

U.S. Department
of Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

Natural Resource Damage Claims Division
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CN)

16480

CERTIFIED MAIL Number: 70083230000195752723

August 26, 2009

Mr. Edward W. Shepard
State Director, Oregon/Washington
Bureau of Land Management, Oregon State Office
P.O. Box 2965
Portland, OR 97208

RE: *New Carissa* Oil Spill Incident Reconsideration Request
Claim Number: S99018-OI2

Dear Mr. Shepard:

The National Pollution Funds Center (NPFC) has reviewed the Department of Interior's (DOI) request for reconsideration of the January 24, 2007 NPFC determination on the *New Carissa* oil spill natural resource damage (NRD) claim. Based on our careful consideration of the additional information provided by DOI, we are approving four additional years of Case Management and Trustee Oversight (years seven through ten), and issuing final denial of the Habitat Restoration Area (HRA) Maintenance (years 21 through 30), Docent, Sister Shorebird, and Habitat Acquisition and Management (Otter Crest) projects. As described and summarized in Table 3, this results in a net payment of \$1,411,036.

Claim Summary

In February 2006, DOI, on behalf of itself, the U.S. Department of Agriculture, State of Oregon, Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, and Confederated Tribes of Siletz Indians of Oregon (collectively referred to as the trustees), submitted a claim to the NPFC for natural resource damages resulting from the *New Carissa* oil spill incident. This claim totaled \$39,725,357, representing costs to assess natural resource injuries resulting from the incident and compensate the public for these losses. The trustees' claim was based on a restoration plan that presented natural resource injuries as: (1) four to eight Western Snowy Plovers (10.5 to 21.1 bird-years); (2) 672 shorebirds (7,045 bird-years); (3) 262 Marbled Murrelets (3,271 bird-years); (4) 2,203 seabirds (43,623 bird-years); and (5) 26,974 to 28,204 lost and 1,000 diminished value recreational trips (total value of \$404,000). Proposed projects to restore these losses included 11 recreation projects (lost recreation), HRA Maintenance and a Docent Program (Western Snowy Plover), Habitat Acquisition and Management at Bandon Marsh and a Sister Shorebird Program (shorebirds), Old-Growth Forest Habitat

Acquisition and Management (Marbled Murrelet), and Predator Management, Educational Signs, and Otter Crest (seabirds).

The NPFC issued its determination with respect to DOI's claim (S99018-OI1) on January 24, 2007. In this determination, the NPFC accepted the trustees' estimates of Marbled Murrelet and recreation losses, while denying certain claimed injuries to Western Snowy Plovers, shorebirds, and seabirds. The NPFC approved the 11 recreation projects (\$404,000), Old-Growth Forest Habitat Acquisition and Management (\$23,208,245), Habitat Acquisition and Restoration at Bandon Marsh (\$1,625,137), and Predator Management and Educational Sign projects (\$1,033,485), and approved 20 years of HRA Maintenance (\$78,420) and six years of Case Management and Oversight (\$711,048). Funding for three projects (Docent Program (\$90,842), Sister Shorebird Program (\$294,610), and Otter Crest (\$5,047,694)), as well as an additional 10 years of HRA Maintenance (\$39,210) and four years of Case Management and Trustee Oversight (\$211,526) were denied. Contingency costs totaling \$4,564,017 were also approved, but withheld pending project-specific justification of the need for these additional funds.

In its January 2007 determination, the NPFC found that the trustees conducted their assessment in accordance with 15 C.F.R. 990. Determinations made by the trustees in the Final Damage Assessment Restoration Plan and Environmental Assessment (Final DARF) are therefore initially presumed correct under OPA's provisions rebuttable presumption. 33 U.S.C. § 2706 (e)(2) and 15 C.F.R. § 990.13. The presumption of correctness, however, may be rebutted. If the rebuttal evidence is of sufficient weight, the NPFC may request that the trustees provide additional clarifying information and, ultimately, may deny the claim in whole or part. As the trier of fact for NRD claims against the Oil Spill Liability Trust Fund (OSLTF), the NPFC determines how much weight to give the evidence submitted by the trustees when adjudicating their claim.

In June 2007, DOI requested that the NPFC reconsider its decision to deny three proposed projects and partially approve three projects. The trustees provided additional project cost and scaling information in September 2007. The NPFC requested additional information from the trustees in December 2007. The trustees responded in June 2008.

DOI's request for reconsideration includes additional information specific to:

- Western Snowy Plovers (level of injury and appropriateness of 10 additional years of HRA Maintenance and the Docent Program);
- Shorebirds (level of injury and appropriateness of the Sister Shorebird Program);
- Seabirds (level of injury and appropriateness of the Otter Crest project); and
- Case Management and Trustee Oversight (appropriateness of an additional four years).

The NPFC has determined that the DOI request meets the requirements for submitting a reconsideration request and, upon reconsideration, that an additional \$171,526 for Case Management and Oversight is appropriate (Table 1). The following sections present the

NPFC analyses and findings with respect to the additional information DOI provided with their reconsideration request.

Table 1. Summary of Claim Elements for which Funds were Denied and Presented for Reconsideration, and NPFC Determination upon Reconsideration.				
Proposed Project		January 2007 Determination	Reconsideration Determination	Final Approved Funding
Western Snowy Plover	HRA Maintenance	Denied years 21-30	Deny years 21-30	No Change
	Docent Program	Denied	Deny	No Change
Shorebirds (non-plover)	Sister Shorebird	Denied	Deny	No Change
Seabirds (non-murrelet)	Habitat Acquisition and Management (Otter Crest)	Denied	Deny	No Change
Case Management		Denied years 7-10; denied annual printing costs and audits	Approve years 7-10; deny annual printing costs	\$90,446
Trustee Oversight		Denied years 7-10	Approve years 7-10	\$81,080
TOTAL				\$171,526

Western Snowy Plover

The trustees requested that the NPFC reconsider its determination to deny their claimed:

- 1) Estimate of total plover injury, including the --
 - a. estimated rate of survival for young plovers, and
 - b. additional undocumented losses; and
- 2) Restoration requirement, including the --
 - a. estimated restoration credits,
 - b. requirement for 30 years of HRA Maintenance vs. 20 years, and
 - c. appropriateness of the proposed Docent Program.

The trustees supported their request by rebutting certain technical model inputs used by the NPFC, providing new information about the potential for additional plover losses, and restating that "additional undocumented (plover) injuries may have occurred." The NPFC carefully reviewed this additional information. Our findings and determination follow.

Estimate of Western Snowy Plover Injury

The trustees observed 45 oiled plovers, and estimated that four to eight died. The NPFC accepted the high end of this range (eight) as a reasonable estimate of total plover mortality.

The trustees used the total mortality range (four to eight) to estimate that the total injury ranged from 10.54 +/- 3.18 to 21.08 +/- 6.36 plover-years (Skrabis, 2006). In accepting the trustees' estimate of eight dead plovers, the NPFC determined that the trustees'

inappropriately used: (1) a 51 percent +/- 40 percent fledgling survival rate, and (2) 91 percent, the most upper bound of the estimated fledgling survival rate range (51 percent +/- 40 percent) to calculate total injury. The NPFC used a 31 percent mean Oregon-specific hatch-year return/nesting rate (obtained from Lauten et al. 2005)¹ to determine that the total injury was 18.04 plover-years.

The trustees requested that the NPFC reconsider the plover hatch-year return/nesting rate (31 percent) used in place of their fledgling survival rate range (51 percent +/- 40 percent). Specifically, the trustees presented the following:

- 1) The hatch-year return/nesting rate used by the NPFC is not a survival rate, and does not account for birds that survived and are known to have permanently dispersed to other breeding areas, such as Humboldt Bay in California and Willapa Bay in Washington;
- 2) Since it is generally agreed (among Western Snowy Plover experts) that most plovers breed in the first year, the actual breeding percentage of returning fledgling plovers is probably closer to 90-100 percent than to the 65 percent used in the NPFC calculation;
- 3) Both the hatch-year return rate and nesting rate used by the NPFC in its calculations potentially underestimate the actual survival and nesting rates of returning first-year (previous year's fledglings) birds; and
- 4) The 51 percent mean fledgling survival rate (Nur et al. 1999) used in the trustee analyses was obtained from a recent Population Viability Analysis of Western Snowy Plovers authored by noted Western Snowy Plover experts in the region.

