)(C). Costs are determined with respect to plans adopted under 33 U.S.C. §2706(d)(2) that are developed and implemented after adequate public notice, opportunity for a hearing, and consideration of all public comments. 33 U.S.C. §2706(c)(5). DOI states that the Plan that forms the basis of this claim was published on DOI's website on October 28, 2016⁸, and that there were no comments on this Plan.^{9,10}

Claim Presentment to the Responsible Party

With certain exceptions, claims to the NPFC for damages must be presented first to the responsible party (RP). 33 U.S.C. §2713(a). In this case the NPFC determined that the RPs and their insurers were entitled to the *Selendang Ayu's* statutory limitation of liability of \$23,853,000 and had no further liability for removal costs and damages.¹¹ As a result, the Trustees were not required to present this claim to the RPs prior to presenting it to the Fund.

Claimant's Burden of Proof

Pursuant to 33 U.S.C. § 2713(e), the President promulgated regulations for the presentation, filing, processing, settlement and adjudication of claims against the Fund. The Claims Regulations are found at 33 C.F.R. Part 136. Trustees bear the burden of proving all evidence,

⁸ Claim Cover Letter, page 2

⁹ Letter from DOI to NPFC, dated March 21, 2017

¹⁰ Trustees indicated that public comments were received on an earlier draft of Plan and the Trustees' responses to those comments are publically available at:
https://www.fws.gov/alaska/fisheries/contaminants/spill/pdf/selendang_Ayu/TrusteeResponsesToPublicComments_FinalOI0816.pdf.

¹¹ NPFC Claim Determination, dated January 27, 2012

information and documentation deemed necessary by the Director, NPFC, to support the claim. 33 C.F.R. §136.105(a). To satisfy this requirement, the trustee claimant must submit its plan, which forms the basis of the claim, along with sufficient supporting information, including documented costs and cost estimates so the NPFC can determine that the activities and associated costs are reasonable and appropriate. 33 C.F.R. § 136.209 (a) and (b).¹²

NPFC Review of Claim Activities and Associated Costs

The Trustees' claim, based on the Plan, identifies activities for (1) the assessment of four resource categories (marine resources, marine mammals, marine birds and human use); (2) restoration planning; (3) trustee coordination; and (4) public outreach, totaling \$2,600,820. It also includes \$1,240,165 for past costs. The claimed costs totaled \$3,840,985. DOI later decreased their claimed costs to \$3,840,935, and then subsequently increased their claimed costs to \$3,842,589.31. This determination presents the NPFC's findings with respect to the Plan and claimed costs.

The NPFC notes that the Trustees and the RPs began cooperative assessment activities in the winter of 2004 and executed a *Natural Resource Damage Funding and Participation Agreement for the M/V Selendang Ayu Incident* in May 2007 whereby the RP agreed to pay all reasonable past and future assessment costs. The RPs also advanced the Trustees \$135,000 (\$120,000 to DOI, \$10,000 to Alaska Department of Natural Resources and \$5,000 to Alaska Department of Fish and Game).

This Funding and Participation Agreement was amended in February 16, 2016¹³, at which time the RPs ceased funding cooperative assessment and collection activities¹⁴; however, they agreed that the Trustees could retain and use remaining advanced funds to conduct cooperative activities specifically for: 1. administrative record compilation, 2. bird injury assessment, and 3. providing notice and opportunity to comment on trustee determinations to the RP.¹⁵ The Trustees provided an accounting of these remaining funds and noted that these funds were expected to be used by the end of 2016. Thus, the claimed costs in this claim are for costs not funded by the RPs pursuant to the Funding and Participation Agreement.

Assessment of Impacts to Marine Resources

Habitats of the Unalaska Island shoreline that were impacted by the *Selendang Ayu* oil spill included rocky shore, beach, vegetated shoreline, and freshwater streams. These habitats contained various types of vegetation, invertebrates, and anadromous fish. During the response, the shoreline was divided into 806 potentially impacted shoreline segments and response personnel conducted Shoreline Cleanup Assessment Technique (SCAT) surveys. While the surveys were conducted to facilitate response and clean up operations, they also provided the

¹² The NPFC is guided by the NOAA Natural Resource Damage Assessments Regulations found at 15 C.F.R. Part 990.

¹³ Amendment Number 1 to Natural Resource Damage Funding and Participation Agreement for the M/V *Selendang Ayu* Incident

¹⁴ As a result of the NPFC granting the RPs' request for a limitation of liability.

¹⁵ The agreement noted that the Trustees could also use these funds to answer questions associated with these three categories with respect to the NPFC's claim adjudication of the Trustees' Assessment Plan

Trustees with useful information for documenting exposure and potential injuries to marine resources and assisted the Trustees in planning future assessment activities. Through these surveys, the response documented the specific locations of the 86 miles of oiled shoreline, the level of oiling, and the oiled habitat type.

As noted above, the Trustees and RP cooperatively conducted visual surveys to document the movement of oil subsequent to the SCAT observations and to collect samples of oiled sediments, oiled biota, and the oil itself. In 2005 and 2006, they conducted a combination of ground, boat, and underwater visual surveys, tissue sampling of salmon¹⁶, and deployment of passive water samplers to assess further impacts to marine resources. Through these assessment activities the Trustees observed reduced invertebrate populations¹⁷ and kelp deformities¹⁸ that could be attributed to oil exposure¹⁹, discoloration and tissue deterioration of various forms of algae, and increased PAH concentrations in streams that placed juvenile fish²⁰ at risk.

While conducting their various surveys from 2004 through 2006, the Trustees also observed and documented significant injuries to marine resources from response actions.²¹ For instance, activities included open burning of oily debris, vegetation cutting, relocation of berms, and the tilling and excavation of oiled sediments using large mechanical equipment, which crushed, displaced, and/or removed large amounts of biota from the environment.

Lastly, the Trustees conducted lingering oil studies²² in 2008 to determine how much oil still remained in the nearshore environment to assess the continued threat to marine resources. Lingering oil on shorelines and in sediments can be ingested by invertebrates or transmitted back into the water-column through currents, tides, and waves. The Trustees conducted shoreline surveys to document surface and subsurface oiling, collected and analyzed oiled sediments, collected and analyzed mussel tissues, and deployed passive water samples. The results of the study indicated that *Selendang Ayu* oil contaminants persisted through the summer of 2008 in amounts significant enough to cause continued injury to the marine environment.

