AMERICAN BIRD CONSERVANCY

Shaping the future for birds

February 20, 2009

NOAA Office of General Counsel for Natural Resources
GCNR 1315 East-West Highway, Bldg. 3
Silver Spring, Maryland 20910
(301) 713-1217; Fax (301) 713-1229

NOS.AthosComments@noaa.gov

Dear Restoration Trustees:

Thank you for the opportunity to comment on the Draft Damage Assessment and Restoration Plan and Environmental Assessment for the Athos Oil Spill. American Bird Conservancy (ABC) maintains a focused interest in the conservation of birds in the Mid Atlantic region, and restoration from this oil spill gives ABC an unprecedented opportunity to assist in the continuing conservation of coastal species in Delaware Bay.

My name is Michael Fry and I am the Director of Conservation Advocacy for American Bird Conservancy, which is a 501(c)3 not-for-profit organization, whose mission is to conserve wild birds and their habitats throughout the Americas. ABC is the only U.S.-based, group dedicated solely to overcoming the greatest threats facing birds in the Western Hemisphere.

My responsibilities as the Director of Conservation Advocacy include projects involving contaminants, pesticides, and oil spills. I have been involved with many oil spill damage assessments and litigation including the Exxon Valdez, American Trader, Puerto Rican, and North Cape spills, in addition to the Athos Oil Spill. I am an avian toxicologist, formerly with the Department of Avian Sciences, University of California at Davis, where I conducted research on the effects of spilled oil on avian reproduction in the field and laboratory. My research has included studies of gulls, other seabird species, raptors, and California Condors. I am also currently Chairman of the DOI Minerals Management Service Environmental Studies Program Scientific Advisory Committee, which evaluates and provides advice on suitability of environmental research projects related to the production of offshore energy conducted or funded by MMS. I have commented previously on the injury and damage assessment for the Athos Oil Spill, and prepared a report on the injury assessment of birds and wildlife in 2006.

Many of the projects proposed as restoration activities by the trustees are excellent. The restoration of tidal wetlands: *Freshwater tidal wetlands restoration at John Heinz National Wildlife Refuge (Pa.)* will provide considerable benefit for wading birds, dabbling ducks, swans, and Canada Geese, as well as some benefits for shorebirds and gulls. The restoration projects included in the *Blackbird Reserve Wildlife Area Pond and Pasture Enhancement (Del.)* similarly will provide benefits for these marsh and pond inhabiting species. The

Darby Creek dam removal and habitat restoration (Pa.), Shoreline restoration at Lardner's Point (Pa)., and
Habitat restoration at Mad Horse Creek (N.J.) are all worthwhile projects that address specific injuries and provide restoration benefits appropriate to recovery from the spill.

I do not believe, however, that the two coupled projects to create oyster reef beds (*Create oyster reefs (N.J., Del.),* will accomplish the restoration benefits stated in the Draft Plan. Oyster bed creation is proposed to restore services to gulls, diving ducks, shorebirds, kingfishers, and wading birds. I agree that diving ducks and cormorants will benefit from the project, but I fail to see any meaningful benefit for shorebirds, kingfishers, gulls and wading birds. None of these species feed in subtidal areas, and no benefits to tidal areas will be provided with the creation of subtidal oyster beds. The assumed creation of fish resources to be utilized by these species is unrealistic. Benefits for cormorants, kingfishers and wading birds are also provided in the wetlands projects mentioned above, and the relatively small direct and indirect injuries to these groups do not warrant a large project such as the oyster reef restoration specifically for them.
Gulls represent the second highest class of injured birds in the spill and do not receive proportional benefit from the final list of projects proposed in the draft restoration plan. Several of the projects considered in the Tier I and Tier II alternatives do, however, provide considerable benefit for gulls and shorebirds not provided in the final list of preferred restoration alternatives. Those projects identified in Tier I that would benefit shorebirds and gulls include:

- Horseshoe Crab Fishery Buyout;
- Delaware Bay Shoreline Restoration Project; and
- Misipillion Horseshoe Crab and Shorebird Project: Beach Improvements/Dune Stabilization

None of these projects were further considered and were not included in the Tier II evaluation. The draft document does not go into sufficient detail to evaluate the logic of the committee, but ABC believes that any project that protects horseshoe crab spawning areas would be of much greater value to gulls and shorebirds than restoration of a subtidal oyster reef.

The Tier 2 projects that would provide the greatest benefit to gulls and shorebirds would be:

- Kelly Island Shorebird and Horseshoe Crab Project;
- Prime Hook NWR (Horseshoe Crab/Avian Restoration); and
- Gandy's Beach Acquisition and Preservation

None of these projects were included in the final list of proposed projects, and all appeared to fail based on questionable marks given in the selection criteria listed in Table 17. The positive benefits identified for Oyster Reef restoration also mystify us, especially in the "Additional Trustee Selection Factors" categories. With regard to oyster reefs, we believe that without long-term protection of these oyster reefs, oyster harvest or poaching could quickly reduce the beds to an inconsequential benefit. As a result, the categories of project longevity and long term O&M should be reduced in value.

ABC believes the projects identified above involving protection and restoration of horseshoe crab spawning beaches are substantially superior to the oyster reef restoration, because there

is ample evidence that intertidal protection of horseshoe crabs would provide important feeding resources for gulls and shorebirds, and would provide the greatest benefit for these injured species during the pre-breeding portion of the reproductive cycle. Protection of the horseshoe crab resource is critical for several species of shorebirds that rely on the horseshoe crab egg resource before breeding and for those species of long distance migrants that pass through this region.

In addition to the benefit of sub-adult populations of ring-billed gulls, middle Atlantic breeding populations of herring and black-backed gulls and resident shorebirds, the protection and enhancement of horseshoe crab spawning beaches will greatly benefit the migratory Red Knot (*Calidris canutus rufa*), a candidate species in significant population decline. We realize that this species was not among the injured resources from the Athos spill, but it is within the mandate of the Trustees as listed in the document "Factors to Evaluate Proposed Restoration Projects under the Oil Pollution Act Delaware River/M/T Athos Oil Spill". Under Secondary Benefits, the section: **Alternative Benefits More than One Natural Resource and/or Service* (Multiple Benefits)** reads: **"**A restoration project that not only restores an injured resource but provides incidental benefits to other resources whether injured or not is generally preferable". Providing significant benefit to a threatened or endangered species is clearly in the best interests of the Trustees. The *Kelly Island Shorebird and Horseshoe Crab Project*, and the *Prime Hook NWR (Horseshoe Crab/Avian Restoration)* projects both would enhance services to gulls, other shorebirds, wading birds, and Red Knots. We urge the Trustees to consider one or both of these two projects as more suitable alternatives than the oyster bed projects which will not provide services for wading birds, gulls, or shorebirds.

ABC also believes that identifying a project such as the oyster reef restoration as a benefit to gulls, shorebirds or wading birds will set an improper precedent for future oil spill restoration considerations. If the trustees successfully argue and justify a subtidal oyster reef restoration project as a benefit to gulls and wading birds, this faulty logic will adversely influence future restoration decisions.

Thank you again for the opportunity to provide comments on the restoration projects for the Athos Oil Spill.

Sincerely,

D. Michael Fry, PhD
American Bird Conservancy
Director of Conservation Advocacy
1731 Connecticut Ave, NW
Washington, DC 20009
202-234-7181
mfry@abcbirds.org