After considering the supplemental information provided by the trustees, the NPFC accepts the trustees use of the 51 percent fledgling survival rate because the preponderance of the evidence no longer rebuts this trustee determination. The NPFC finds, however, that the preponderance of the credible evidence continues to rebut the trustees' decision to use the upper limit of the 51 percent +/- 40 range (i.e., 91 percent) as a model input for fledgling survival to estimate the total injury/restoration requirement. The NPFC therefore determines that the preponderance of credible evidence supports a finding that the most reasonable and appropriate fledgling survival rate was the estimated mean rate of 51 percent. Using this fledgling survival rate, the NPFC further determines that the preponderance of credible evidence supports a total injury of 21.08 plover years.

In addition to the calculated total injury (21.08 plover-years), the trustees, in their request for reconsideration, reassert that an additional one to three plovers may have died (beyond those quantified in the claim). If the trustees' assertion is accepted, then plover mortalities would increase to as much as five to eleven. In its January 2007 determination, the NPFC denied compensation for these additional claimed losses because the trustees did not provide any measure or quantification of such loss, as required under OPA.

¹ 31 percent estimate was calculated by multiplying the 13-year average hatch-year return rate of 46.7 percent by the 13-year average hatch-year nesting rate of 65 percent for returning birds.

The trustees' request for reconsideration reasserts their professional judgment that one to three additional plovers died as a result of the spill. The trustees argue that their failure to quantify these additional plover injuries does not establish that the injuries did not occur. The trustees restate their justification that plovers likely were missed due to survey frequency and perished prior to the beginning of the surveys, and repeat the statements provided by Mr. Mark Stern that:

- 1) 10 to 20 percent of plovers were unbanded at the time of the impact study², raising the "real possibility" that unbanded birds may have been undercounted;
- 2) Nesting was not observed on North Spit's South Beach following the spill; and
- 3) The fitness of individual plovers may have been affected by sublethal effects of the spilled oil.

After reviewing the additional information submitted by the trustees the NPFC finds that the trustees have not provided any new evidence of additional measured or quantified injuries, as required by OPA. More specifically:

- 1) The Final DARP determined that four to eight plovers were estimated to be either killed or injured as a result of this incident;
- 2) No new justification is provided to support the claim that unbanded plovers were undercounted;
- 3) The absence of nesting on North Spit's South Beach, noted by Mr. Stern in the reconsideration request (reconsideration request, page 14) as a possible indicator of "additional, undocumented effects," was addressed in the New Carissa plover impact assessment (Stern et al. 2000), which states:
"many of the birds that nested on the South Beach in 1998 did breed successfully on the 94 HRA in 1999. It is not possible to determine if the absence of nesting and brooding activity on the South Beach was due to oiling and activities associated with the New Carissa, or if simply the habitat at the interior sites [the 94 HRA] was preferred for other reasons, or some combination of both." and *"The total number of nests found in 1999 was identical to 1998 . . . Overall nest success in 1999 was nearly identical to 1998; both 1998 and 1999 were higher than the 10 year mean."*
- 4) While Mr. Stern's statement on page 14 of the trustees' request for reconsideration reiterates that there may have been sublethal effects that impacted the fitness of individual plovers, he explicitly notes in the New Carissa plover impact assessment that: *"...it is not possible to assess or quantify those potential impacts."*

After reviewing the reconsideration request, the NPFC finds that the preponderance of the credible evidence does not establish the additional one to three dead plovers hypothesized by the trustees. As the Final DARP found that four to eight plovers were

² Trustee injury assessment/impact study was based on data from plovers that were banded as part of on-going efforts by the Nature Conservancy.

either injured or killed, that finding is presumed to be correct unless there is sufficient evidence to rebut it. By failing to provide a valid and reliable quantification of these additional injuries, the trustees have not provided sufficient evidence to rebut the Final DARP's findings regarding plover injuries. For these reasons, the NPFC finds that the trustees have not carried their burden of proving provided sufficient new information to support this additional claimed injury.

Western Snowy Plover Restoration Requirement

HRA Maintenance

The trustees proposed to restore the plover injury with a habitat maintenance project (HRA Maintenance; \$117,630) in the area where the responsible party (RP) conducted emergency restoration. The trustees estimated restoration benefits for two potential scenarios. In scenario one, the trustees assumed that one plover per year would be restored in perpetuity (except in 2003, when no plovers would be restored), which would generate a total of 50.31 +/- 39.46 plover-years (1.68 +/- 1.32 plover-years per year). In scenario two, the trustees assumed that one plover per year would be restored through 2002, no plovers in 2003, and two plovers per year in perpetuity, thus generating 96.44 +/- 75.64 plover-years (3.21 +/- 2.52 plover-years per year). The NPFC accepted the trustees' conservative approach (scenario one) in the January 2007 determination, but, as with the injury quantification described above, substituted a 31 percent hatch-year return/nesting rate for the trustees' 51 percent +/- 40 percent fledgling survival rate. As discussed above, the NPFC now accepts the use of a mean 51 percent mean fledgling survival rate and the corresponding total injury estimate of 21.08 plover-years. Using the mean 51 percent fledgling survival rate in the trustees' plover model (Skrabis 2006) and considering that 50.31 bird-years will be restored by HRA Maintenance, the project restores 1.68 plover-years per project year. Thus, the 12.6 project-years (21.08 plover-years lost/1.68 plover-years restored per project-year) of HRA Maintenance restores plover injuries. Accordingly, the NPFC finds that the preponderance of credible evidence establishes that 20 years of HRA Maintenance compensates for the injuries to plovers. As a result, the NPFC denies the trustees' request for project funds for years 21-30.

Docent Program

The trustees also proposed the Western Snowy Plover Docent Program to restore claimed plover losses, a multi-agency effort to recruit, train, and place docents to monitor plover breeding areas. In its January 2007 determination, the NPFC found that additional restoration beyond the approved HRA Maintenance project was not warranted and denied funds for this project. As described above, the approved 20 year HRA Maintenance project exceeds the quantified injury accepted by the NPFC. When adjudicating a NRD claim, the OSLTF is only available to pay claims for uncompensated damages. 33 U.S.C. § 2712 (a)(4). Also, any compensation recoverable by the trustees through this claim is limited to the reasonable cost of assessing damages and the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources.

33 U.S.C. § 2706 and 33 C.F.R. § 136.211 Because the HRA Maintenance project adequately compensates for the injuries to plovers caused by this incident, funding the Docent program would exceed the measure of natural resource damages compensable under OPA and amount to an overcompensation of damages. As a result, the NPFC denies the trustees' claim for funding of the Docent program.

Shorebirds (Non-Plover)

Estimate of Shorebird Injury

The trustees claimed 672 dead shorebirds, with a total injury of 7,045 lost shorebird-years. In its January 2007 determination, the NPFC found that the evidence established 413 shorebird mortalities and a total injury of 4,371 shorebird-years. The difference between the trustee and NPFC findings turns on whether all oiled seabirds died. In its determination, the NPFC rejected the trustees' unsupported contention that 100 percent of lightly oiled Sanderlings died. The trustees requested that the NPFC reconsider its determination to eliminate all lightly oiled Sanderlings from mortality and lost shorebird-year calculations, arguing that:

- Published literature provides evidence that oiled, captured, rehabilitated, and released seabirds experience reduced survival, or fail to reproduce post-release (Anderson et al. 1996; Sharp 1996; Mead 1997);
- Oiled Sanderlings spend significantly more time preening and bathing, and less time feeding and resting, compared to non-oiled birds (Burger and Tsipoura 1998; Burger 1997)
- Sanderling carcasses are unlikely to be found because dead/injured shorebirds are quickly scavenged from the beaches (Roy Lowe, pers. comm.);
- Published literature (Burger and Tsipoura 1998; Larsen and Richardson 1990) showing that in the days following a spill there is a decrease in the percentage of birds observed with oil, amount of oil observed on oiled birds, and number of shorebirds in the population; and
- The trustees observed fewer Sanderlings following the *New Carissa* incident.

Upon review of the above information, the NPFC acknowledges that the evidence shows that small amounts of oil can injure shorebirds. However, the supplemental information does not support the trustees' contention that 100 percent of lightly oiled birds died. In fact, the trustees' assertions of reduced survival rates and modified behavior shows that some oiled birds survive. Thus, the NPFC affirms its previous determination that the preponderance of credible evidence rebuts the trustees' determination that 100 percent of lightly oiled birds died as a result of this incident.

