

## National Pollution Funds Center Determination

Claim Number and Name:	<b>S99028-OI01</b> , Oregon/Washington Coast Mystery Oil Spill Assessment Costs
Claimant:	Department of the Interior (DOI)
Claim Type:	NRDA, Upfront Assessment Costs
Amount Requested:	\$533,183
Offer Amount:	\$445,604.41
Available Contingency:	\$87,809.29
Determination Date:	May 8, 2020
NPFC Claim Manager:	[REDACTED]

### Summary of the Incident and Claim

In March 1999, the U.S. Coast Guard received reports of tar balls and oiled birds washing ashore on the beaches of northern Oregon<sup>1</sup> and southern Washington.<sup>2,3</sup> Responders to the incident conducted beach cleanup operations and wildlife surveys largely from March 4, 1999 through March 7, 1999,<sup>4</sup> with additional beach surveys or carcasses collections continuing as late as March 27, 1999.<sup>5</sup> Spill responders initially suspected that the oil originated from the *M/V New Carissa* incident;<sup>6</sup> however, subsequent laboratory analysis of oil taken from the tar balls and bird feathers did not match the *M/V New Carissa* reference samples.<sup>7</sup> The source of the spill was never identified.<sup>8</sup>

Following the spill, the Department of the Interior (DOI), along with the State of Washington,<sup>9</sup> acting as natural resource trustees (the Trustees) designated under OPA and appropriate state laws, initiated an assessment of natural resource damages resulting from the discharge. Based on a portion of the bird carcasses recovered, the Trustees developed a Natural Resource Damage Assessment Plan (Plan) to quantify the total bird injury associated with the incident and plan appropriate restoration of those injured resources.<sup>10</sup>

<sup>1</sup> POLREP 3, MSO Portland, Oregon, 070213Z MAR 99.

<sup>2</sup> The response to the Washington beaches was conducted under a separate FPN (S99029).

<sup>3</sup> POLREP 3, MSO Portland, Oregon, 070509Z MAR 99.

<sup>4</sup> As reflected in POLREP reports for FPN S99028 (OR) and S99029 (WA).

<sup>5</sup> As reflected in Morgue data report for *M/V New Carissa* spill response.

<sup>6</sup> The *M/V New Carissa* was a freighter that released between 70,000 and 140,000 gallons of oil after grounding along the central Oregon coast near Coos Bay on February 4, 1999.

<sup>7</sup> ADL Laboratories. 2001. Analysis of Feather Samples After the *M/V New Carissa* Oil Spill, Final Report. Prepared by [REDACTED].

<sup>8</sup> Marine Casualty Investigation Report, Case Number MC990002837, July 30, 1999.

<sup>9</sup> Represented by the Washington Department of Fish and Wildlife.

<sup>10</sup> 1999 Oregon/Washington Coast Mystery Oil Spill Natural Resource Damage Assessment Plan and Claim for Past and Future Assessment Costs. Prepared by [REDACTED]

[REDACTED] Submitted to the NPFC March 23, 2015.

On March 30, 2015, the NPFC received a claim from DOI for costs to assess potential natural resource injuries resulting from the *Oregon/Washington Coast Mystery* oil spill (S99028-OI01) that occurred in March 1999. The claim totaled \$1,406,169 for past (\$387,633) and future (\$1,018,536) costs to assess injuries to birds resulting from the spill and conduct restoration planning activities as described in the Trustees' Plan. On November 4, 2015, DOI reduced the claim sum certain to \$1,306,783 (\$380,217 for past costs and \$926,566 for future costs).<sup>11</sup> On March 24, 2016, the NPFC issued a determination offering to pay \$540,439 for past assessment and restoration planning costs and future assessment costs, approving \$27,952 for future injury assessment contingency funding, deferring adjudication of \$533,183 in future restoration planning costs, and denying payment of \$205,209 in indirect costs and associated contingency.

Pursuant to 33 C.F.R. §136.115(d), on May 19, 2016, the DOI requested that the NPFC reconsider its decision to (1) deny payment of indirect costs and associated contingency in the amount of \$205,209 and (2) defer adjudication of future restoration planning costs (specific to \$407,392 of the total deferred amount of \$533,183). On July 14, 2016, the NPFC issued a reconsideration determination that offered an additional \$173,427 for indirect costs, and approved additional contingency of \$7,810. Accordingly, the NPFC made a cumulative final offer to pay \$713,866 for past assessment and restoration planning costs and future assessment costs, and approved the availability of an additional \$35,762 for future injury assessment contingency funding.