Pursuant to the Plan, the Trustees now seek assessment costs to develop a GIS mapping database to analyze all available site-specific spatial and temporal information of oiling that was gathered during the response and by the Trustees and to conduct literature reviews to gather information on injury thresholds, magnitude of impacts, and recovery times for marine resources exposed to oil. The Trustees will then combine the spatial and temporal analyses of oiling with the literature derived injury characteristics to quantify injury to marine resources.

¹⁶ To measure PAH levels

¹⁷ The Trustees documented the presence of “Green shore phenomenon”; an algae bloom that the Trustees have observed in previous oil spills when mortality occurs to large numbers of plant-eating invertebrates and has further been replicated in controlled field experiments

¹⁸ Kelps were observed with only stems – the main parts of their blades were missing

¹⁹ Preassessment Data Report #2. M/V *Selendang Ayu* Oil Spill Surveys of Intertidal, Subtidal, and Anadromous Stream Habitats

²⁰ Coho salmon and Dolly Varden char

²¹ Natural resource damages resulting from injuries due to response activities are compensable from the Fund.

²² Because of the harsh weather of Unalaska, the remoteness of the location, and inaccessibility of some shoreline segments, some affected areas were only partially cleaned, while others were not cleaned at all.

The Trustees claim \$303,177 (\$111,400 as contract costs and \$191,777 as agency labor and travel) for this activity to develop the GIS database and analyze the site specific oiling data (\$90,953), conduct the literature reviews for background injury information (\$60,635), attend meetings to discuss results of the GIS analyses and literature reviews (\$30,318), combine the results of the GIS analyses and literature reviews to quantify injuries (\$75,794), and draft the Marine Resources section for the Damage Assessment and Restoration Plan (DARP) (\$45,477).

On January 25, 2017²³, the NPFC requested that the Trustees explain how the assessment approach proposed by the Trustees would account for injuries caused by the response, such as the burning of oily debris and large-scale sediment removal. The Trustees responded to the NPFC on March 21, 2017²⁴ that injuries associated with the response will be assessed in a manner consistent with injuries caused by oiling, whereby the spatial and temporal extent of the documented response injuries will be incorporated into the GIS database for analyses.

After reviewing the Trustees' Assessment Plan and additional claim information, the NPFC finds that, based on the magnitude of the spill and level of injury and assessment information previously collected, the: (1) Assessment of Impacts to Marine Resources assessment activity described above is appropriate and will lead to injury quantification, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort. Therefore, claimed costs of \$303,177 for the Marine Resources assessment activity are compensable from the Fund. 33 U.S.C. §2706(d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51, 990.52, and 990.27.

Assessment of Impacts to Marine Mammals

Marine mammals come into contact with oil when they surface to breathe or when they climb ashore at haul out locations. Following the incident and during the response, surveys of marine mammals were conducted via aircraft, vessel, and by foot. While these surveys were limited in scope²⁵, the Trustees gathered sufficient information to document the presence of hundreds of sea otters, Stellar sea lions, and harbor seals in areas impacted by *Selendang Ayu* oil.²⁶ Several of the sea otters and harbor seals were observed to be oiled and necropsies conducted on two otter carcasses indicated deaths consistent with oil exposure.²⁷

Pursuant to the Plan the Trustees propose to quantify injuries to sea otters, Stellar sea lions, and harbor seals using swept-through modeling, an established and commonly used "Type A" quantification method for NRDA referenced in 15 C.F.R. §990.27(b)(1)(iii). The Trustees will compile spatial and temporal data on the locations of marine mammal haul out locations and marine mammal population densities within the oiled areas to estimate the number of mammals exposed to oil. The Trustees will also conduct literature reviews to gather information on the known effects of oil exposure on marine mammals, including levels of oiling required to induce

²³ Memo from NPFC to DOI, dated January 25, 2017

²⁴ Letter from DOI to NPFC, dated March 21, 2017

²⁵ These surveys were limited due to adverse weather conditions, the large area of oiling, and an emphasis by personnel on surveys conducted to support other response activities and bird assessment.

²⁶ Preassessment Data Report #11, Summary of Aerial, On-Water, and Beach Surveys of Marine Mammals in the Vicinity of the Grounded *Selendang Ayu* on the Northwest Coast of Unalaska Island, Alaska, December 2004 - January 2005

²⁷ Plan, page 3-14

injuries and recovery times for affected mammals. The Trustees will then conduct an analysis using the estimated number of marine mammals exposed to oil combined with the literature-derived injury information to quantify the amount of marine mammal injury resulting from the spill.

The Trustees claim \$136,704²⁸ (\$49,608 as contract costs and \$87,907 as agency costs) for this activity to compile data on haul out locations and population densities (\$41,011), conduct literature reviews on the effects of oil exposure on marine mammals (\$27,341), quantify injury by analyzing the mammal population data and literature-based injury values (\$41,011), and report writing of the Marine Mammal section of the DARP (\$27,342).

After reviewing the Trustees' Assessment Plan and additional claim information, the NPFC finds that, based on the magnitude of the spill and the number of marine mammals documented to be in the impacted areas, the: (1) Assessment of Impacts to Marine Mammals assessment activity described above is appropriate and will lead to injury quantification, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort. Therefore, claimed costs of \$136,704 for the Marine Mammal assessment activity are compensable from the Fund. 33 U.S.C. §2706(d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51, 990.52, and 990.27.

Assessment of Impacts to Marine Birds

Acute Injury

During the response, 1,795 oiled bird carcasses and an additional 199 live oiled birds were collected, representing 41 different species of seabirds.²⁹ Auklets were the most commonly found species, however there also various types of murre, puffins, cormorants, ducks, gulls, loons, grebes, and albatrosses, among others, included in the collected birds.³⁰ The Trustees assert that, because dead birds were lost at sea, carcasses were scavenged by predators, and searchers were unable to locate all of the birds that washed ashore, it's likely that only a small proportion of oiled birds were discovered.³¹

The Trustees, to quantify the full extent of bird injury from direct oiling, seek funds to complete analysis of a background bird mortality study and, using those results, finalize the development of a Beached Bird Model (BBM). The BBM is an established model used to estimate spill-induced mortality as a function of carcass recovery, considering natural mortality, birds lost at sea, carcass removal from scavengers and rewash, and searcher effort and efficiency, among other factors.