Shorebird Restoration Requirement

The trustees proposed two projects to restore shorebird losses: (1) acquire a nine-acre parcel (Bandon Marsh) and convert the surrounding 500 acres of pasture to marsh

(\$1,625,137), and (2) Sister Shorebird–Sanderling Module (\$168,574)³. The restoration scaling analysis provided by the trustees concluded that Bandon Marsh will restore 11,446 shorebird-years and “a very substantial number of waterfowl”. The trustees did not quantify the restoration benefits of the Sister Shorebird Program. In its January 2007 determination, the NPFC approved funds for Bandon Marsh as full compensation of seabird losses; the Sister Shorebird Program was denied.

The trustees’ reconsideration request included new information to support the Sister Shorebird Program. Specifically, they provided a plan for a Sanderling module within the Sister Shorebird Program. This module would educate Oregon children about Sanderlings, the shorebird species most heavily impacted by the *New Carissa* spill.

The NPFC recognizes that education programs can raise awareness of the impacts of human disturbance on shorebirds and their habitat. The Bandon Marsh project, however, provides 162 percent of trustees’ claimed injury estimate and 262 percent of the NPFC estimate.⁴ The trustees contend that the Sister Shorebird Program is needed to provide additional restoration beyond that achieved by Bandon Marsh to compensate for Sanderling injuries. However, the trustees have not attempted to scale the Sanderling benefits of the Sister Shorebird Program, and such benefits would further increase the overcompensation of the shorebird injuries and raise significant questions about the appropriateness of the Bandon Marsh project previously approved. The NPFC therefore finds that OPA and NPFC’s claims regulations preclude compensation for the Sister Shorebird Program. Because the Bandon Marsh project completely compensates for the shorebird injuries, all shorebird-years generated by the Sister Shorebird Program would be in excess of the measure of damages compensable under OPA and amount to an overcompensation of damages. 33 U.S.C. §§ 2706 (d) 2712 (a)(4) and 33 C.F.R. § 136.211. As a result, the NPFC denies the claim for funding of the Sister Shorebird Program.

Seabirds (Non-Murrelet)

The trustees claimed 43,623 lost seabird-years and \$7,006,226 to implement three restoration projects: Predator Management (30 years; \$1,033,485); Educational Signs (\$925,047), and Otter Crest (\$5,047,694). The NPFC accepted 42,214 lost seabird-years and approved the Predator Management and Educational Sign projects in its January 2007 determination. Funding for Otter Crest was denied.

The trustees’ request for reconsideration provides additional information about the injury calculations and the benefits of the three proposed projects. The trustees responded to a NPFC request for additional information in June 2007 and submitted a revised seabird

³ On September 11, 2007, the Trustees submitted a revised project and budget request, requesting \$168,574 to develop and implement a Sanderling Module within the Sister Shorebird School program.

⁴ Even though the shorebird benefits of the Bandon Marsh project go beyond the injuries, the evidence supports funding the Bandon Marsh project because it’s the most cost-effective alternative and the project is not feasibly reducible. Furthermore, the Bandon Marsh project benefits other natural resources in addition to shorebirds.

restoration proposal in September 2007. The NPFC findings with respect to this additional information are presented below.

Seabird Injury

In its January 2007 determination, the NPFC found that there were computational errors in the trustees' quantification of injury to gulls and kittiwakes involving the inconsistent use of a mid-point averaging approach across species in the model analyses. The trustees, in their request for reconsideration, further explained the basis of their calculations, which the NPFC accepts. Seabird injury is therefore determined to be 43,623 seabird-years, by species or species group, as follows:

- 1,297 loon-years
- 3,256 grebe-years
- 1,120 cormorant-years
- 7,838 murre and puffin-years
- 2,647 auklet and Ancient Murrelet-years
- 578 storm-petrel and shearwater-years
- 7,469 fulmar-years
- 8,097 gull and kittiwake-years (determined to be 5,224 gull-years⁵ and 2,873 kittiwake-years)
- 11,322 scoter and duck-years

Seabird Restoration

In their claim, the trustees estimated that the Predator Management and Otter Crest projects would restore 29,292 and 18,179 seabird-years, respectively (47,471 total seabird-years). The trustees did not quantify seabird restoration benefits resulting from the Educational Sign project, indicating only that it would restore "bird diversity".

The NPFC approved the Predator Management and Educational Sign projects in its January 2007 determination, finding that Predator Management would restore 104,008 seabird-years. The large difference between the trustee estimate (29,292 seabird-years) and the NPFC estimate (104,008 seabird-years) is because the trustees did not include restoration benefits of gulls (74,716 seabird-years) identified in the seabird injury worksheets that the trustees prepared and provided to the NPFC.

⁵ The trustees did not distinguish lost gull and kittiwake-years. In the reconsideration request and in response to NPFC questions about the potential harmful effects of expanding gull populations (page 51), the trustees state that it is appropriate to remove 5,200 gull-years from the estimated lost gull/kittiwake injury. While the trustees did not provide the calculations used to obtain this estimate, the NPFC notes that estimated gull mortality was 220 birds (64.7 percent of total estimated gull/kittiwake mortality), and that the gull/kittiwake model used the same biological parameters for gulls and kittiwakes to calculate total mortality. Thus, the NPFC has determined that it is reasonable to assume that lost gull-years will also be 64.7 percent of total estimated lost gull/kittiwake-years, or 5,224 gull-years. Presumably, the trustees used the same approach to obtain their estimate of "approximately 5,200". The NPFC thus determines that 5,224 gull-years and 2,873 kittiwake-years have been lost as a result of the spill.

The trustees requested reconsideration of the Otter Crest project in their June 2007 response, stating that: (1) the Predator Management project worksheet that shows gull benefits was pre-decisional, (2) it is not appropriate to include incidental increases in gull productivity from the Predator Management project because gulls are not a restoration priority, and (3) preserving the Otter Crest parcel in its current natural state will have the greatest long-term, positive impact on nesting seabirds due to the permanent, irreversible threat from development. The trustees supported these views with peer-reviewed literature describing gull predation on Cassin's Auklet (Manuwal and Thoresen 1993), kleptoparasitism against the Rhinoceros Auklet (Gaston and Dechesne 1996) and statements from Roy Lowe, Project Leader of the Oregon Coast National Wildlife Refuge, regarding a 32 percent increase in the population of gulls on the Oregon Coast from 1988 to 2006 and a 3,200 percent increase in the population of gulls on East Sand Island in the Columbia River from 1989 to 2001. The trustees further state that:

"...it would be scientifically indefensible to include in our seabird REA any incidental increase in gull productivity resulting from one of our restoration projects, since any increase in gull numbers will likely have an adverse effect on the other species of seabirds we are trying to restore" (reconsideration request, page 47); and
"Given the elevated population levels of gulls and the gull predation on other seabird species, including those injured in the incident, the public and the environment will not be made whole by substituting the productivity of gulls for that of the remaining injured seabird species (reconsideration request, page 51)."

Based on the information summarized above, the trustees concluded in their reconsideration request that: (1) gulls should not be included in the quantification of restoration benefits of the Predator Management project, (2) they would remove gull injury from the total seabird loss (approximately 5,200 bird-years) since they are not pursuing gull restoration, and (3) acquisition of Otter Crest is necessary to compensate for quantified total loss of seabird-years (reconsideration request, page 45).

In September 2007, DOI provided further information to support the acquisition of Otter Crest. Specifically, DOI stated that the project: (1) will benefit Pigeon Guillemots, a member of the alcid family, the group of seabirds most impacted by the spill, (2) is threatened by development, and (3) provides an exceptional opportunity for seabird education. To emphasize this last point, DOI proposed to add a viewing platform and several interpretive panels to the project, claiming that these additional components would benefit most, if not all, seabird species injured by the *New Carissa* spill. As a result of these modifications, the trustees' requested an additional \$360,731, increasing total project funds from \$5,047,694 to \$5,408,205.

After reviewing the trustees' request for reconsideration and additional information provided in September 2007, the NPFC determined that more information was needed to complete adjudication. In December 2007, the NPFC requested that the trustees: (1) justify implementation of the Predator Management project, which, according to preliminary injury quantification, would greatly benefit a nuisance species (gulls) and

thus increase the impact of this species on other shorebirds, and (2) quantify the restoration benefits (seabird-years) expected from the Educational Sign project and proposed Otter Crest interpretive panels and platforms to support their position that additional restoration was required to compensate for the seabird loss. Trustees' responses and subsequent determinations are listed below.