Through the reconsideration determination, the NPFC also affirmed our decisions to deny payment of \$23,972 in indirect costs and defer adjudication of \$533,183 in future restoration planning costs. In the reconsideration determination the NPFC instructed the DOI that the NPFC would hold the claimed \$533,183 in a contingency reserve account for a period of three years from the date of the reconsideration determination (July 14, 2016) to allow the DOI the opportunity to present a description and findings of the assessment efforts in sufficient detail for the NPFC to determine that the estimate of total injury is reliable and valid. The NPFC further specified that, "The NPFC will issue its determination with respect to these claimed costs at that time based on the results of the documentation submitted. If DOI fails to submit such findings within the three year period stated above, these claimed costs are denied." The NPFC received confirmation that the DOI had received and accepted the NPFC's reconsideration determination on July 21, 2016.

The NPFC did not receive a description and findings of the assessment efforts from the DOI by July 14, 2019 - three years from the date of the reconsideration determination. Accordingly, pursuant to the terms of the reconsideration decision accepted by the DOI, the NPFC denied the \$533,183 of future restoration planning costs because the DOI failed to timely submit sufficient and detailed assessment information for the NPFC to determine if the injury assessment was reliable and valid.<sup>12</sup> The NPFC issued our determination on September 17, 2019. The determination was made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. §2701 *et seq.*) and the OPA claims regulations (33 C.F.R. Part 136).

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<sup>11</sup> October 22, 2015 Letter from DOI to NPFC.

<sup>12</sup> Although the DOI submitted some supporting documentation on July 16, 2019 according to terms of the July 14, 2016 determination the claim was denied as of July 14, 2019 on the grounds that the documentation was not timely. The administrative processing of the denial was completed and the denial mailed on September 17, 2019.

The NPFC received a written request for reconsideration of the DOI's claim of \$533,183 in damages on October 24, 2019 (the Request). The DOI included the factual and legal basis of the relief requested, along with the proscribed description and findings of the assessment efforts to facilitate the NPFC's determination whether the estimate of total injury is reliable and valid. Pursuant to 33 C.F.R. §136.209(b) and 33 C.F.R. §136.211(b), the DOI also provided an accounting of upfront assessment funding previously provided by the NPFC and cost documentation to support that the damages requested are uncompensated and that previous funding was spent in accordance with the claimed activities.

The NPFC's adjudication and final decision regarding the DOI's request for reconsideration of the \$533,183 in claimed damages for future assessment activities (restoration planning) follows.

### **General Finding Incorporated by Reference**

As the DOI's Claim represents future assessment costs for which the NPFC deferred adjudication through a previous determination, the NPFC applies the following general findings of the NPFC's March 24, 2016 initial determination and adopted in the June 14, 2016 determination on reconsideration:

1. The *Oregon/Washington Coast Mystery* oil spill is an OPA incident that resulted in damages to natural resources. 33 U.S.C. §2702(b)(2)(A).
2. The DOI is a federal trustee designated by the President with responsibilities to assess natural resource damages under its trusteeship and to develop and implement plans to restore, rehabilitate, replace, or acquire the equivalent of the natural resources under its trusteeship. 33 U.S.C. §2706(b)(2)); 33 U.S.C. §§2706(c)(1)(A) and (C), and 33 C.F.R. §136.207.
3. The Trustees' Natural Resource Damage Assessment Plan, which forms the basis of the claim, was developed and implemented after adequate public notice, opportunity for a hearing, and consideration of all public comments. 33 U.S.C. §2706(c)(5).
4. No Responsible Party was identified for the *Oregon/Washington Coast Mystery* oil spill, therefore, the natural resource trustees are entitled to present claims directly to the NPFC. 33 C.F.R. §136.103.

### **Time Limitations**

Multiple time limitation are associated with this Request:

1. 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 Request is associated with a claim for future assessment costs necessary to complete the natural resource damage assessment. As such, the assessment is not complete. Therefore the DOI has submitted their claim within the statutory time limitation.

2. As described in the above Summary, the NPFC deferred adjudication of these future assessment costs for a period not to exceed three years from the date of the July 14, 2016 determination in order to provide the DOI an opportunity to provide additional information to support the reliability and validity of the injury quantification. The DOI failed to present the NPFC with the requested information within the agreed timeframe, therefore the NPFC issued a denial on September 17, 2019 on the basis that the DOI failed to timely submit sufficient evidence to support the validity and reliability of the injury to natural resources.