²⁸ The NPFC notes that the budget in Table 5.2 of the Plan provides a claimed amount for this activity of \$136,704, which correctly corresponds to the Trustees' total claim sum certain. However, within Section 3-2 of the Plan and other budget tables, the claimed costs sum to \$136,705. The NPFC used the claim amount of \$136,704 to be consistent with the total claim sum certain.

²⁹ Plan, page 3-16

³⁰ Air surveys in January 2005 indicated that there were at least seven additional uncollected species of birds that were likely present in the oiled waters.

³¹ Plan, page 3-18

The Trustees have already completed three site-specific studies³² that will serve as components of the BBM. They studied the likelihood that a bird carcass would persist on the shore by depositing carcasses on beaches in the study areas and then periodically checking how many carcasses remained on the beach, and in what state (intact/scavenged). Additionally, they studied the likelihood that a bird carcass would be discovered during surveys by depositing carcasses on beaches in the study areas and monitoring how many of the carcasses were found by various survey teams. Lastly, the trustees assessed the likelihood that an oiled bird carcass would wash ashore by releasing drift blocks in the area of the incident³³ and counting how many of those drift blocks washed ashore.

The Trustees³⁴ also completed initial analysis of a study on background bird mortality in the affected areas. Background bird mortality measures the number of dead birds that would normally be expected to wash ashore absent the occurrence of an oil incident. The Trustees conducted bird surveys at control sites in 2005 to count the amount of birds that washed ashore as a basis to determine background mortality. Based on the three completed studies and the initial analysis of the background bird mortality study, the Trustees conducted a preliminary BBM³⁵ in 2008.³⁶

The RP also separately conducted its own field studies in 2010 that assessed carcass persistence, searcher efficiency, and background bird mortality. Using these three field studies as a basis, the RP developed its own preliminary BBM³⁷ to calculate total acute bird injury.

On May 22, 2017³⁸ the NPFC and the Trustees discussed the field studies and BBMs that were conducted separately by the Trustees and RP. The NPFC asked if the Trustees had considered the results and analyses of the studies conducted by the RP and if those results would be incorporated into the Trustees' assessment. On May 26, 2017³⁹ the Trustees confirmed that funds provided by the NPFC would be used to review the studies and analysis contained in the RP's studies and that those results would be considered during the Trustees' final quantification efforts.

Chronic Injury

Studies^{40,41} following the *Exxon Valdez* oil spill indicate that, in addition to fatalities caused by direct oiling, birds can experience chronic, sub-lethal impacts from feeding on oil contaminated

³² The Trustees worked cooperatively with the RP on both the carcass persistence and searcher efficiency studies, with the RP providing funding and independent analysis of the results.

³³ They conducted this survey during weather patterns that were similar to those during the incident

³⁴ The Trustees worked cooperatively with the RP on the background mortality assessment, with the RP providing funding and independent analysis of the results.

³⁵ DRAFT REPORT: M/V Selendang Ayu: Seabird Mortality Model, December 30, 2008

³⁶ The RP reviewed this report and provided feedback on the results.

³⁷ Methods, Analyses, and Results of the Estimate of Seabird Mortality Associated with the Selendang Ayu Oil Spill, Varoujean, D.H. and Everett, W.H

³⁸ PHONECON between the NPFC and DOI on May 22, 2017

³⁹ Email from DOI to NPFC, dated May 26, 2017

⁴⁰ Esler, D., J.A. Schmutz, R.L. Jarvis and D.M. Mulcahy. 2000. Winter survival of adult female Harlequin Ducks in relation to history of contamination by the Exxon Valdez oil spill. *J. of Wildlife Management* 64:839-847.

prey, which can inhibit population recovery following an oil spill.⁴² The Trustees captured harlequin ducks in 2005, 2006, and 2008⁴³ from 3 areas impacted by the *Selendang Ayu* oil spill and one uncontaminated control area. They conducted liver biopsies of the captured ducks and tested the samples for PAH levels. The test results indicated significantly higher PAH levels in birds from the oil impacted areas in all years studied.

The Trustees plan to generate density maps of birds exposed to residual oil and conduct literature reviews to determine impacts to birds from dietary PAH exposure. The Trustees will combine the population density information and injury values from literature to determine the number of birds that experienced injury from chronic oil exposure and the length of those injuries. The chronic injury assessment will complement the injury results produced by the BBM and will be closely coordinated to ensure that there will be no double-counting of injury between the two studies.

The NPFC spoke with the Trustees on May 22, 2017⁴⁴ with respect to the specific species of birds that would be included in the chronic injury assessment. The previous research cited by the Trustees, and the Trustees' own incident-specific assessment work, focused only on harlequin ducks. On May 26, 2017⁴⁵, the Trustees confirmed that the chronic bird injury assessment would only be applied to harlequin ducks and other species with similar life traits (i.e. foraging habits, habitat fidelity, and types of prey) as harlequin ducks.

NPFC Determination for Acute and Chronic Bird Injury

The Trustees claim \$217,917 (\$63,557 as contractor costs and \$154,360 as agency labor) for bird assessment activities to complete the background bird mortality study (\$21,037), run the final version of the BBM (\$65,022), estimate chronic injury through density mapping and literature reviews (\$89,583), and document assessment results and write the bird injury report for the DARP (\$42,275).

After reviewing the Trustees' Assessment Plan and additional claim information, the NPFC finds that, based on the magnitude of the spill and level of injury and assessment information previously collected the: (1) Assessment of Impacts to Birds assessment activity described above is appropriate and will lead to injury quantification⁴⁶, and (2) costs claimed for this activity are reasonable and appropriate for the proposed level of effort. Therefore, claimed costs of \$217,917 for the Marine Birds assessment activity are compensable from the Fund. 33 U.S.C. §2706(d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.51, 990.52, and 990.27.

⁴¹ Elser, D. and S.A. Iverson. 2010. Female harlequin duck winter survival 11 to 14 years after the Exxon Valdez oil spill. *J. of Wildlife Management* 74:471-478.