1) Predator Management and Potential for Gull Restoration

In June 2008, the trustees responded to the NPFC's request to justify implementation of the Predator Management project given its potential to increase gulls, stating that: (1) the Predator Management project as originally proposed would not increase the gull population, and (2) eliminating predators from the breeding areas would allow cormorants time to reestablish their colonies and thereby displace gulls from the areas cormorants previously nested (i.e., Predator Management would result in a net decrease in gulls). The trustees did not provide any documentation to support these responses, and the NPFC notes that this new information contrasts sharply with the 74,716 gull-years estimated to be generated in the trustees' preliminary injury quantification worksheets. However, in light of the trustees' statement that the worksheets provided to the NPFC were pre-decisional and the additional information based on the trustees' professional experience, the NPFC finds that the trustees' proposal to remove gulls from both the estimates of total seabird injury and restoration credits (from the proposed projects) is reasonable. Accordingly, the compensable total seabird injury is determined to be 38,399 seabird-years.

2) Calculation of Restoration Benefits from Educational Signs and Platforms

In their June 2008 response, the trustees included a quantification of the restoration benefits (seabird-years) expected from the Educational Sign project. The trustees used data from a recreational study in Oregon (Shelby and Tokarczyk 2002), a disturbance monitoring study conducted at Oregon's Three Arch Rocks National Wildlife Refuge (Riemer and Brown 1997), and their professional judgment to estimate the number of visitors at 17 different seabird breeding locations during the nesting season that would disturb nesting birds, nests lost per incident, and project benefits of 6,275 bird-years. The NPFC finds that the quantification method is reasonable, and accepts the trustees' estimate that 6,275 bird-years will be restored by the Educational Sign project.

In the December 2007 correspondence, the NPFC also requested that the trustees quantify the seabird benefits resulting from the viewing platform and interpretative panels proposed at Otter Crest to justify the additional costs and enable the NPFC to determine the appropriate amount of seabird restoration required to compensate for the lost seabird years. The trustees have not provided the requested quantification of seabird benefits.

Revised Seabird Restoration Proposal

The supplemental information provided to the NPFC in June 2008 included a revised seabird restoration proposal based on the additional information about gulls and the

requested scaling information on the benefits of the Educational Signs. The new proposal includes Predator Management reduced from 30 to 20 years (at a corresponding reduced cost of \$821,485); (2) Educational Signs (\$925,047); and (3) Otter Crest (\$5,408,425). Table 2 lists the seabird restoration alternative approved by the NPFC in the January 2007 determination, and as revised by the June 2008 proposal.

Table 2. Seabird Restoration Alternatives (seabird injury = 38,399 seabird-years).			
<i>Alternative Approved in NPFC January 2007 Determination</i>			
Project	Species: Seabird-years	Total Seabird-years	Cost
Predator Management (30 years)	Cormorants - 23,768	29,292	\$1,033,485
	Auklets - 4,872		
	Storm-Petrels - 652		
Educational Signs	Common Murres - 4,865	6,275	\$925,047
	Tufted Puffins - 17		
	Pigeon Guillemots - 932		
	Storm-Petrels - 461		
Total		35,567	\$1,958,532
<i>Revised Alternative Proposed in June 2008</i>			
Predator Management (20 years)	Cormorants - 15,845	19,528	\$821,485
	Auklets - 3,248		
	Storm-Petrels - 435		
Educational Signs	Common Murres - 4,865	6,275	\$925,047
	Tufted Puffins - 17		
	Pigeon Guillemots - 932		
	Storm-Petrels - 461		
Habitat Acquisition and Management (Otter Crest)	Cormorants - 16,072	18,179 ^a	\$5,408,425
	Pigeon Guillemots - 2,107		
Total		43,982^a	\$7,154,957
^a does not include additional unquantified benefits associated with the observation platform.			

Because they were not part of the Final DARP, the trustees' determinations in the revised restoration proposal are not presumed correct by OPA's rebuttable presumption. 33 U.S.C. § 2706 (e)(2) and 15 C.F.R. § 990.13. To the contrary, because the revised restoration proposal contradicts the trustees' determination in the Final DARP that the Predator Management project should last 30 years, in order to be accepted by the NPFC the evidentiary value of the trustees' revised restoration proposal must be of sufficient weight to rebut the presumed correctness of the 30 year timeline determined in the Final DARP.

Notwithstanding the trustees current contentions, the NPFC has determined that the previously approved 30 years of Predator Management and Educational Signs is appropriate compensation for the seabird injury and most reasonably meets the OPA evaluation standard for cost-effectiveness (15 C.F.R. § 990.54(a)(1)). The NPFC notes

that 30 years of Predator Management restores 29,292 seabird-years and Educational Signs restores 6,275 seabird-years of four seabird species, compensating for 35,567 lost seabird-years at a cost of about \$1.96 million. In contrast, the trustees' June 2008 proposal restores 43,982 total seabird years⁶, at a cost of \$7.15 million. Since the seabird injury without gulls totals 38,399 bird-years, the restoration proposal approved by the NPFC in January 2007 restores 93 percent of the total injury, while the trustees' revised proposal restores at least 115 percent of the total injury at an additional cost of about \$5.4 million.

Furthermore, the trustees have not accounted for benefits to numerous seabirds that they state will result from the Bandon Marsh and Educational Sign projects. For example, the Final DARP states that the Bandon Marsh project will benefit a substantial number of waterfowl (DARP, page 68). In their reconsideration request, the trustees emphasize that waterfowl species minimally injured during the spill would receive the vast majority of these benefits. The trustees also state that the Educational Sign project will result in additional, unquantified benefits to numerous other seabird species, including Rhinoceros and Cassin's Auklets, and Brandt's, Pelagic, and Double-Crested Cormorants, Black, White-Winged and Surf Scoters, Northern Fulmars, Ancient Murrelets, Common, Pacific and Red-Throated Loons, Western, Clark's, Horned, Eared and Red-Necked Grebes, Black-Legged Kittiwakes, and Short-Tailed Shearwaters (June 2008 response from trustees to NPFC's request for additional information).

Seabird Summary

The NPFC accepts the trustees' proposal to remove gulls from both the estimates of total seabird injury and seabird restoration achieved from the approved alternatives. Accordingly, the total seabird injury is determined to be 38,399 seabird-years. Predator Management and Educational Signs, approved by the NPFC in its January 2007 determination, compensate for at least 93 percent of the accepted seabird injury (35,567 of the 38,399 total seabird-years lost). The trustees argue that the remaining seven percent of the seabird injury (2,832 seabird-years) should be compensated through land acquisition at Otter Crest, reduced duration of Predator Management (20 years instead of 30 years), and Educational Signs. This revised seabird restoration proposal increases the seabird restoration cost by about \$5.4 million, and overcompensates seabird loss by at least 15 percent.

After careful review and consideration of the reconsideration request and supplemental information provided by the trustees, the NPFC has determined that the trustees have not met their burden of proving that the restoration suite of Otter Crest, Educational Signs, and scaled-back Predator Management is appropriate under OPA. Even though their proposal conflicts with determinations made in the Final DARP, the trustees currently propose to scale down the Predator Management Project to 20 years. By scaling down the project, the trustees reduce restoration benefits realized from the Predator Management Project in order to provide a justification for claiming the Otter Crest

⁶ Does not include additional unquantified benefits associated with the Otter Crest observation platform

project at an additional cost of about \$5.4 million. Notwithstanding the trustees' arguments to the contrary, the preponderance of the credible evidence does not support scaling back the Predator Management Project in order to justify the Otter Crest Project. To the contrary, the preponderance of the credible evidence supports fully funding the Predator Management Project as described in the Final DARP because it is the most cost-effective project chosen by the trustees to restore seabird injuries.

The NPFC further finds that it is not reasonable to ignore the seabird restoration benefits that the trustees assert would result from the Bandon Marsh and Educational Sign projects when considering the seabird debit that remains after crediting the Predator Management and Educational Sign projects. The NPFC understands that it is not always possible to quantify benefits to all species from a restoration project. However, in this instance the NPFC finds that the further seabird restoration from the Bandon Marsh and Educational Signs projects undermines the trustees' position that an additional \$5.4 million for the Otter Crest project is needed to achieve more than 100 percent compensation for seabird injuries. The preponderance of the credible evidence establishes that most, if not all, of the seabird injuries will be restored by the Bandon Marsh, Educational Signs and Predator Management projects.