3. A Requests for Reconsideration must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier. 33 C.F.R. §136.115(d). The denial was mailed September 17, 2019 and the Request was received by NPFC on October 24, 2019.<sup>13</sup> As such, the Request was received within the period of limitation, and documentation (as described above) was received which allows the NPFC to complete the adjudication of claimed assessment costs.

### **Claimant's Burden of Proof**

Under OPA, trustees bear the burden of proving all evidence, 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 trustees were provided an extended opportunity (3 years) to present a description of the injury assessment efforts and their findings in sufficient detail for the NPFC to determine that the estimate of total injury is reliable and valid.

Furthermore, the NPFC acts as the fact-finder during the adjudication of claims. In this role, the NPFC considers all relevant evidence and weighs its probative value when adjudicating a claim. The NPFC is not bound by the findings or conclusions reached by other entities. If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence. In its adjudication, the NPFC considered all of the documentation provided by the DOI along with independently conducted fact finding. The following sections of this determination summarize the NPFC's review of the submitted documentation and supporting information. As this determination is based on the unique facts giving rise to this claim, it should not be viewed as controlling over future NPFC claims determinations.

### **Injury Assessment**

The Trustees determined that the natural resource injury quantification and associated compensatory restoration is best characterized in terms of the direct loss, or acute mortality, of migratory birds and the restoration necessary to replace the equivalent of the birds lost. The Trustees state that bird carcasses recovered during the incident represent a portion of the total birds killed 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. To quantify the full extent of

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<sup>13</sup> The date of mailing of this determination is the date of record for this request.

bird injury, the Trustees developed a Beached Bird Model (BBM), conducted two field studies, and developed an oil spill trajectory model to estimate the total bird mortality.

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, searcher effort and efficiency, unsearched areas, birds removed or buried by tides/waves, and injured birds healthy enough to leave the shoreline prior to expiration. The two field studies aimed to provide estimates of natural mortality and carcass removal by scavengers for the model. Similarly, the oil spill trajectory model is a component of the BBM which provided information for the BBM on the predicted oil release point and travel path. The trustees had to hindcast from the time and place where oil is known to have come ashore using winds and currents from the time of the incident to determine the most likely discharge scenario. The resulting trajectory model then allowed the trustees to account for estimated deposition of birds on unsearched shoreline in the impact area and for birds lost at sea.

The Trustees input the estimated bird mortality provided by the BBM into a resource equivalency analysis (REA) to determine the amount of compensatory restoration required to offset the bird injury. The REA uses values taken from scientific literature to calculate the amount of natural resource services lost for each species of bird that was injured. The amount of bird injury calculated through the REA is expressed in terms of the number of discounted bird-years (DBY) lost.

The NPFC had deferred adjudication of certain future assessment costs because although the NPFC recognizes that the BBM and REA are appropriate tools for quantifying injury to inform the type and scale of restoration, the BBM relies on (and is sensitive to) accurate estimates of several spill-specific and environmental parameters (e.g., search effort<sup>14</sup>, carcass persistence, background deposition rates<sup>15</sup>, wind, and current conditions). The NPFC was not confident that the Trustees would be able to develop a valid estimate of the injury using the BBM given the challenges of recreating the actual incident-specific and environmental conditions that are necessary for the model to produce a valid and reliable estimate of total injury that occurred 16 years previously from an unknown source.

#### *Beached Bird Model Inputs and Assumptions*

Connection of bird recoveries to the spill. The BBM assumes the 272 recovered carcasses were birds killed by the spill. The NPFC recognizes that obvious oiling is not a reliable indicator of cause of death given the strong relationship between the recoveries of visibly oiled and unoiled birds during previously studied spill incidents,<sup>16</sup> and that bird recoveries above background

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<sup>14</sup> DOI states that carcasses were not searched for systematically during the response which, while the spill is of limited time period and scope, will still necessitate that DOI reconstruct this search effort from the records of various untrained responders who searched with varying levels of intensity.

<sup>15</sup> Field studies to replicate carcass persistence and background deposition rates could also be affected by the 16 years that have elapsed since the spill occurred. Potential changes to oceanography, beach topography, bird populations, and land usage, among other factors, could influence the results of these studies.

