

U.S. Department
of Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

Director (NPFC)
CG National Pollution Funds Center
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave SE
Washington D.C. 20593-7605
Phone: 202-795-6054

16480

January 27, 2017

MEMORANDUM

From:

[REDACTED]
Claims Manager, NPFC

To:

[REDACTED]
National Oceanic and Atmospheric Administration (NOAA)

Subj: Claim: P05005-OC1 – *Athos I* – Mad Horse Creek Restoration Project

1. The National Pollution Funds Center (NPFC) issued its determination offering to pay a total of \$30,435,311.35 for NOAA's past assessment costs and future costs to implement nine projects to restore natural resource damages resulting from the *Athos I* incident. The determination also approved up to \$6,473,816 for potential unforeseen or contingency costs, to be paid when, and if, needed in accordance with the NPFC's Contingency Policy.
2. On September 27, 2016, the NPFC received a request from NOAA for contingency funds totaling \$318,781.03 to continue implementing the Mad Horse Creek project associated with the *Athos I* incident. Then, on December 20, 2016, NOAA revised the requested amount to \$275,042.01.
3. The NPFC approves contingency funds totaling \$275,042.01 for the Mad Horse Creek project. The enclosed determination provides the basis of this decision. If you have any questions about this determination, please feel free to contact me at 202-795-6054
4. If you accept this offer, please complete the enclosed Acceptance/Release Form and return to:

Director (NPFC)
CG National Pollution Funds Center
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave SE
Washington D.C. 20593-7605

5. 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 transferred to you via the Intra-Governmental Payment and Collection System within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds to your Damage Assessment Restoration and Revolving Fund Account with the signed release.

Encl: (1) NPFC Contingency Determination
(2) Release

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NPFC CONTINGENCY DETERMINATION

Claim Number and Name:	P05005-OC1, <i>Athos I</i> , NRD Restoration
Claimant:	National Oceanic and Atmospheric Administration (NOAA)
Type of Request:	Contingency Funds Request dated September 27, 2016
Request Amount:	\$275,042.01
Offer Amount:	\$275,042.01
Determination Date:	January 27, 2017
NPFC Claim Manager:	[REDACTED]

History of the Claim

On November 26, 2004, the tank vessel *Athos I* struck submerged objects while moving to its berth on the Delaware River near Paulsboro, New Jersey. The vessel's hull was breached, resulting in approximately 263,000 gallons of heavy Venezuelan crude oil discharging into the River.

The natural resource trustees assessed natural resource damages resulting from the spill and developed a plan that identified nine restoration projects to compensate for the losses and served as the basis of a claim for reimbursement of the natural resource damages to the NPFC under the Oil Pollution Act for past assessment and future implementation costs. The claim, submitted by NOAA on behalf of itself, the U.S. Fish and Wildlife Service, states of Delaware and New Jersey, and Commonwealth of Pennsylvania, totaled \$37,106,991.35, which included \$2,939,560.35 for past assessment costs, \$27,495,751 to implement the nine restoration projects, and \$6,473,816 for contingency costs associated with these projects. The planned Mad Horse Creek project restores 160 acres within New Jersey's Mad Horse Creek Wildlife Management Area by (1) lowering marsh elevation to establish natural tidal inundation and (2) creating wet meadow and upland grassland habitat on land now used for agriculture. Increased production resulting from the restored marsh will compensate for losses of dabbling ducks and shorebirds, while increased production from the wet meadow and grassland will compensate for the remaining injuries to geese and swans.

The NPFC's October 5, 2010 determination provided \$19,347,667 to implement the Mad Horse Creek Project and approved 25 percent, or \$4,836,917, as project-specific contingency funding subject to NPFC review and approval of appropriate justification of the need and documentation of trustee expenditures to date pursuant to the NPFC contingency policy.

On September 27, 2016, the NPFC received a request from NOAA for contingency funds totaling \$318,781.03 to continue implementing the Mad Horse Creek project associated with the *Athos I* incident. Then, on December 20, 2016, NOAA revised the requested amount to \$275,042.01¹.

The remainder of this determination provides the NPFC's determination with respect to NOAA's September 27, 2016 request, and offer to pay \$275,042.01 of approved contingency funds to complete implementation of one of the approved restoration project.

¹ NOAA removed agency labor costs for the state of New Jersey from the request.

Requirements for Paying Approved Contingency

The NPFC's determination that approved funding for the restoration project summarized how and when approved contingency costs will be paid. Specifically, contingency funds are available for six years from the date of payment of the determined claim, for activities within the scope of the approved plan, and when the NPFC receives sufficient information to determine that the:

1. requested contingency costs were not included in the initial trustee claim;
2. need for additional contingency funds has been demonstrated by establishing that:
 - a. the claimant overlooked certain activities/costs that were later found to be necessary to complete a project; and/or
 - b. certain specific significant costs of the plan were subject to later developments or events that resulted in increased costs to implement the project (that can be described in reasonable detail and are within reasonable cost parameters); and
3. claimant spent, obligated or otherwise committed the OSLTF funds previously provided to them for the project.

NPFC Review and Determination of Contingency Request

NOAA's contingency request totals \$275,042.01 to complete the Mad Horse Creek restoration project. To support the request, DOI provided a brief description of the project, statement of work, signed contracts, justification for additional funds, and cost documentation.