Under OPA, only uncompensated damages can be reimbursed by the OSLTF and the measure of natural resource damages is the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the natural resources damaged as a result of the incident plus the diminution in value of those natural resources pending restoration. Just like any other claimant, the trustees bear the burden of proving their claim. In this case, the trustees have failed to carry their burden of showing under OPA and Coast Guard regulations that the Otter Crest project should be compensated as a claim against the OSLTF. 33 U.S.C. §§ 2706 (d), 2712 (a)(4), and 33 C.F.R. §§ 136.105, 136.211. Given the totality of the circumstances surrounding this claim, the NPFC finds that, notwithstanding the trustees' rebuttable presumption, the preponderance of credible evidence continues to show that the Otter Crest project is not needed. The preponderance of the credible evidence shows that the seabird injuries will be adequately compensated by the Bandon Marsh, Educational Signs, and Predator Management projects. As a result, the NPFC denies the trustees' claim for the Otter Crest project.

Case Management and Trustee Oversight

In its January 2007 determination, the NPFC approved funds for six years of Case Management and Trustee Oversight (\$711,048). The NPFC denied four additional years (\$171,526) based on the determination that the majority of the approved restoration projects would be completed within the six-year timeframe. The NPFC also funded preparation and printing of final reports, but denied funds to print five annual reports (\$10,000) because the NPFC does not require commercially printed reports and encourages use of its standard electronic reporting forms as part of its cost documentation and reporting requirements. Finally, the NPFC denied \$30,000 for independent audits, determining that they were not necessary as NPFC Progress and Cost Reporting forms

are sufficient to meet NPFC accounting requirements. In total, \$211,526 in Case Management and Trustee Oversight was denied.

In requesting reconsideration for four additional years of Case Management and Trustee Oversight, the trustees highlighted the extended project implementation period and monitoring under the HRA Maintenance, Marbled Murrelet, Predator Management, and Bandon Marsh projects. The NPFC acknowledges that a reduced level of Case Management and Trustee Oversight expenditures will be necessary after year six, even though monitoring, oversight, and reporting costs listed in the project budgets generally conclude at year six. Therefore, upon reconsideration, the NPFC approves Case Management and Trustee Oversight funds for years six through ten (\$171,526).

The trustees' request for reconsideration also reasserts their need for \$10,000 to print five annual reports, stating that: (1) there is a need to report to the public concerning the restoration of public resources; (2) printing a professional report is the best way to inform the public of the restoration actions; and (3) the NPFC's denial of funds to print annual reports did not appear to take into consideration the trustees' full public reporting requirements.

After reviewing this additional information, the NPFC agrees that there is a need to report to the public about trustees' actions to restore public resources, and notes that funds were approved to print a final report on these actions. The NPFC finds, however, that the trustees have not provided sufficient information to show that the printing of annual reports is essential to fulfill their public reporting requirements, particularly when other, less expensive options (i.e., posting annual reports on their website) are available. Thus, upon reconsideration, the NPFC denies the trustees' request for \$10,000 to print five annual reports.

Finally, the trustees have agreed to drop their request for \$30,000 for independent audits, provided that they have access to 25 percent contingency for NPFC cost documentation and reporting requirements (reconsideration request, pages 4-5). The NPFC concludes that this request is reasonable, and thus eliminates the \$30,000 request for independent audits, while increasing the maximum contingency available for Case Management and Trustee Oversight to 25 percent.

In summary, the NPFC, upon reconsideration, approves \$171,526 of the \$211,526 in denied Case Management and Trustee Oversight costs. The trustees have agreed to drop their request for \$30,000 for independent audits, and the NPFC has denied the trustees' reconsideration request for the printing costs of annual reports (\$10,000), while increasing the contingency amount available to the trustees for Case Management and Trustee Oversight from 15 percent to 25 percent.

Trustee Settlement Fund

In December 2003, the NPFC and DOI entered into a Memorandum of Agreement (MOA) outlining how the \$4 million Lump Sum Payment received from the RP would be

used to advance and reimburse preassessment and restoration planning costs incurred as part of the NRDA for this incident. The MOA states that:

- The acceptance of the \$4 million settlement does not affect the trustees' rights to recover from the OSLTF full compensation for natural resource damages;
- In order to show that they have uncompensated natural resource damages and demonstrate adherence to the foregoing regulations, the trustees shall submit the entire claim and all supporting documentation to the OSLTF, including documentation for all sums expended from the Lump Sum Payment;
- The amount paid on the trustees' claim from the OSLTF will first deduct all monies in the Lump Sum Payment plus accrued interest, except that \$867,899.72 reimbursement to the OSLTF referred to below will not be so deducted;
- Of the Lump Sum Payment, \$867,899.72 shall be allocated to the OSLTF for reimbursement of its payments to the trustees for pre-assessment costs associated with their natural resource damage assessment of the Incident and \$248,000 shall be allocated to the NRDA-R Fund for reimbursement of the funding it provided to the trustees for the restoration planning phase of their damage assessment; and
- The remainder of the Lump Sum Payment shall be placed in an interest-bearing sub-account of the NRDA-R Fund dedicated to the payment of damage assessment and restoration costs associated with the M/V New Carissa Oil Spill.

In its January 2007 determination, the NPFC approved payment of certain assessment costs based on the trustees' claim of a settlement fund balance of \$2,387,319. The NPFC denied \$250,700 of additional claimed costs from the settlement fund because: (1) documentation provided to support these additional costs was not sufficient to warrant payment, and (2) some of the costs were included in both the assessment cost documentation and proposed restoration project budgets, thus presenting "double recovery" issues. When determining the amount remaining in the settlement fund, the NPFC accepted the cost amounts stated in trustee resolutions without insisting upon the production of the underlying cost documents that specifically identify the costs in the resolutions.

In their reconsideration request, the trustees acknowledged that certain settlement fund expenditures had also been included in other parts of the claim. Specifically, the trustees stated that they had identified two items totaling \$54,200 that had been subtracted from the settlement fund and also included in the Marbled Murrelet Habitat Acquisition project budget⁷. As a result, the trustees revised their claimed settlement fund balance from \$2,136,619 to \$2,190,819.

Upon further review of trustees' assessment and project costs, the NPFC noted that \$23,000 for Land Surveys is listed in both the Marbled Murrelet Habitat Acquisition budget and assessment cost documentation (FTR 2006-02). The NPFC asked the trustees

⁷ Per August 14, 2008 email from Kerrie Palermo to Scott Knoche, the trustees stated that the two items were: (1) Realty reviews by Oregon State Office BLM for \$49,200; and (2) HazMat Review by Salem District BLM for \$5,000.

to provide evidence supporting that this \$23,000 was for separate surveys (and not another double-counting error). In email correspondence to the NPFC on August 25, 2008, the trustees stated the \$23,000 for surveys was not claimed to either the settlement fund or claimed restoration project costs because the funds were not needed. This statement contradicts the fact that \$23,000 for Land Surveys was requested and paid to the trustees via the January 2007 determination⁸ and is included in documentation of past assessment costs (FTR 2006-02).

Given the lack of appropriate documentation of settlement fund expenditures and, in particular, the: (1) trustees' confirmation of double-counting \$54,200 of costs in the Marbled Murrelet Habitat Acquisition project and assessment cost documentation (FTR 2006-02), (2) NPFC's identification of a \$23,000 item (Land Survey) included in both the Marbled Murrelet Habitat Acquisition and assessment cost documentation (FTR 2006-02), and (3) trustees' incorrect assertion that the \$23,000 for surveys was not claimed, the NPFC cannot reconcile assessment costs claimed against the settlement fund⁹, as required by the MOA. In reaching this conclusion, the NPFC finds that it cannot rely solely on the assertions of costs in the trustee assessment and restoration planning costs without examining the underlying cost documentation. Accordingly, until appropriate documentation of costs can be reviewed by the NPFC to ensure that the costs are reasonable and that there are no additional double-counting problems, the NPFC must assume that the settlement fund balance is \$3,133,627, calculated as follows:

\$4,000,000	RP Lump Sum Payment (i.e., settlement amount)
(\$851,502.68) ¹⁰	Documented preassessment costs incurred under IAG
(\$93,963)	DOJ litigation services
(\$248,000)	Trustee assessment costs prior to MOA (per MOA)
\$327,092.75 ¹¹	Interest earned on RP Settlement Fund (as of May 2009)
\$3,133,627	Remaining Balance = RP Settlement – (Preassessment + DOJ services + Interest Earned)

NPFC Treatment of Contingency

The NPFC recognizes that costs of approved projects are estimated and may unexpectedly increase as a result of new and/or unforeseeable circumstances. Accordingly, the NPFC has determined that the OSLTF will remain available for such contingency costs that arise during the implementation of the approved projects.

