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NPFCPOLICY CN05
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NATIONAL POLLUTION FUNDS CENTER POLICY CN05

Subj: NRD CONTINGENCY PAYMENTS

1. PURPOSE. This policy addresses how the NPFC will adjudicate requests for “contingency” amounts as part of a natural resource damage claim for payment from the OSLTF.
2. ACTION. The Cn Division Chief shall ensure that all Cn Claims Managers understand and follow the provisions of this policy and that division SOPs are updated to reflect this policy, and that the *Funding Guidelines* and relevant Web pages inform claimants of the policy.
3. POLICIES AFFECTED. None.
4. BACKGROUND. An OPA natural resource damage that may be compensated from the OSLTF is unique among OPA damages to the extent the damage is the cost of a plan to conduct restoration or assessment activities in the future. Accordingly plan costs are largely best or reasonable estimates. While the NPFC and the OSLTF have a clear interest in finality when it pays a natural resource damage claim, that interest should be balanced against the desirability of natural resource restoration under a plan(s) subject of a claim as it is approved for payment by NPFC. This policy establishes that balance.
5. POLICY.
 - a. General. NPFC will authorize certain contingent amounts in claim determinations consistent with this policy. Because of the speculative nature of those contingencies at the time of the claim determination, contingent amounts will be paid only if and when those contingencies arise. A contingency shall be project specific. A claim determination authorizing a contingency may provide a reasonable period of limitation beyond which the contingency shall not be available. The maximum period of time for the availability of a granted contingency shall be 6 years from the date of payment of the determined claim. For example if a claim payment is made on January 31, 2007, any related contingency may be requested no later than January 31, 2013 unless the determination provides an earlier cut-off date. In a rare case an exception to this rule may be granted if adequate documentation and rationale are provided.

NPFCPOLICY CN05

- b. Contingencies that may be authorized by the NPFC in adjudicating a claim, and ultimately approved for payment are:
 - (1) the potential in complex project plans to overlook certain activities/costs which nevertheless are later found to be necessary to complete the project, and
 - (2) the potential that certain specific significant costs of a plan are subject to later developments or events that result in an increase in costs, and that can be described in reasonable detail and within reasonable cost parameters (e.g. a plan to purchase property may be subject to the future availability of property for purchase and/or the outcome of purchase negotiations).
- c. The initial claim determination will establish the contingency percentage by project, based on a determination of degree of project complexity or potential for unknown event(s). The maximum allowable contingency is 25% of the cost of a project plan approved in the NPFC claim determination. This is consistent with the claimant's burden in presenting the claim in the first instance to present a reasonably complete plan and cost estimate. In a rare case an exception to this rule may be granted if adequate documentation and rationale are provided. The related release shall expressly recognize the contingency as part of the payment agreement.
- d. The contingency shall be payable at a future date (up to 6 years), up to the maximum amount, provided a claimant trustee provides documentation to establish the specific activities and reasonable costs to the satisfaction of the NPFC. The trustee claimant must describe in sufficient detail the nature and likelihood of the additional project activities and/or uncertain future event, and the basis for the claimed contingency amount. The trustee claimant must provide adequately detailed, complete and reasonable plans and cost estimates. A trustee claimant shall certify that the activities and costs were not included in the initial trustee claim but nevertheless are activities and costs that are necessary to complete the project plan as approved in the NPFC claim determination.
- e. The NPFC retains all discretion to grant or deny a contingency request in its determination under this policy or to amend or cancel this policy at any time.
- f. Contingent amounts are not available under this policy for activities or costs outside the scope of the plan(s) as approved in the initial NPFC claim determination.
- g. This policy does not otherwise provide for contingencies for the success of a project. The risk that a project will restore natural resources as intended is not a risk assumed by the Fund.

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JAN P. LANE