⁴² Plan, page 3-30

⁴³ The RP participated in the 2008 study and reimbursed the Trustees for the prior years' studies.

⁴⁴ PHONECON between the NPFC and DOI on May 22, 2017

⁴⁵ Email from DOI to NPFC, dated May 26, 2017

⁴⁶ The NPFC expects that the results of the Trustees' acute bird injury quantification activities will include a discussion of how the analyses in the RP's draft BBM were considered during the development of the Trustees' final BBM.

Loss of Human Use

The Trustees assert that most residents and tourists of Unalaska Island fish, hunt, or gather wild resources⁴⁷, which are associated with both recreational and subsistence uses of those resources. Following the spill, the Trustees reviewed response actions, conducted literature reviews, held public meetings, and interviewed local resource specialists to help determine whether human use injuries had occurred as a result of the *Selendang Ayu* oil spill.⁴⁸ While the frequency of resource use at Skan and Makushin Bays⁴⁹ is typically limited due to the distance from Unalaska Bay/Dutch Harbor⁵⁰, the Trustees determined that disruptive response activities⁵¹ and negative public perception of natural resource safety⁵² likely impaired the ability of residents and tourists to engage in recreational and subsistence activities from Skan Bay all the way Unalaska Bay.

The Trustees' Plan stated that there was insufficient data to pursue a quantitative approach to assessing human use injuries associated with the *Selendang Ayu* oil spill⁵³. Accordingly, the Plan provided that the Trustees will qualitatively describe the likely human use injuries and corroborate those likely injuries with available literature. They will then qualitatively correlate the human use injuries to the restoration benefits likely to result from the chosen restoration alternatives. The Trustees claimed \$76,102 (\$45,902 as agency labor, \$30,200 as contract costs) to qualitatively document and describe human use injuries (\$47,742) and draft the Human Use injury report for the DARP (\$28,360).

The NPFC requested additional information from the Trustees on February 17, 2017⁵⁴, asking for a more detailed description of the methodology and basis for a qualitative assessment. Additionally, because the Plan stated that there was no evidence of injury to archaeological and cultural resources and cited that passive injuries *may* [emphasis added] have occurred, the NPFC asked whether these injury categories would be included in the assessment. If the Trustees planned to assess these injuries, that NPFC requested that they provide documentation to support that these respective injury types occurred or likely occurred in accordance with 15 C.F.R. 990.42(a)(1), and the costs and level of effort associated with the assessment of these injuries.

To provide the NPFC with clarification on the qualitative approach identified in the Plan, the Trustees requested a telephone conference with the NPFC on March 13, 2017. During that conversation, the Trustees explained that by pursuing a qualitative assessment approach, they would not be conducting any injury quantification efforts that would require a corresponding additional restoration⁵⁵. The Trustees would simply be conducting limited interviews and literature reviews to gather more information about the type of human use injuries that likely occurred. The Trustees would then draft a written description of the type of injuries that

⁴⁷ Preassessment Data Report #12, Potential Human Use Losses Associated with the *Selendang Ayu* Oil Spill, page 1

⁴⁸ The RP reimbursed the Trustees for human use assessment costs.

⁴⁹ The areas of Unalaska Island most directly impacted by the release of oil from the *Selendang Ayu* oil spill

⁵⁰ Preassessment Data Report #12, Potential Human Use Losses Associated with the *Selendang Ayu* Oil Spill

⁵¹ The USCG imposed restrictions on water and air access. At its peak, the response included 22 vessels, heavy equipment, and 230 workers on land and in the water.

⁵² Public perception was affected by commercial fishery closures, a Subsistence Advisory issued by Unified Command, and an "impaired water body" declaration issued by ADEC.

⁵³ Plan, page 3-24

⁵⁴ Memo from NPFC to DOI, dated February 17, 2017

⁵⁵ PHONECON between the NPFC and DOI on March 13, 2017

occurred and then discuss how the restoration projects scaled for other injury categories would simultaneously also benefit the human use injuries that occurred.

The Trustees later provided a formal response to the NPFC's questions in writing on April 20, 2017⁵⁶. The Trustees stated that they now intend to quantify injuries to human use and select and scale additional restoration for those specific human use injuries⁵⁷. Additionally, the Trustees responded that their human use assessment could include assessment of archaeological, cultural resources, and passive use injuries. However, they did not provide additional documentation to support that these respective injury types occurred or likely occurred, nor did they provide documentation of the cost and level of effort associated with the assessment of those injuries.

After reviewing the Trustees' Plan and supporting claim information, the NPFC denies the Trustees' claimed funds in the amount of \$76,102 for the assessment of human use injuries. The Trustees' stated intent via the April 20, 2017 correspondence is to pursue a quantitative approach to assessing human use, if possible. However, this approach was not included in the Plan that was publicly reviewed and submitted to the NPFC as the basis for their claimed funding, which clearly stated that only a qualitative approach would be pursued by the Trustees.⁵⁸ Pursuant to 33 U.S.C. 2706(d)(2), all costs are determined with respect to plans and those plans may only be implemented after public notice, opportunity for a hearing, and consideration of all public comment. 33 U.S.C. 2706(c)(5). The quantitative approach introduced by the Trustees represents a significant and fundamental change to the assessment approach described in the Plan, did not go through the required public review process, and thus, the claimed funds are not compensable.

Further, the Trustees indicated in their April 20, 2017 correspondence that archaeological, cultural, and passive use injuries could be included in their assessment. As stated in the Plan, "there were no impacts to archaeological sites from the oil or cleanup activities," "the Trustees have not identified any cultural resources that were impacted by the spill," and "individuals within and outside of Unalaska may have experiences[sic] passive use losses."⁵⁹ However, despite the NPFC's request⁶⁰, the Trustees did not provide any additional documentation to support that these injury types occurred or likely occurred in accordance with 15 C.F.R. 990.42(a)(1). Accordingly, the Trustees have not provided a documented basis to support the assessment of those potential injuries. As well, the Trustees did not provide costs and level of effort associated with their assessment of those injuries, as requested by the NPFC⁶¹.