⁸ See section 11.4 "Marbled Murrelet Restoration Costs"

⁹ Specifically, the following assessment costs categories: DOI NRDAR for restoration planning costs through 2004 (\$520,589); FTR 2004-01 (\$57,242); FTR 2006-01 (\$78,128); FTR 2006-02 (\$263,503); and FTR 2006-03 (\$174,920).

¹⁰ Although the MOA states that \$867,899.72 of the lump sum payment should be allocated to the OSLTF for reimbursement of pre-assessment costs, the NPFC's records show that the OSLTF only actually reimbursed \$851,502.68. To ensure that the OSLTF does not receive excessive credit for preassessment costs, the NPFC used the amount actually reimbursed instead of the amount noted in the MOA.

¹¹ Per June 16, 2009 email from Kerrie Palermo to Scott Knoche, the trustees stated that the interest earned on the RP Settlement Fund, as of May 2009, is \$327,092.75.

Contingency amounts will be paid if and when unforeseen costs arise, provided that they are supported by appropriate justification and documentation of costs incurred to date.

Table 4 provides the contingency percentage assigned by project based on the NPFC's determination of the degree of each project's complexity or potential for unknown events. Contingency amounts listed are those approved by the NPFC in the first determination, with the exception of Case Management and Trustee Oversight. Upon reconsideration, the NPFC has determined that 25 percent contingency for Case Management and Trustee Oversight will be available to the Trustees, instead of the 15 percent approved in the previous determination.

Table 4. Approved Contingency Amounts.		
Species	Restoration Project	Approved 25 Percent Contingency Amount
Western Snowy Plover	HRA Maintenance (20 yrs)	\$19,605
Shorebirds (Non-Plover)	Bandon Marsh	\$406,284
Seabirds and Waterfowl	Predator Management (30 yrs)	\$258,371
	Educational Signs	\$231,262
Case Management		\$148,018
Trustee Oversight		\$72,626
Total		\$1,136,166

Summary

The NPFC has carefully reviewed the trustees' request for reconsideration and supplemental information related to the NPFC's January 2007 determination to deny funds for the Sister Shorebird, HRA Maintenance (years 21-30), Docent, and Otter Crest restoration projects, and Case Management and Trustee Oversight (years six through ten). Upon reconsideration, we approve \$171,526 for Case Management and Trustee Oversight (years six through ten). Funding for the Sister Shorebird-Sanderling Module (\$168,574), HRA Maintenance (years 21-30; \$39,210), Docent (\$90,842), and Otter Crest (\$5,408,425) projects, and Case Management costs for the printing of annual reports (\$10,000) is denied. Attachment 1 provides a summary of the NPFC determinations.

Through the January 2007 determination and the decisions herein on reconsideration, the NPFC has approved \$28,156,908 for 16 natural resource restoration projects and associated Case Management and Trustee Oversight costs as reasonable and appropriate compensation for natural resource damages resulting from the *New Carissa* incident.

The NPFC has also reviewed the cost documentation provided by the trustees to support their claim that the settlement fund balance is \$2,136,619. The NPFC has determined that \$945,466 of the claimed costs have been appropriately documented, leaving a corresponding undocumented settlement fund balance of \$3,054,534.

The NPFC has provided DOI \$23,612,245 for the recreation and Marbled Murrelet Habitat Acquisition projects approved in the January 2007 determination. Subtracting

this amount from the total approved amount (\$28,156,908) and accounting for the settlement fund balance yields a payment offer of \$1,411,036 (Table 3).

Table 3. Summary of Settlement Offer.		
January 2006 Determination		
	Project(s)	Offered and Paid
Lost Recreation	11 projects, including repairing beach trails, signs etc.	\$404,000
Marbled Murrelets	Habitat Acquisition and Management	\$23,208,245
	Total	\$23,612,245
NPFC Decision on Reconsideration		
	Project(s)	Offer
Western Snowy Plovers	20 years of Habitat Maintenance	\$78,420
Shorebirds (except plovers)	Habitat Acquisition and Restoration at Bandon Marsh	\$1,625,137
Seabirds (except Marbled Murrelets) and Waterfowl	Predator Management	\$1,033,485
	Educational Signs	\$925,047
Case Management	10 years	\$592,070
Trustee Oversight	10 years	\$290,504
	Total	\$4,544,663
Settlement Fund Balance		(3,133,627)
NPFC Payment Offer		\$1,411,036
Contingency		\$1,136,166

Cost Documentation, Progress Reporting, and Final Report

As the designated Lead Administrative Trustee (LAT) for this claim, DOI shall ensure that all expenditures of NPFC funds are documented appropriately, spent only on activities for which the claim has been paid, and reported to the NPFC. Any funds not spent or documented appropriately shall be returned to the Fund. Accurate and timely cost documentation is also required to support any requests for contingency funds.

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

1. Certification by DOI that all restoration activities have been conducted in accordance with the *New Carissa* Restoration Plan as approved by the NPFC;
2. A progress report that describes work accomplished, the timeline for future activities, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (labor, contracts, purchases/expendables, travel, government equipment); and
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress of the project for the year. Enough detail should be included to determine reasonableness of costs for each employee when cost documentation is received with the final report.

In addition to annual reports, DOI shall submit a final report within 120 days of the date project implementation is completed. This final report shall include a summary of project implementation and restoration benefits achieved, as well as project expenditures as follows:

Labor: For each employee, please include a description of their function/role, hours worked, labor rate, and indirect rate. An explanation of indirect rate expenditures, if any, will be necessary.

Travel: Please include all paid travel reimbursement vouchers and receipts.

Contract: Please describe activities undertaken, lists of deliverables, and contract invoices and receipts.

Purchases/Expendables: Please include invoices and receipts, along with an explanation of costs.

Government Equipment: Costs incurred for equipment and other miscellaneous resources should be documented. Please provide the rate (*i.e.* hourly, weekly) and time for all equipment used for which costs were being incurred.

The NPFC will reconcile cost information provided by DOI in the final reports. All remaining funds and/or inadequately documented costs will be returned to the NPFC. Attached are optional annual and final progress and cost reporting templates that the NPFC has developed to facilitate reporting (Attachment 2).

Conclusion

This offer constitutes final payment for natural resource damages resulting from the *New Carissa* oil spill incident. The NPFC will, however, allow the trustees 90 days from the date of this determination to provide the missing cost documentation for incurred assessment costs from the settlement fund prior to closing this case. Costs determined by the NPFC to be reasonable and appropriate will be paid by the NPFC.

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

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

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the offer is void. If the settlement is accepted, your payment will be mailed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds with the signed Release Form.

Please feel free to contact me at the above address or by phone [REDACTED] if you have any questions or would like to discuss this determination.

Sincerely,

[REDACTED]

Chief, Natural Resource Damage Claims Division
National Pollution Funds Center

Attachments: (1) Summary of Claim Adjudication
(2) Cost and Progress Reporting Forms (Optional)

Attachment 1: Summary of Claim Adjudication.