<sup>16</sup> Ford, R.G. 2006. Using beached bird monitoring data for seabird damage assessment: the importance of search interval. *Marine Ornithology* 34:91-98.

deposition rates are reasonably attributable to the spill in the absence of any identified alternate stressor in the environment. The Trustees determined the background deposition for the spill by reviewing Coastal Observation and Seabird Survey Team (COASST) data from 2000 to 2018 which indicates a background encounter rate on area beaches in March is less than one bird per km per month, and that most of the encountered birds are heavily decomposed. Given that the search procedures during the spill were generally less rigorous than the standardized procedures for COASST surveys, the Trustees expect an encounter rate well under one bird per km and made no correction to the total birds attributed to the spill.<sup>17</sup> Background deposition encounter rates associated with a single search day tend to be higher than those associated with multi-day searches.<sup>18</sup> For the *M/V New Carissa* spill, during the same time period and directly south of the mystery spill, the background deposition rate was calculated as 0.1-0.2 birds per km searched<sup>19</sup> (and applying the same methodology, 0.2-0.25 birds per km for Slusher Lake, Gearhart and Tillamook Head – the beaches eliminated from the *M/V New Carissa* claim and incorporated here).<sup>20,21</sup> The COASST data for 2000 to 2018 (which the trustees use in this Claim) indicate background deposition rates slightly lower for the shoreline areas affected by the *M/V New Carissa* spill than for the mystery spill.<sup>22</sup> Both methodologies suggest slightly higher background deposition rates in the OR-WA Mystery spill impact area than the *M/V New Carissa* impact area. Utilizing a zero background deposition rate skews the results toward increased impacts; however, given the few km searched and other conservative parameters, the use of a zero background deposition rate is not unreasonable.

Searcher efficiency. The Trustees estimate searcher efficiency at 65% for all beaches searched.<sup>23</sup> The rate is supported by a 2009 searcher efficiency study<sup>24</sup> conducted on a selection of beaches impacted by the spill. In the Trustees' study, multiple methods of searching were compared and consideration was made for the distribution of carcasses on the beach (lower vs. upper) and variations in findability. Given that carcass searches during the spill were largely secondary activities (conducted by clean up contractors during their operations) rather than designated carcass search teams, the NPFC finds the rate likely overestimates searcher efficiency and is therefore a conservative estimate.

In Washington, an additional adjustment was made to searcher efficiency as searchers did not collect all carcasses, leaving carcasses uncollected if there was not obvious oiling. This bias was

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<sup>17</sup> Seabird Mortality Report, p. 11.

<sup>18</sup> A single search day includes carcasses deposited over a longer period of time versus multi search days in which the encounter rate in subsequent days is largely attributed to birds deposited since the previous day.

<sup>19</sup> Having already corrected for the spike in encounters for first day of search.

<sup>20</sup> Attachment to Email from [REDACTED], NPFC. August 18, 2006 Derivation of the estimated rate of natural carcass deposition-Ford.pdf.

<sup>21</sup> At an average background deposition rate of 0.15 birds per km, the ultimate percentage of carcasses found attributed to the spill was 56.7% indicating even low background deposition rates can have significant impact on total mortality estimates.

<sup>22</sup> Outer Coast Results of carcass deposition trends for Southern Oregon and Northern Oregon and Southern Washington. <http://explore.coasst.org:3838/Explore-data/>. Accessed February 3, 2020.

<sup>23</sup> Seabird Mortality Report p. 10.

<sup>24</sup> Ford, R.G., M.J. Szumski, N. Strom, W.A. Williams, J.L. Casey, D. Jacques. 2011. Calibrating Seabird Mortality Data, Oregon and Washington. Included as Appendix A of the Seabird Mortality Report.

corrected using ratios of oiled to unoiled birds derived from the Oregon data for Sunset-Gearhart. The NPFC found no evidence rebutting this methodology and associated assumptions.

Carcass persistence. Carcass persistence was determined separately for large and small birds as small birds are removed (scavenged, buried by wind-blown sand, or washed back out to sea) at a higher rate than large birds. The trustees used large bird persistence rates calculated in studies conducted for the *M/V New Carissa* spill<sup>25</sup> on beaches to the south of those impacted by the Oregon/Washington Coast Mystery spill. Persistence of small birds was estimated through a study in the spring of 2015 on four beach segments in the Mystery Spill area (two each in Oregon and Washington).<sup>26</sup> Daily persistence rates for both large and small birds were applied accordingly (assuming the discharge incident occurred on March 3 and birds were deposited on the beaches March 4 (Day 0) (see below discussion of spill trajectory and timing of beaching of oil and birds).<sup>27</sup> In the case of Tillamook Head where the carcass search occurred on March 17, after 13 days, using the Day 6 persistence rate likely resulting in a low estimate of total deposited birds in that reach.<sup>28</sup>

Cumulative Effect of Beached Bird Model Inputs. Adjusting for background deposition, searcher efficiency, and for carcass persistence, the Trustees estimated deposition of 969 total birds: 88 large birds and 272 small birds at Sunset-Gearhart; 26 large birds and 51 small birds at Tillamook Head; and 87 large and 445 small birds in Washington.<sup>29</sup> More generous estimations (such as zero background deposition) are likely offset by more conservative estimations (use of large bird persistence rates determined for the *M/V New Carissa* NRDA and searcher efficiency) providing a reasonable and well supported estimate of deposition for searched beaches.