Lastly, the Plan submitted by the Trustees as a basis for their claimed funds must provide the NPFC with sufficient information to determine that assessment procedures are appropriate (15 C.F.R. 990.27(a)) and the costs are reasonable (33 U.S.C. 2706(d)(c)). As modified by the Trustees on April 20, 2017, the Trustees' description of proposed work simply states that "If it is possible to quantify injuries to human uses, and select and scale appropriate restoration for those

⁵⁶Letter from DOI to NPFC, dated April 20, 2017

⁵⁷ If their quantification efforts are not possible within the budget previously claimed, they will pursue the qualitative approach previously described in the Plan

⁵⁸ Plan, page 3-24

⁵⁹ Plan, page 3-24

⁶⁰ Memo from NPFC to DOI, dated February 17, 2017

⁶¹ Memo from NPFC to DOI, dated February 17, 2017

injuries, within the budget that the Trustees are requesting, then the Trustees will do so.” The Trustees provided no additional information regarding the actual quantification approach and methodologies that would be used. The scant level of information provided by the Trustees offers the NPFC no basis to determine that any assessment procedures that would be used are reliable, valid, and capable of providing assessment information of use in determining the type and scale of restoration appropriate for human use injuries. Nor can the NPFC determine that costs are reasonable when the assessment activities to be pursued are undefined and uncertain.

For all these reasons, the NPFC denies costs to assess human use injuries in the amount of \$76,102. U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §990.27

Restoration Planning

Because response actions following the spill were expected to return injured resources to baseline within a reasonable timeframe, and restoration of the injured areas is otherwise unfeasible⁶², the Trustees decided to forego primary restoration and only pursue compensatory restoration for damages associated with the *Selandang Ayu* oil spill. Following the spill, the Trustees and RP began to jointly identify restoration project alternatives. The Trustees conducted preliminary evaluation of potential oil abatement restoration projects, which would remove existing oil from the environment or prevent future releases of oil. The Trustees are considering a restoration project that would improve notification and response times for vessels in distress⁶³ in the Aleutian Islands. This project would prevent future incidents from occurring and provide restoration benefits for marine resources, birds, and marine mammal injuries associated with the *Selandang Ayu* oil spill.

Because the level of bird injury is expected to be particularly significant based on assessment activities to date, the Trustees are considering additional bird-specific projects to ensure that all injuries⁶⁴ are restored. The projects being considered involve predator management⁶⁵ at auklet breeding locations, prevention of invasive species (i.e. rats) introduction to breeding locations, habitat modification to improve nesting areas, and protection of currently existing bird habitat⁶⁶. While the oil abatement and other bird specific restoration alternatives have already been broadly identified and described, the Trustees still need to develop the project specific restoration methods, locations, project costs, and project scaling to define the conceptualized alternatives.

In addition to the previously described restoration alternatives, the Trustees also recognized the potential need to identify and develop additional restoration alternatives for lost human use and marine mammal injuries, depending on the results of their respective assessment activities.

Once all the restoration alternatives have been developed, the Trustees will need to evaluate the alternatives, select the preferred alternatives, and document their restoration planning efforts in the DARF.

⁶² Difficulty with accessing the site and potential to disturb recovering areas with construction equipment

⁶³ Because the Aleutian Islands are remote and treacherous to navigate, prevention of, and response to, incidents are extremely difficult.

⁶⁴ Specifically the auklets, which were the most commonly found species

⁶⁵ Through the removal of arctic foxes and rats

⁶⁶ Via land acquisition, easement, or improvement of land management practices.

The Trustees claim \$1,362,334 (\$1,008,144 as agency labor and travel and \$354,190) as costs to complete evaluation, scaling, and costs for the oil abatement (\$402,611), predator management (\$205,630), breeding habitat modification (\$143,028), prevention of invasive species (\$143,028), and habitat protection (\$205,629) restoration alternatives. Additionally, funds are jointly requested to identify and develop human use and marine mammal alternatives, if warranted (\$62,602), prepare for and attend meetings to review restoration alternatives (\$74,602), and writing and review of the Restoration Planning DARP section (\$125,204).

After reviewing the Trustees' Plan and additional claim information, the NPFC finds that: (1) the \$62,602 in joint restoration planning funding requested specifically for human use injury and marine mammals is denied based on the NPFC's denial of the Trustees' Human Use assessment activities discussed above, (2) the remaining Restoration Planning assessment activities described above are appropriate and support the Trustees' efforts to quantify injury and plan appropriate restoration, and (3) costs claimed for the remaining restoration planning activities are reasonable for the proposed level of effort. Therefore, claimed costs of \$1,299,732 for the Restoration Planning assessment activity are compensable from the Fund. 33 U.S.C. §2706(d)(1)(C), 33 C.F.R. §136.211, and 15 C.F.R. §§990.53 and 990.55.

Trustee Coordination

The Trustees' claim \$174,298 in agency labor costs for the six participating trustee council members to continue the coordination activities necessary to support all aspects of the injury assessment and restoration activities described in the Plan. Claimed costs identified in the Plan include scheduling, planning, and attending conference calls and webinars (\$34,860), scheduling, planning, and attending in-person meetings in Anchorage, Alaska (\$52,289), dissemination, review, and compilation of trustee comments on all trustee documents that are produced from Plan-related assessment and restoration-planning activities (\$69,719), and compiling cost documentation and generating reports to fulfill NPFC cost-reporting requirements (\$17,430).

After reviewing the Trustees' Plan and additional claim information, the NPFC finds that: (1) the Trustee Coordination assessment activity described above is appropriate and supports the Trustees' efforts to quantify injury and plan appropriate restoration, and (2) costs claimed for this activity are reasonable for the proposed level of effort⁶⁷. Therefore, claimed costs of \$174,298 for the Trustee Coordination assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.53 and 990.55.

Public Outreach

The Trustees' Plan identified costs in the amount of \$330,288 (\$31,900 for contract, \$298,388 for agency costs) to promote and enhance continued public participation in the restoration planning process as directed by 33 U.S.C. §2706(c)(5) and 15 C.F.R. §990.14(d). Claimed costs in the amount of \$90,737 will allow the Trustees to maintain and update a publically available

⁶⁷ Even though the NPFC denied the Trustees' Human Use Assessment Activity, the NPFC determined that the level of effort and costs needed to complete the described Trustee Coordination activities, such as compilation of cost documentation, attend meetings, and review of the DARP, would not appreciably decrease.