Project	Claimed Injury	NPFC Injury Determination	NPFC Reconsideration of Injury Determination	Proposed Restoration/Project Cost (Claimed Restoration Credit)	NPFC Determination/Compensable Amount	NPFC Reconsideration/Compensable Amount
Lost Recreation	26,974-28,204 lost trips; 1,000 diminished use trips; total value \$404,000	Accepted	N/A	11 projects, including repairing beach trails, signs etc. (\$404,000)	Approved \$404,000 (paid)	N/A
Marbled Murrelets	262 marbled murrelets; 3,271 marbled murrelets/yr	Accepted	N/A	Habitat Acquisition and Management (1,269 acres: Siletz, Plum Creek, and Arnold Creek parcels) (\$23,208,245) (~3,270 murrelet-yr)	Approved \$23,208,245 (paid)	N/A
Western Snowy Plovers	4-8 plovers (10.5-21.1 plover/yr) Plus "unquantified" injury	8 plovers; 18 plover/yr ^a	Accept trustee fledgling rate and injury estimate of 21 plover/yr; no additional info provided to support additional loss of plovers	Habitat Maintenance-30 acres for 30 yrs (\$117,630), (50.3 plover/yr)	Approved \$78,420 (20 yrs maintenance; NPFC estimated this restores 33.6 plover/yr). Deny \$39,210	Denied \$39,210- 20 yr project provides sufficient restoration
Shorebirds (except Plovers)	672 shorebirds; 7,045 shorebird/yr	413 birds; 4,371 shorebird/yr ^b	Bandon Marsh provides sufficient shorebird restoration	Docent Program (\$90,842); Trustees do not estimate bird-yr benefits	Denied \$90,842 (Habitat Maintenance provides sufficient restoration).	Denied \$90,842
Seabirds (except Marbled Murrelets and Waterfowl)	2,203 seabirds 43,623 bird/yr; 38,399 bird/yr w/o gulls 1,297 loon/yr; 3,256 grebe/yr; 1,120 cormorant/yr; 7,838 murre and puffin/yr; 2,647 auklet and ancient murrelet/yr; 578 storm petrel and shearwater/yr; 7,469 fulmar/yr; 8,097 gull and kittiwake/yr; 5,224 gull/yr; 2,873 kittiwake/yr; 11,322 scoter and duck/yr	42,214 seabird/yr 6,689 gull and kittiwake/yr (NPFC) vs 8,097 gull and kittiwake/yr (trustee)	Accept trustee estimate of 8,097 gull and kittiwake/yr and 43,623 total bird/yr; 38,399 bird/yr w/o gulls	Predator Management (\$1,033,485 - 30 yrs)	Approved \$1,625,137 (not paid)	Approved \$1,033,485 for 30 yrs
				Seabird/yr = 104,008 w/gulls; 29,292 w/o gulls; 23,768 cormorant/yr; 74,716 gull/yr; 4,872 auklet/yr; 652 storm-petrel/yr	Approved \$1,033,485 (not paid)	Approved \$1,033,485 for 30 yrs
				Educational Signs (\$925,047)	Approved \$925,047 (not paid)	Approved \$925,047
				Habitat Acquisition and Management (Otter Crest) (\$2,408,425)	Denied \$3,408,425; (Predator mgmt, signs, and ancillary benefits of Bandon Marsh provide sufficient restoration)	Denied \$5,408,425
Case Mgmt	N/A	N/A	N/A	Case Management (\$632,070; 10 yrs)	Approved yrs 1-6 other than printing annual reports and independent audits (\$501,624); denied yrs 7-10	Approved \$592,070 for yrs 1-10; except for printing of annual reports and audits.
Trustee Oversight	N/A	N/A	N/A	Trustee Oversight (\$290,504; 10 yrs)	Approved yrs 1-6 (\$209,425); denied yrs 7-10	Approved \$290,504 for yrs 1-10

^a NPFC used Oregon specific nesting rate to estimate revised fledgling rate

^b NPFC did not accept mortality of birds oiled less than 1 percent

^c DARP, pg 68

References

- Anderson, D.W., F. Gress, and D.M. Fry. 1996. Survival and dispersal of oiled Brown Pelicans after rehabilitation and release. *Marine Pollution Bulletin* 32:711-718.
- Burger, J. 1997. Effects of Oiling on Feeding Behavior of Sanderlings and Semipalmated Plovers in New Jersey. *The Condor* 99: 290-298.
- Burger, J., and N. Tsipoura. 1998. Experimental oiling of Sanderlings (*Calidris alba*): behavior and weight changes. *Environ. Toxicol. and Chem.* 17(6): 1154-1158.
- Gaston, A.J., and S.B. Dechesne. 1996. Rhinoceros Auklet (*Cerorhinca monocerata*) In *The Birds of North America*, No.6 (A. Poole and F. Gill, eds.). The Academy of Natural Sciences, Philadelphia, PA, and the American Ornithologists Union, Washington, DC.
- Larsen, E.M. and S.A. Richardson. 1990. Some effects of a major oil spill on wintering shorebirds at Gray's Harbor, Washington. *Northwestern Naturalist* 71:51-56.
- Lauten, D.J., K.A. Castelein, E. Seckinger, E. Seckinger, E. Kolkemo and E.P. Gaines. 2005. The Distribution and Reproductive Success of the Western Snowy Plover Along the Oregon Coast – 2004. Unpublished Report by the Oregon Natural Heritage Information Center to the Coos Bay District Bureau of Land Management; Oregon Dunes National Recreation Area; U.S. Fish and Wildlife Service; Oregon Department of Fish and Wildlife; and Oregon Department of Parks and Recreation. Portland, Oregon.
- Manuwal, D.A., and A.S. Thoresen. 1993. Cassin's Auklet (*Ptychoramphus aleuticus*) In *The Birds of North America*, No.313 (S. Poole and F. Gill, eds.). The Academy of Natural Sciences, Philadelphia, PA, and the American Ornithologists Union, Washington, DC.
- Mead, C. 1997. Poor prospects for oiled birds. *Nature*, Vol. 390, pp. 449-450.
- Nur, N., G.W. Page and L.E. Stenzel. 1999. Population Viability Analysis for Pacific Coast Snowy Plovers. Point Reyes Bird Observatory. Stinson Beach, CA. Appendix D in *Western Snowy Plover (Charadrius alexandrinus nivosus) Pacific Coast Population Draft Recovery Plan*. U.S. Fish and Wildlife Service. May 2001.
- Sharp, B.E. 1996. Post-release survival of oiled, cleaned seabirds in North America. *Ibis*, Vol. 138 No. 2, pp. 222-228.
- Skrabis, K.E. 2006. Resource Equivalency Analysis for Western Snowy Plover, *New Carissa* Oil Spill, February 1999. Unpublished Report to Bureau of Land Management, U.S. Fish and Wildlife Service, U.S. Department of the Interior.
- Stern, M.A., D.J. Lauten, K.A. Castelein, K.J. Popper and J.A. Fukuda. 2000. Final Impact Assessment of Oil Spilled from the *New Carissa* on the Western Snowy Plover along the Oregon Coast. Unpublished Report by the Oregon Natural Heritage Program and The Nature Conservancy to TMM Co., LTD; Coos Bay District Bureau of Land Management; Oregon Department of Fish and Wildlife; Dunes National Recreation Area; and U.S. Fish and Wildlife Service. Portland, OR.

U.S. Department
of Homeland
Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

U.S. Coast Guard Stop 7100
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CN)

16480
April 21, 2010

CERTIFIED MAIL Number: 7008 3230 0001 9575 2570

Mr. Edward W. Shepard
State Director, Oregon/Washington
Bureau of Land Management, Oregon State Office
P.O. Box 2965
Portland, OR 97208

RE: *New Carissa* Oil Spill Incident Reconsideration Request (Addendum)
Claim Number: S99018-OI2

Dear Mr. Shepard:

The National Pollution Funds Center (NPFC) has reviewed the additional information provided by the U.S. Department of the Interior (DOI) regarding claimed costs and expenditures from the Settlement Fund established for the *New Carissa* oil pollution incident. We have determined that \$972,480 of additional claimed costs are reasonable and documented appropriately. Accordingly, we are amending our August 26, 2009 determination on reconsideration by increasing our offer from \$1,411,036 to \$2,383,516. This amended offer is made in accordance with the Oil Pollution Act (OPA, 33 U.S.C. §§ 2701 et seq.) and the OPA regulations found at 33 C.F.R. § 136 and 15 C.F.R. § 990.

Background

In June 2007, DOI requested that the NPFC reconsider its decision to deny three proposed projects and partially approve three projects claimed for natural resource damages resulting from the *New Carissa* oil spill incident. On August 26, 2009, after reviewing the reconsideration request, the NPFC approved \$4,544,663 of additional claimed costs, but determined that DOI expenditures of money received from a settlement with the responsible party (referred to as the Settlement Fund) were not appropriately documented. The NPFC therefore withheld \$3,133,627 of the amount approved for the additional projects, offering to pay \$1,411,036 of the \$4,544,663 approved claim amount. Recognizing the potential for additional, but undocumented, costs, the NPFC allowed DOI the opportunity to submit additional documentation of Settlement Fund expenditures.