#### *Extrapolation to total number of birds killed*

As previously described, the 272 recovered carcasses represent a portion of the 969 estimated to have been deposited on the searched beaches (as described above). In addition, the trustees assume carcass deposition on shoreline that was not searched and additional carcasses lost at sea. To estimate these parameters, the Trustees determined the likely spill trajectory and estimated deposition and loss at sea relative to the deposition on the searched beaches. The Trustees evaluated several spill scenarios using GNOME<sup>30</sup>, utilizing current modeling data from CREOFS.<sup>31</sup> They determined that an oil release on the afternoon of March 3, 1999<sup>32</sup> from a southern transiting vessel would result in the pattern of oiling consistent with what was observed

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<sup>25</sup> Ford, R.G., G.K. Himes Boor, and J.C. Ward. 2001 Seabird Mortality Resulting from the *M/V New Carissa* Oil Spill Incident, February and March 1999. Prepared for U.S. Fish and Wildlife Service, Oregon Fish and Wildlife office, 47 pp. and appendices.

<sup>26</sup> Seabird Mortality Report. Appendix B. Persistence of Small Bird Carcasses on Ocean Beaches North and South of the Columbia River Mouth.

<sup>27</sup> Seabird Mortality Report. pp. 10-11.

<sup>28</sup> Carcasses collected from Tillamook Head on March 27 are accounted for through the BBM and were not included as inputs to the model.

<sup>29</sup> Seabird Mortality Report, pp. 22-23.

<sup>30</sup> General NOAA Operational Modeling Environment (GNOME).

<sup>31</sup> Columbia River Estuary Operational Forecast System (CREOFS). The Trustees used CREOFS data from the same time period in 2018 as 1999 data were not available.

<sup>32</sup> Using wind data specific to the dates in question, and current data over a comparable time period.

in both Oregon and Washington.<sup>33</sup> Carcass deposition is expected to mimic oil deposition as bird carcasses and oil are similarly responsive to wind and currents.<sup>34</sup> The Trustees utilized the spill trajectory to characterize deposition on unsearched beaches and birds lost at sea.

Deposition on unsearched beaches. The model simulates a pattern of oiling on ocean beaches both north and south of the Columbia River mouth and extending northward past Ocean Park in Washington and southward towards Cannon Beach in Oregon. Modeled oiling is relatively uniform throughout the extrapolation area (south of Tillamook Head near Cannon Beach in Oregon to Leadbetter Point in Washington). Although oiled birds were identified north of Willapa Bay, the extrapolation area was conservatively confined and any oiled birds found outside the extrapolation area or outside the search parameters were excluded from the BBM.<sup>35</sup> Given the uniform oiling within each extrapolation area (Sunset-Gearhart, Tillamook Head, and Washington) the calculated birds/km of searched area were extrapolated to the related unsearched portions of each area. Consequently, the calculated deposition of 969 carcasses on searched beaches results in a total deposition of 2287-2539 birds for the entire area.<sup>36</sup> PolReps do not support even distribution of oiling throughout the extrapolation area, therefore, this is likely an overestimate of the number of birds deposited in the extrapolation area. However given the conservative confines of the extrapolation area - excluding shoreline with known bird deposition – the NPFC finds this to be a reasonable approximation.

Birds lost at sea and resulting total loss. The model supports that the bulk of oil (and birds) deposited on the shoreline within 12-48 hours after the spill. This is consistent with observations in the field.<sup>37</sup> A total of 75% of the oil (and birds) in the GNOME simulation beached and the remaining 25% drifted out to sea. The NPFC asked for additional explanation as to the effect on currents from higher outflow from the Columbia River in 1999 compared to 2018 (which was the source of inputs to the model).<sup>38</sup> The Trustees explained that as fresh water flows increase, bird carcasses are carried further out to sea, resulting in a diminished number of beachings.<sup>39</sup> As a result, the 25% estimate of birds lost at sea based on 2018 current data is conservative and underestimates the total number of birds impacted by the spill. Adjusting for birds lost at sea, the Trustees determined that the total number of birds killed by the spill was 3049-3385.

### *Resource Equivalency Analysis*

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<sup>33</sup> Seabird Mortality Report. pp. 12-21.