The NPFC first considered whether the request was submitted within six years from the date of payment of the determined claim. The NPFC issued its determination to offer payment for the project subject to this request on October 5, 2010. NOAA accepted the NPFC's offer on October 8, 2010, the NPFC made payment on the same day. This request for contingency funds was received by the NPFC on September 27, 2016, within six years from the date of payment of the determined claim.

The following summarizes the NPFC's review and evaluation of NOAA's request for contingency funds.

NOAA explained in their contingency request that they have experienced delays in implementing the Mad Horse Creek Project, primarily due to the unexpected need to complete an archaeological survey of the upland portion of the restoration project. NOAA estimates that construction for the project will now be completed by October 2019^{2,3}. NOAA claims \$275,042.01⁴ as contingency for the cost to complete an archaeological survey and redesign of the project based on the results of the survey.

On March 4, 2014, NOAA notified the NPFC about the need to conduct an archaeological survey within the upland portion of the Mad Horse Creek Project. Initial surveys required by the New Jersey Historic Preservation Office (NJHPO) found evidence that the restoration site has a high potential for archaeological resources that may require collection, inventory, and preservation, pursuant to Section 106 of the National Historic Preservation Act (NHPA). To comply with the requirements of Section 106 of the NHPA, NOAA needed to conduct an

² Email dated September 9, 2016, from NOAA to NPFC.

³ The original completion date for the project was 2011.

⁴ \$112,203.90 for Phase I of the archaeological survey + \$162,838.11 to redesign the project = \$275,042.01

additional two-phased archaeological survey of the project area before continuing with the restoration project. NOAA initially estimated the cost to complete Phase I of the archaeological survey⁵ as \$155,943, and the cost to complete Phase II⁶ of the survey was unknown at the time. NOAA completed Phase I of the survey for less than the estimated amount and now claims \$112,203.90 as the full cost for Phase I.

On October 13, 2015, NOAA provided the NPFC with the findings from Phase I of the archaeological survey⁷, which concluded that the project site may have potential to contain significant historic and prehistoric resources eligible for listing in the National Register of Historic Places (NRHP) and NJHPO. At the time, based on the results of Phase I of the survey, NOAA and its contractor concluded that Phase II of the archaeological survey was needed; however, after consulting with the NJHPO⁸, NOAA decided to redesign the project to avoid areas with known archaeological resources because it would be more cost effective than going through Phase II of the survey and then having to mitigate⁹ potential damages to archaeological resources. This additional redesign effort requires an additional \$162,838.11 of contract costs to complete the final design plans.

The NPFC previously reviewed NOAA's proposal for the Phase I archaeological survey and determined that the proposed work and associated costs described met the criteria in section 5(b) of the NPFC contingency policy¹⁰. NOAA provided the NPFC with cost documentation to support their costs. The NPFC reviewed the cost documentation provided to support the claimed costs and determined that all costs were properly documented. The work completed and costs claimed for the Phase I archaeological survey are consistent with NOAA's plan and necessary to complete the Mad Horse Creek project, therefore, the NPFC finds claimed costs of \$112,203.90 to be compensable.

The NPFC also reviewed the proposal for the redesign of the project. After Phase I of the survey was completed, NOAA estimated it would cost \$200,000 to complete Phase II of the archaeological survey based on the size of the property and the number of resources discovered during Phase I. NOAA would then need to develop a plan to either mitigate or avoid the resources identified through the Phase II survey, which could cost between an additional \$420,000 and \$600,000¹¹. By making the decision to forgo Phase II of the survey and develop a plan to avoid certain areas with historical resources, NOAA saved approximately \$457,000 to \$637,000¹². NOAA provided a signed contract and statements of work to support their claimed costs. Based on the information provided by NOAA, and their need to redevelop a plan to avoid areas with historic resources anyways because of the Phase I survey results, the NPFC finds \$162,838.11 to be compensable.

⁵ The purpose of Phase I was to determine the presence or absence of archaeological resources within the upland portion of the project.

⁶ The purpose of Phase II was to determine if archaeological resources identified during Phase I are eligible for listing on the NRHP.

⁷ Email from [REDACTED] (NOAA) to [REDACTED] (NPFC) dated October 13, 2015.

⁸ Email dated September 27, 2016, from NOAA to NPFC.

⁹ Mitigate for the loss of any historical resources or take additional precautions to preserve those resources.

¹⁰ Memo dated August 25, 2014, from NPFC to NOAA

¹¹ Email dated January 12, 2017, from NOAA to NPFC

¹² \$200,000 for Phase II survey + \$420,000-\$600,000 to mitigate and avoid - \$162,838.11 for the redesign of the project = \$457,000-\$637,000.

In summary, the NPFC paid \$19,347,667 to implement the Mad Horse Creek Project and approved 25 percent or \$4,836,917 in contingency. With the approved additional funding of \$275,042.01 in this determination, the total amount approved for the Mad Horse Creek project is \$19,622,709.01. This is a full and final offer for the Mad Horse Creek project and no other OSLTF funds are available for this project, or any other Athos projects¹³.

¹³ The NPFC's contingency policy limits contingency requests to six years from the date of the original determination. The NPFC issued its determination to the trustees on October 5, 2010; therefore, the time limit on contingency funds has expired.