Administrative Record⁶⁸ for the NRDA, including the review of future and historical documents that are related to the NRDA. Costs in the amount of \$239,551 will support the Trustees' efforts to hold public meetings to increase the public's involvement in the identification and evaluation of restoration projects, release the DARP for public comment, hold meetings to present the DARP's findings, and respond to the public's comments on the DARP.

After reviewing the Trustees' Plan and additional claim information, the NPFC finds that: (1) the Public Outreach assessment activity described above is appropriate and supports the Trustees' efforts to quantify injury and plan appropriate restoration, and (2) costs claimed for this activity are reasonable for the proposed level of effort. Therefore, claimed costs of \$330,288 for the Public Outreach assessment activity are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.53 and 990.55.

Past Assessment and Restoration Planning Costs

The Trustees originally claimed \$1,240,165 in past assessment and restoration planning costs associated with the Plan as follows: \$1,143,679 for NOAA, \$46,207 for FWS, \$1,960 for ADFG, \$18,178 for ADEC. On April 12, 2017⁶⁹, the Trustees reduced their total claimed costs to \$1,240,115 to reflect an initial calculation error of \$50 by ADEC. On April 20, 2017⁷⁰, the Trustees increased their claimed past costs to \$1,241,769.31⁷¹ to reflect an increase of \$1,604.31 in indirect costs based on the application of updated and valid indirect rates at the NPFC's request⁷².

NOAA Costs

NOAA claimed \$1,143,679 in past costs for labor and indirects (\$689,257.14), contract costs (\$387,866.29), travel (\$7,683.40), and purchases (\$58,872.07) that were incurred by NOAA from October 1, 2007 through October 3, 2015. Labor costs were supported by agency timesheets and descriptions of labor for each employee, indirect costs were supported by documentation of indirect cost calculation methods, contract costs were supported by invoices, proofs of payment, and statements of work, purchases were supported by receipts, and travel was supported by signed travel vouchers.

The Plan and associated claim materials document that NOAA's past costs were incurred to: (1) coordinate their assessment activities and costs with other trustees and the RP, (2) compile cost documentation, (3) conduct preliminary identification and evaluation of the restoration alternatives identified in Chapter 4 of the Plan, and (4) develop the Assessment Plan. Additionally, in 2008, NOAA conducted the lingering oil studies described in the "Marine Resources" section of the determination. During these studies NOAA conducted shoreline surveys and collected and analyzed water⁷³, mussel, and sediment samples.

⁶⁸ Available at: https://www.fws.gov/alaska/fisheries/contaminants/spill/sa_record.htm

⁶⁹ Email from DOI to NPFC, dated April 12, 2017

⁷⁰ Letter from DOI to NPFC, dated April 20, 2017

⁷¹ The NPFC notes that when the Trustees increased their claimed costs by \$1,604.31, they based this increase on the original claimed amount of 1,240,165, instead of the revised claimed amount of \$1,240,115.

⁷² Memo from NPFC to DOI, dated February 17, 2017

⁷³ Water was collected using passive water samplers.

On February 17, 2017⁷⁴, the NPFC requested additional information from NOAA, including a request for updated cost documentation with the appropriately documented indirect rates for each fiscal year and an assessment purpose for all purchases. The NPFC also requested additional documentation to support several purchases where the receipts did not identify the nature of the purchase or support the specific amount claimed for reimbursement – Alaska Industrial Hardware (\$672), Safeland Industrial Supply Co (\$508.18), Garmin (\$157.65), and LECO Corporation (\$49.27, \$312.54).

On April 20, 2017⁷⁵, NOAA provided cost documentation with the appropriately documented appropriate rates, which increased their total indirect costs by \$1,604.31 and total claimed past costs to \$1,145,283.31. Additionally, NOAA explained that all purchases were incurred to support either the field work phase or laboratory analysis phase of the Lingering Oil studies. Lastly, NOAA was unable to provide any additional documentation to specifically identify and substantiate the Alaska Industrial Hardware (\$672) and Garmin (\$257.65) purchases and was only able to document \$140 of the Safeland Industrial Supply purchase (\$508.17). NOAA did provide additional descriptions to support the LECO Corporation purchases of \$49.27 and \$312.54, explaining that the purchases were laboratory equipment fittings needed for the analysis of samples for the Lingering Oil studies.

After reviewing the Trustees' Plan and additional claim information specific to NOAA's past assessment and restoration planning costs, the NPFC finds that: (1) NOAA's past activities for which costs are claimed are appropriate and support the Trustees' efforts to quantify injury and plan appropriate restoration, (2) NOAA purchases in the amount of \$1,297.82 (Alaska Industrial Hardware – 672; Garmin - \$257.65; Safeland Industrial Supply - \$368.17) were not supported by the provided cost documentation, and, therefore, are denied, (3) the remaining costs claimed for NOAA's activities are reasonable for the described level of effort. Therefore, claimed costs of \$1,143,985.49 for NOAA's past costs are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.27, 990.53 and 990.55.

DOI Costs

DOI claimed \$46,207 in past indirect costs that were incurred from July 1, 2010 to October 20, 2015. The RP had previously reimbursed the base labor associated with those indirect costs, but DOI never submitted the related indirect costs to the RP for reimbursement. The indirect costs were supported by documentation of indirect cost calculation methods and agency timesheets and descriptions of labor documenting the actual labor associated with the indirect costs.

The Plan and associated claim materials document that the DOI labor costs associated with the indirect costs were incurred to: (1) coordinate their assessment activities and costs with other trustees and the RP, (2) compile cost documentation, (3) conduct preliminary identification and evaluation of the restoration alternatives identified in Chapter 4 of the Plan, and (4) conduct public outreach and Administrative Record activities. Additionally, DOI evaluated the results of the background bird mortality study and draft BBM.