<sup>34</sup> Fingas, M. 2014. Handbook of Oil Spill Science and Technology. Chapter 17.5.1.

<sup>35</sup> Morgue data for *M/V New Carissa* spill, *M/V New Carissa* DARP Appendix 8, includes the birds/shorelines associated with the Oregon-Washington Coast Mystery Spill, and 34 birds collected in locations or time frame not associated with the defined searches used in the BBM were excluded from the basis for total bird losses.

<sup>36</sup> Total extrapolated deposit: 168 large and 522 small birds in the Sunset-Gearhart segment; 56 large and 112 small in the Tillamook Head segment; and 234-275 large and 1195-1406 small birds in Washington. Seabird Mortality Report pp. 2223. The extrapolation area includes both the searched and unsearched shoreline.

<sup>37</sup> PolReps for March 5 and 6 for both Oregon and Washington indicate minimal additional deposition after initial sighting of oil.

<sup>38</sup> Columbia River Bonneville outflow of ~275-290 kcfs March 3-7, 1999 and ~200-225 kcfs March 3-7, 2018. Columbia River DART. Columbia Basin Research, University of Washington (2020). River Environment Graphics and Text. Available from [http://www.cbr.washington.edu/dart/query/river\\_graph\\_text](http://www.cbr.washington.edu/dart/query/river_graph_text). Generated January 22, 2020

<sup>39</sup> Additional Information received February 28, 2020



The Trustees conducted a REA to convert direct mortality to Discounted Bird Years (DBY) for four groups of birds (alcids, marbled murrelet, surface feeders, and divers) based on general life history information and breeding habitat requirements to facilitate evaluation and scaling of restoration projects. The Trustees determined life history information for representative species for each group (age distribution, lifespan, survival rates, and fecundity) and determined for each group that direct loss and lost productivity of one generation (F1) was justified for quantifying the injury. The NPFC considers the Trustees' REA methodology<sup>40</sup> generally to be consistent with standard practice and prior NRD claims paid by the NPFC for injuries to similar species in the Pacific Northwest.<sup>41</sup> However the NPFC finds various inputs to be inconsistent with these prior assessments and a resulting lack of evidence to determine the validity of the REAs.

By example, for the Procellarids and Larids group (which relies on northern fulmar as the representative species), the trustees cite the Luckenbach DARP, the *M/V New Carissa* DARP, and/or similar citations from either/both DARPs, yet the specific input parameters differ as illustrated in the below table.

<b>Input Parameters for Northern Fulmar REAs</b>			
<b>OR/WA</b>	<b>New Carissa<sup>42</sup></b>	<b>Luckenbach<sup>43</sup></b>	<b>Common Citations</b>
60 year life span	32 year ave. life span	70 year lifespan	Hatch & Nettleship 1998
First breed at age 9*	First breed at age 9	N/A	S. Hatch personal comm.
95% adults breed	85% adults breed	N/A	Hatch & Nettleship 1998
Direct and F1 injury	Direct, F1, and F2 injury	Direct injury	Only Luckenbach DARP cites a reference supporting generational input

\*actual REA table uses Age 8 (age class 7-8) in calculation inadvertently

Although some parameters remain consistent, differences like those identified above impact the resulting DBYs.

<b>Comparison of Total Direct Bird-Years Lost (not discounted) per bird killed</b>			
	<b>OR/WA</b>	<b>New Carissa</b>	<b>Luckenbach</b>
Birds Killed	674	179	4496
Total Direct Bird Years	13,713-14,377	2,626-2,805	
<b>Ratio BY/Bird</b>	<b>20.34-21.33</b>	<b>14.67-15.67</b>	<b>12.7</b>

Because it is unclear in the Luckenbach DARP whether the 12.7 ratio applied to the different oiling events incorporates or does not incorporate "spill year" value, ranges for OR/WA and M/N New Carissa were calculated to account for the ratio with/out spill year bird years

<sup>40</sup> Skrabis, K.E. 2019. Resource equivalency analysis for bird mortality resulting from the Oregon/Washington Mystery Oil Spill, March 1999. Final Report. Prepared for Oregon Fish and Wildlife Office, FWS. 26 pp.

<sup>41</sup> Claims paid for the *S.S. Luckenbach* spill (A02005-OI2) and the *M/V New Carissa* spill (S99018-OI1) utilized similar REA methodology and life history inputs.