On January 11, 2010, DOI provided the NPFC with documentation of Settlement Fund expenditures totaling \$1,036,752, representing assessment and restoration costs incurred by DOI in fiscal years 2004 to 2009. Upon review, the NPFC determined that \$972,480 of the additional documented costs were reasonable and appropriate. A total of \$79,200, representing three items associated with the Marbled Murrelet restoration project costs¹ were determined to have been previously funded by the NPFC and are denied.

Conclusion

The NPFC has reviewed the additional documentation of Settlement Fund expenditures submitted after the NPFC issued its determination on reconsideration. We have determined that an additional \$972,480 of assessment and restoration planning costs incurred by DOI are compensable. Accordingly, we amend our determination dated August 26, 2009 by increasing the offer upon reconsideration from \$1,411,036 to \$2,383,516, an increase of \$972,480 (Table 1).

Table 1. Summary of accounting for Settlement Fund.	
\$4,000,000	RP Lump Sum Payment (i.e., Settlement Fund amount)
(\$851,503)	Documented preassessment costs incurred under IAG
(\$93,963)	DOJ litigation services
(\$248,000)	Allocated to NRDA-R Fund for reimbursement of funding provided to the trustees for restoration planning phase of damage assessment.
\$327,092.75	Interest earned ending May 1, 2009
\$3,133,627	Settlement Fund balance as determined in August 26, 2009 Determination
(\$1,036,752)	Additional documented Settlement Fund expenditures submitted January 11, 2010
	FY 2004, \$174,204.83
	FY 2005, \$264,810.72
	FY 2006, \$253,048.32
	FY 2007, \$198,110.45
	FY 2008, \$83,205.85
	FY 2009, \$63,371.23
\$682.75	Interest earned May 1, 2009 through September 30, 2009
(\$16,398)	Additional preassessment cost documented ²
\$79,200.00	FY 2005 - 2009 claimed costs denied (submitted January 11, 2010)
\$788	Travel cost for Barbra Hill (NRDA Training) ³
\$2,161,148	Revised Settlement Fund Balance
\$972,480	Additional Offer (\$3,133,627 - \$2,161,148)

¹ \$25,000 for appraisal costs, \$49,200 for acquisition realty costs, and \$5,000 for environmental site assessment costs

² Per 10/23/2009 email from Carolyn Palermo, U.S. Fish and Wildlife Service, to Fredy Hernandez, NPFC

³ The Fund is only available to pay reasonable assessment costs. The NPFC denies costs associated with Barbra Hill's training.

This amended offer constitutes final action on the DOI request for reconsideration and final payment for natural resource damages resulting from the *New Carissa* oil spill incident.

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

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

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the offer is void. If the settlement is accepted, your payment will be mailed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds with the signed Release Form.

Please feel free to contact me at the above address or by phone ([REDACTED]) if you have any questions or would like to discuss this determination.

Sincerely,

[REDACTED]
F. J. [REDACTED]
Claims Manager
National Pollution Funds Center

U.S. Department
of Homeland
Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

U.S. Coast Guard Stop 7100
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CN)

Claim Number: S99018-OI1	Claimant Name: Department of the Interior- Bureau of Land Management ATTN: Edward Shepard State Director, Oregon/Washington Bureau of Land Management, Oregon State Office P.O. Box 2965 Portland, Oregon 97208
--------------------------	--

This claim arose from natural resource damages caused by the discharge of an estimated 25,000 to 140,000 gallons of oil following the grounding of the M/V New Carissa on February 4, 1999 at Coos Bay, Oregon's North Spit ("Incident"). The discharge of oil is described in the Final DARP, Payne and Driskell (2003)⁴ and Ford (2001)⁵. The Incident does not include oiling of birds collected in the three northern-most search segments in Oregon (Slusher Lake, Gearhart, and Tillamook Head) and from beaches in southern Washington. Samples of oiled feathers from these birds were found not to be consistent with M/V New Carissa oil³. These birds were not included in the final DARP. On February 28, 2006 this claim was submitted by the United States Department of the Interior, United States Department of Agriculture, Oregon Department of Fish and Game, Confederated Tribes of Siletz Indians of Oregon, and the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians (collectively referred to as the "trustees"). The NPFC's initial determination was issued on January 24, 2007 and the NPFC's determination of the trustees' request for reconsideration was issued on August 26, 2009, and an addendum to the NPFC determination of the trustees request for reconsideration was issued on March x, 2010 (collectively referred to as "NPFC's Determinations"). In accordance with the Initial Determination, the NPFC paid the trustees \$23,612,245 as full and complete compensation for the Lost Recreation projects and the Marbled Murrelet Habitat Acquisition project claimed by the trustees. The NPFC's determinations dated August 26, 2009 and April 21, 2010 on the trustees' request for reconsideration awarded \$2,383,516 as compensation for all other natural resource damages incurred as a result of the Incident. The trustees agree and accept that the NPFC Determinations represent a full and final determination of all the natural resource damages resulting from the Incident and hereby release any and all rights to claim any other natural resource damages resulting from the Incident as consideration for the compensation awarded in the NPFC Determinations.

⁴ Payne, J.R. and W.B. Driskell, 2003. Interpretation of oiled feather data from the *M/V New Carissa* spill. Unpublished report to the New Carissa Trustees.

⁵ R.G. Ford et al., 2001. Seabird mortality resulting from the M/V New Carissa oil spill incident February and March 1999.

This settlement includes the release of any right held by the trustees to dispute how the NPFC Determinations calculated the remaining balance in the Settlement Fund created as a result of the Memorandum of Agreement ("MOA") entered into between the NPFC and the Bureau of Land Management in December of 2003.

This release includes any right the trustees have to dispute the contingencies awarded in the NPFC Determinations. Although this settlement and release does not actually pay the contingencies awarded by the NPFC Determinations, the trustees acknowledge that any future contingency payments will be limited to the amount awarded by NPFC for each project as detailed in the NPFC Determinations. The NPFC will only authorize actual payment of these contingency awards from the Oil Spill Liability Trust Fund ("Fund") if and when a permissible contingency actually occurs. In order to support a request for contingency payment, the trustees acknowledge that they will have to fully document that the request for payment complies with the NPFC's policy for Natural Resource Damage Contingency Payments.

The trustees agree to comply with 33 C.F.R. § 136.211 by reimbursing the OSLTF for any amounts awarded by the NPFC Determinations in excess of that amount required to accomplish the activities approved in the NPFC Determinations. The trustees, agree to comply with this requirement by satisfying the reporting requirements set forth in the NPFC Determinations.

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

The trustees acknowledge that the United States was a party to Green Atlas Shipping S.A., et al. v. United States of America, CN: 00-cv-06078-TC (D. Or. filed March 20, 2000)("Lawsuit"). Although natural resource damages were not at issue in the Lawsuit's initial pleadings, the Consent Decree entered in the Lawsuit did address some of the natural resource damages resulting from the Incident. Other than the Lawsuit, the trustees warrant that they have not been a party to any lawsuit where the costs and damages paid by this settlement and release have been at issue or paid. The trustees further warrant that, other than the Consent Decree entered in the Lawsuit, the trustees have not prejudiced their subrogation rights covering the costs and damages paid by this settlement and release. The trustees further warrant that, other than the Consent Decree entered in the Lawsuit, the trustees have not and will not enter into any settlement with any person or entity covering the costs or damages paid by this settlement and release.

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

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

This Agreement is not intended to, nor shall it, vest rights in persons who are not parties to it. The trustees, certify that to the best of their knowledge and belief the information contained in this claim represents all material facts and is true. The trustees, understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. 287 and 1001).

The release may be signed in counterparts.

[Attached signature page]

Claim Number S99018-OI1 Release
M/V New Carissa Marbled Murrelet and Lost Recreation Projects

Ed Shepard
BLM OR/WA State Director
Authorized Official for the *M/V New Carissa NRDA*,
United States Department of Interior

Date

Linda Goodman
Regional Forester, Region 6
US Forest Service,
United States Department of Agriculture

Date

Virgil Moore
Director
Oregon Department of Fish and Wildlife

Date

Delores Pigsley
Tribal Chairman
Confederated Tribes of Siletz Indians of Oregon

Date

Ron Brainard
Tribal Council Chairman
Confederated Tribes of the Coos, Lower Umpqua and
Siuslaw Indians

Date