⁷⁴ Memo from NPFC to DOI, dated February 17, 2017

⁷⁵ SAFE File Exchange on April 20, 2017

With respect to 33 C.F.R. 136.113, DOI provided an accounting of all other compensation received as a consequence of the *Selendang Ayu* oil spill. During the process of reconciling their past costs and payments received from the RP, DOI discovered that there was an additional \$3,478.02 in payments from the RP that had never been applied to any of DOI's past costs⁷⁶. DOI indicates that the reason for this discrepancy is unknown and that those funds are not available to pay for any remaining past or future costs.

After reviewing the Trustees' Plan and additional claim information specific to DOI's past assessment and restoration planning costs, the NPFC finds that: (1) DOI's past activities for which costs are claimed are appropriate and support the Trustees' efforts to quantify injury and plan appropriate restoration, and (2) the costs claimed for DOI's activities are reasonable for the described level of effort. However, while DOI is unable to locate the surplus RP payment of \$3,478.02 in its financial system and those funds are not currently available for use, pursuant to 33 U.S.C. 2706(d)(3), the NPFC cannot determine that payments from the NPFC in the amount of \$3,478.02 would not result in a double recovery of damages, and, accordingly, are denied. Therefore, claimed costs of \$42,728.98 for DOI's past costs are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.27,990.53 and 990.55.

ADFG Past Costs

ADFG claimed \$1,960 in past costs for labor and indirects that were incurred from April 1, 2010 through October 20, 2015. Labor costs were supported by agency timesheets and descriptions of labor for each employee and indirect costs were supported by documentation of indirect cost calculation methods.

The Plan and associated claim materials document that ADFG's past costs were incurred to: (1) coordinate their assessment activities and costs with other trustees and the RP, (2) compile cost documentation, (3) conduct preliminary identification and evaluation of the restoration alternatives identified in Chapter 4 of the Plan, and (4) conduct public outreach and Administrative Record activities. Additionally, ADFG conducted background literature reviews on human uses of natural resources in Unalaska.

After reviewing the Trustees' Plan and additional claim information specific to ADFG's past assessment and restoration planning costs, the NPFC finds that: (1) ADFG's past activities for which costs are claimed are appropriate and support the Trustees' efforts to quantify injury and plan appropriate restoration, and (2) the costs claimed for ADFG's activities are reasonable for the described level of effort. Therefore, claimed costs of \$1,960 for ADFG's past costs are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.27,990.53 and 990.55.

⁷⁶ Enclosure F, Plan of the U.S. Fish and Wildlife Service for the Use of Advance Funds Remaining after October 20, 2015

ADEC Past Costs

ADEC claimed \$18,178 in past costs for labor and indirects that were incurred by ADEC from July 1, 2010 through October 20, 2015. Labor costs were supported by agency timesheets and descriptions of labor for each employee and indirect costs were supported by documentation of indirect cost calculation methods.

The Plan and associated claim materials document that ADEC's past costs were incurred to: (1) coordinate their assessment activities and costs with other trustees and the RP, (2) compile cost documentation, (3) conduct preliminary identification and evaluation of the restoration alternatives identified in Chapter 4 of the Plan, and (4) conduct public outreach and Administrative Record activities.

On March 21, 2017, the Trustees notified the NPFC that, due to a calculation error, ADEC initially claimed \$50 more than they needed and the appropriate amount claimed should be \$18,128. As previously noted, when the Trustees later amended their sum certain on April 20, 2017, they did not take into account this earlier sum certain decrease of \$50 and thus ADEC's claim amount was effectively raised back to \$18,178.

After reviewing the Trustees' Plan and additional claim information specific to ADEC's past assessment and restoration planning costs, the NPFC finds that: (1) ADEC's past activities for which costs are claimed are appropriate and support the Trustees' efforts to quantify injury and plan appropriate restoration, and (2) the costs claimed for ADEC's activities are reasonable for the described level of effort, not including the excess \$50 that was unintentionally claimed. Therefore, claimed costs of \$18,128 for ADEC's past costs are compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.27,990.53 and 990.55.

ADOL Past Costs

ADOL claimed \$30,141 in past costs for labor and indirects (\$30,129) and purchases (\$12.00) that were incurred by ADOL from July 1, 2010 through October 20, 2015. Labor costs were supported by agency timesheets and descriptions of labor for each employee, indirect costs were supported by documentation of indirect cost calculation methods, and purchases were supported by receipts.

The Plan and associated claim materials document that ADOL's past costs were incurred to: (1) coordinate their assessment activities and costs with other trustees and the RP, (2) compile cost documentation, (3) conduct preliminary identification and evaluation of the restoration alternatives identified in Chapter 4 of the Plan, and (4) conduct public outreach and Administrative Record activities.

After reviewing the Trustees' Plan and additional claim information specific to ADOL's past assessment and restoration planning costs, the NPFC finds that: (1) ADOL's past activities for which costs are claimed are appropriate and support the Trustees' efforts to quantify injury and plan appropriate restoration, and (2) the costs claimed for ADOL's activities are reasonable for the described level of effort. Therefore, claimed costs of \$30,141 for ADOL's past costs are

compensable from the Fund. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211, 15 C.F.R. §§990.27,990.53 and 990.55.

Summary of Past Assessment and Restoration Planning Costs

In total, the Trustees claimed costs of \$1,241,769.31 for past assessment and restoration planning costs. The NPFC determined that costs in the amount of \$1,236,943.47 are compensable from the Fund; costs totaling \$4,825.84 are denied. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211(a), 15 C.F.R. §990.30.

Summary

The NPFC has reviewed the claim submitted by DOI, on behalf of all the Trustees, for costs to implement its injury assessment and restoration planning activities for the *Selendang Ayu* oil spill in accordance with OPA (33 U.S.C. §2701 *et seq.*) and associated regulations (15 C.F.R. Part 990 and 33 C.F.R. Part 136).

Through this determination, the NPFC offers \$3,699,059.47 for past assessment and restoration planning costs incurred by the Trustees (\$1,236,943.47) and costs to implement future approved injury assessment and restoration planning activities detailed in the Trustees' Plan (\$2,462,116).

The NPFC denies payment of \$143,529.84 based on the on the unsupported Human Use assessment activity (\$76,102), restoration planning costs associated with Human Use (\$62,602), incorrectly calculated sum certain for ADEC past costs (\$50), unsupported NOAA purchases (\$1,297.82), and potential for double recovery of damages from DOI (\$3,478.02).