<sup>42</sup> Skrabis, Kristin E. May 24, 2005. Resource Equivalency Analysis for Northern Fulmar, *M/V New Carissa* Spill, February 1999. USDOI

<sup>43</sup> S.S. Jacob Luckenbach and Associated Mystery Oil Spills, Final DARP. November 1, 2006. Appendix F: Procellarid/Farallon Islands and Taiaroa Head REA Details.

Finally, the Trustees applied a 3% annual discounting rate utilizing 2019 as the base-year to develop the total DBYs of injury for scaling restoration. Three percent (3%) is a standard annual discounting rate utilized in NRDA and generally accepted by NPFC to account for injury compounding over the period of time necessary to complete NRDA.

The NPFC questioned the application of 2019 as the base year because the incident occurred in 1999 and the Trustees' opportunity to combine the injuries with the *M/V New Carissa* incident that occurred at the same time and in the same location. The Trustees offered explanations, i.e., that (1) the injuries were first determined to be from separate incidents in 2003; (2) they were under the impression the two claims had to be kept separate; (3) the Trustees did not have the available resources to conduct simultaneous assessments, and (4) with available resources it would have taken five years to complete the REAs for the Oregon-Washington Mystery Spill.<sup>44</sup>

The NPFC does not accept a base-year of 2019 based on the explanations provided. If the Trustees use DBYs as the scaling metric for a restoration claim, the Trustees will need to provide sufficient justification for the base-year and other input parameters for the REAs. The Trustees must identify the year and provide evidence that the identified year was the period of time required to complete the NRDA.

## Summary

The NPFC finds that the DOI provided the necessary evidence to support the Trustees' assessment that 3,049-3,385 birds died as a result of the Oregon-Washington Coast Mystery Oil Spill. Although evidence suggests certain inputs to the BBM might be skewed toward increased impacts (e.g., background deposition of 0%, uniform deposition throughout extrapolation area), the Trustees applied other parameters that offset the potential overestimation (e.g., bounding the extrapolation area to exclude areas north of Willapa Bay known to be associated with stranded birds, utilizing conservative inputs for lost at sea modeling, and excluding live oiled birds). However, the NPFC finds that the life history data used in the REA and the procedures applied in the REA to translate bird mortality to bird-years is not supported.

## Previously Received Funds for Future Assessment Costs

The NPFC approved and paid the DOI \$357,621 in "future" assessment costs to complete a BBM, field studies in support of BBM inputs, trajectory modeling, REA, and associated case management. The DOI documented \$233,655.50 in total expenses incurred between July 2016 and December 2019 in support of the stated assessment activities. All costs were reported through the DOI Cost Documentation Tool (CDT). Labor costs of \$71,966.63 were supported by labor detail reports and descriptions of labor for each employee, \$140,028.18 indirect costs were supported by indirect detail reports using cost calculation methods accepted by NPFC, \$61.55 in travel was supported by a travel detail report including dates and purpose of travel, and \$68,000.00 in contracts were supported by invoices, proof of payments, and detailed scopes of work. The DOI did not access contingency reserves.

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<sup>44</sup> Email from [REDACTED]: response to NPFC Questions 1-3 (OR/WA Mystery Spill). February 28, 2020

The original plan, assessment report, and associated cost documentation support that the costs were incurred for the intended purposes. The DOI has \$123,965.50 remaining of funds paid by the NPFC for the purposes of NRDA.

### Future Restoration Planning Costs

The deferred portion of the Claim subject to this adjudication represents \$533,183 for future restoration planning efforts, which include: \$205,682 for field activities associated with developing restoration project alternatives; \$136,626.00 in support of restoration project development; \$114,356.00 to prepare the Damage Assessment and Restoration Plan (DARP); and Contingency of \$76,518.70.<sup>45</sup> Future Case Management costs of \$112,905.91<sup>46</sup> were previously approved and paid in accordance with the terms of the July 14, 2016 Determination.

The DOI has confirmed that the Trustees' restoration planning activities and associated budget remain viable and valid.<sup>47</sup> Restoration planning activities include evaluation of three specific restoration projects which primarily benefit rhinoceros auklets and other alcids (72% of the birds killed by the spill) - rabbit control at Destruction Island, sea otter control at Sea Bird Rocks, and mink and raccoon removal on Scott Island- and the evaluation of additional projects to restore species not directly benefitting by the aforementioned projects.

<b>RESTORATION PLANNING AND DARP</b>		
<b>Trustee Case Management associated with Restoration Selection Phase</b> (paid at time of original claim adjudication)		<b>112,905.91</b>
<b>Restoration Project Development – Trustee Management</b>		<b>136,626.00</b>
<b>Restoration Project Development Field Activities</b>		<b>205,682.00</b>
Restoration Feasibility Project 1 Evaluation (Destruction Island)	80,645.00	
Restoration Feasibility Project 2 Evaluation (Seabird Rocks)	21,927.00	
Restoration Feasibility Project 3 Evaluation (Scott Islands)	-	
Field Activities for Identification of Additional Restoration Projects	103,110.00	
<b>DARP Development</b>		<b>114,356.00</b>
<b>Restoration Planning Total</b>		<b>569,569.91</b>
Less remaining funds paid through original adjudication (2016)		(123,965.50)
<b>NPFC Offer to Pay</b>		<b>\$ 445,604.41</b>
<b>Total Available Contingency</b>		<b>\$ 87,809.29</b>
25% Contingency on Field Activities for Project Development	51,420.50	
10% Contingency on Other Activities	36,388.79	

<sup>45</sup> Contingency of 25% on costs associated with Field Activities and 10% contingency on all other costs.

<sup>46</sup> And associated Contingency of \$11,290.59 was approved.

<sup>47</sup> Additional Information received March 24, 2020

## Determination Summary

The NPFC has reviewed the claim submitted by DOI for costs to complete Restoration Planning activities for the Oregon/Washington Cost Mystery Oil Spill incident 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 \$445,604.41 for costs to implement restoration planning activities detailed in Trustees' Plan. The NPFC also approves \$87,809.29<sup>48</sup> in available contingency for future restoration planning activities that may be provided to the DOI contingent on demonstrated need within three years from the date of this determination.

The NPFC denies payment of \$11,059.59 of the \$533,183.00 requested by the DOI, as reflective of funds paid in support of injury assessment activities for which the DOI did not expend and which is still available to the trustees for restoration planning.

As discussed above the NPFC is releasing funds for future assessment/restoration planning activities; however, any claim for compensatory restoration associated with this incident must include a supportable scaling methodology.

## 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 the Trustees' Plan. For this claim, the NPFC will deposit \$ 445,604.41 into the DOI's Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund). The DOI has demonstrated that the NRDAR Fund is a non-appropriated account that meets these requirements.<sup>49</sup> The 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 and all accumulated interest. 33 U.S.C. §2706(f) and 33 CFR 136.211(b).

## Cost Documentation, Progress Reporting, and Final Report

As the claimant, the 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

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<sup>48</sup> A portion of this contingency is the previously approved contingency for Case Management which was paid in accordance with the 2016 Determination but associated with the Restoration Selection portion of the NRDA.

<sup>49</sup> 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.

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, the DOI shall provide the NPFC with a report on the status of implementation and expenditures. These annual progress reports should include:

1. Certification by the 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 activity and expense category; 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.

The 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 the 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 may include reports from the Cost Documentation Tool (CDT) and/or other documentation to support:
  - a. Labor: For each employee –
    - i. A written description of the work accomplished and how that work is linked to the activities in the Plan. Enough detail should be included to determine the reasonableness of the costs.
    - ii. The CDT Labor Detail Report identifying the number of hours worked and labor rate.
    - iii. Overtime Pay: In cases where employees work beyond their 40-hour work week, the Service must provide justification that: the activity was time-sensitive (e.g., time-sensitive work while conducting assessment or restoration activities; the activity could not be conducted within the 40-hour work week; it was unreasonable to wait until the following week to conduct the activity; and it was not possible to schedule the work earlier in the week.
  - b. Travel: The CDT Travel Detail Report, purpose of each trip, and full dates of trips. Copies of paid travel reimbursement vouchers and receipts will be retained by DOI and provided on request.
  - c. Contract: The CDT Contract Detail Report, a copy of the contract (which include activities undertaken and lists of deliverables), contract invoices, and proof of payment.

- d. Purchases/expendables: The CDT Supplies and Equipment Detail Report and any associated invoices and receipts, along with an explanation of costs.
- e. Government Equipment: The CDT Vehicle Detail Report and any associated receipts or documentation of costs, including the rate (i.e., hourly, weekly) and time for all equipment used for which costs were incurred. The NPFC will only pay to purchase property when operational necessity directly related to the approved assessment/restoration effort is demonstrated and it is clearly more beneficial to the government than leasing. When making decisions whether to buy or lease property, trustees should factor in the costs necessary to acquire, maintain, and dispose of the property, not just the purchase price versus the costs of leasing. Documentation of the factors considered in purchasing property during a spill is required for cost recovery.
- f. Indirect Costs: The CDT Indirect Calculation Detail Report which provides the basis and determination of the indirect costs.

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.