Table 1. Summary of Adjudicated Costs			
	Claimed	Approved	Denied
Marine Resources	\$303,177	\$303,177	\$0
Marine Mammals	\$136,704	\$136,704	\$0
Marine Birds	\$217,917	\$217,917	\$0
Human Use	\$76,102	\$0	\$76,102
Restoration Planning	\$1,362,334	\$1,299,732	\$62,602
Trustee Coordination	\$174,298	\$174,298	\$0
Public Outreach	\$330,288	\$330,288	\$0
Past Costs	\$1,241,769.31	\$1,236,943.47	\$4,825.84
Total	\$3,842,589.31	\$3,699,059.47	\$143,529.84

Reconsideration of Claim Determination

Through this determination, the NPFC has denied the following costs: Human Use assessment activity (\$76,102), restoration planning costs associated with Human Use (\$62,602), unsupported purchases from NOAA (\$1,297.82), potential for double recovery of damages for DOI (\$3,478.02), and incorrectly calculated past costs for ADEC (\$50). Collectively, this amounts to \$143,529.84 in denied costs.

DOI may make a written request for reconsideration of this determination. The reconsideration request must be received by the NPFC within 60 days after the date of this determination, or within 30 days from when the determination is received, whichever comes first. The request for reconsideration must be in writing and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. During the reconsideration adjudication, the NPFC will conduct a de novo review and reevaluate your entire claim. Disposition of the reconsideration will constitute final agency action. All correspondence should include the corresponding claim number J05003-OI03.

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. DOI has demonstrated that the NRDAR Fund is a non-appropriated account that meets these requirements⁷⁷. 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).

For this claim, if the offer is accepted, the NPFC will deposit \$3,699,059.47 into DOI's Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund)⁷⁸. DOI shall disburse the past costs as described above and future costs to NOAA, ADEC, ADOL and ADFG from the NRDAR Fund

⁷⁷ 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.

⁷⁸ The NPFC recognizes that NOAA requested to be paid directly for their costs. However, with the denial of some future costs, the specific amounts to be allocated to each Trustee could not be calculated by the NPFC. Accordingly, DOI, as FLAT, can distribute the amounts to each Trustee as needed.

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 an approved activity is 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;
 - e. Government Equipment: Documentation of costs, including the rate (i.e., hourly, weekly) and time for all equipment used for which costs were incurred; and
 - f. Grants: Grant proposals, activities undertaken, and proof of grant disbursement.

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).

Contingency

On January 5, 2017 the NPFC adopted a new policy whereby the NPFC will no longer approve or pay any costs identified as contingency. Accordingly, acceptance of this offer from the NPFC will result in final agency action for all assessment and restoration planning activities associated with this claim and no further funds will be available.

U.S. Department
of Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

CG National Pollution Funds Center
US Coast Guard STOP 7605
2703 Martin Luther King Jr Ave. SE
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Claim Number: J05003-OI03

Claimant Name: Department of the Interior

On December 7, 2016, the Department of the Interior (DOI), on behalf of NOAA, Alaska Departments of Natural Resources, Fish and Game, Environmental Conservation and Law (the State and Federal Trustees), presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$3,840,985 for costs to assess potential injuries to natural resources resulting from the M/V *Selendang Ayu* oil spill. The NPFC assigned Claim Number J05003-OI03 to this claim. On April 20, 2017, DOI increased the claimed costs to \$3,842,589.31. The Trustees' claim, as revised, totaled \$1,241,769.31 for past assessment and restoration planning costs and \$2,600,820 for future assessment and restoration planning costs.

The State and Federal Trustees, through their authorized representatives, accept the NPFC's settlement offer of \$3,699,059.47 as full, final and complete settlement and satisfaction for all costs described in the September 22, 2017 determination (J05003-OI03).

DOI, as the Federal Lead Administrative Trustee, shall comply with 33 U.S.C. § 2706(f) by depositing into its revolving trust account the \$3,699,059.47 awarded in the September 22, 2017 determination. DOI shall disburse the past costs to NOAA and each State Trustee as described in the Determination and future costs from the DOI revolving trust account.

Each State and Federal Trustee hereby assigns, transfers, and subrogates to the United States all rights, claims, interest and rights of action, that he or she may have against any party, person, firm or corporation that may be liable for the payment of the \$3,699,059.47 paid from the Fund for Claim Number J05003-OI03. Each State and Federal Trustee authorizes the United States to bring suit, compromise or settle in the name of the Trustees and for the United States to be fully substituted for, and subrogated to all rights arising from, and associated with this amount paid by the Fund for which each Trustee is compensated under this settlement. Each Trustee warrants that no legal action has been brought regarding this matter, and no settlement has been or will be made, by them or any person acting on their behalf with any other party for amounts which are the subject of this claim against the Fund.

Each Trustee warrants that no settlement will be made by any person on their behalf with any other party to recover the compensation paid by the Fund for the September 22, 2017 determination without consultation with the NPFC.

Upon acceptance of this offer the Trustees will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the Fund. Cooperation shall include, but not be limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, and providing any

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documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person.

The State and Federal Trustees certify that to the best of their knowledge and belief that the information contained in this claim represents all material facts and is true, and it understands that misrepresentation of facts is subject to prosecution under federal law including, but not limited to, 18 U.S.C. §§287 and 1001.

FOR THE DEPARTMENT OF THE INTERIOR

Title of DOI Authorized Representative

Date of Signature

Name of DOI Authorized Representative

Signature

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Title of NOAA Authorized Representative

Date of Signature

Name of NOAA Authorized Representative

Signature

FOR THE ALASKA DEPARTMENT OF LAW

Title of ADOL Authorized Representative

Date of Signature

Name of ADOL Authorized Representative

Signature

FOR THE ALASKA DEPARTMENT OF NATURAL RESOURCES

Title of ADNDR Authorized Representative

Date of Signature

Name of ADNDR Authorized Representative

Signature

FOR THE ALASKA DEPARTMENT OF FISH AND GAME

Title of ADFG Authorized Representative

Date of Signature

Name of ADFG Authorized Representative

Signature

FOR THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Title of ADEC Authorized Representative

Date of Signature

Name of ADEC Authorized Representative

Signature