

Claim Number and Name:	<b>J05003-RP04</b> , <i>M/V Selendang Ayu</i> Oil Spill Assessment Costs
Claimant:	Ayu Navigation Sdn Bhd, and IMC Shipping Co. Pte. LTD
Claim Type:	Limit of Liability Claim, Natural Resource Damage Assessment (NRDA), Past Assessment Costs
Amount Requested:	\$11,391,721.26
Offer Amount:	\$7,218,149.91
Denied Amount:	\$4,173,571.35
Determination Date:	April 8, 2022
NPFC Claim Manager:	(b) (6)

### I. Summary of the Incident and Cooperative Natural Resource Damage Assessment

The *M/V Selendang Ayu*, a 738-foot bulk freighter, was traveling through the Aleutian Islands on December 6, 2004 when it experienced mechanical problems and encountered severe weather conditions. After floating without use of its engine for two days, the vessel ran aground off the shore of Unalaska, Alaska between Skan Bay and Spray Cape on December 8, 2004. The grounding ruptured the vessel's bottom fuel tanks and, ultimately, approximately 339,538 gallons of Intermediate Fuel Oil 380 and 14,680 gallons of marine diesel were released into the environment<sup>1</sup>. The owner of the vessel, Ayu Navigation Sdn Bhd, and the operator, IMC Shipping Co. Pte. LTD., were both designated as responsible parties (RPs) for the spill. The RPs conducted and funded removal activities for the incident.

Upon notification of the spill, the Department of the Interior, Fish and Wildlife Service (FWS), the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), along with the State of Alaska, acting as natural resource trustees designated under the Oil Pollution Act of 1990 (OPA) and appropriate state laws, initiated an assessment of natural resource damages (NRDA) resulting from the discharge and response to the discharge of oil. The Trustees and RPs began discussing the possibility of conducting cooperative NRDA activities soon after the incident occurred and the Trustees formally requested funding to conduct NRDA from the RPs on December 15, 2004.<sup>2</sup> The RPs responded that they would fund such work if they could participate in the studies and have access to data.<sup>3</sup> The Trustees indicated that they did not have time to set up a cooperative agreement prior to commencing field work and instead obtained an obligation of funding from the National Pollution Funds Center (NPFC) to immediately begin their work through an Interagency Agreement (IAA)<sup>4</sup>. After continued discussions of a cooperative NRDA, the Department of Justice (DOJ) informed the RPs on January 8, 2005 of the Trustees' intent to begin conducting some assessment activities cooperatively.<sup>5</sup> The initial cooperative work involved planning and conducting various field studies in 2005 to support the assessment of bird injuries. The Trustees and RPs signed a

<sup>1</sup> Notice of intent to conduct restoration planning, Fed. Reg. 72, No 61, Mar. 30, 2007

<sup>2</sup> Letter from Alaska Attorney General's Office and Department of Justice to the RPs, dated December 15, 2004

<sup>3</sup> Letter from RPs to Alaska Attorney General's Office, Department of Justice, and Department of Interior, dated January 3, 2005

<sup>4</sup> J05003-OI1

<sup>5</sup> Email from Department of Justice to the RP, dated January 8, 2005

funding agreement that documented the terms of the bird studies, which included both participation and funding from the RPs.<sup>6</sup>

The Trustees and RPs also formalized an agreement to cooperatively conduct field studies assessing oiling of vegetated habitat<sup>7</sup> and worked together to plan, conduct, and analyze oiling and injury of intertidal habitat and juvenile salmon in 2005. Following the completion of the preassessment field studies in 2005, the Trustees began drafting resource specific reports to document the results of their preassessment reports. The RPs' co-authored one of the preassessment reports<sup>8</sup> and began providing input on all the remaining reports in early 2007. In addition to conducting resource specific field work, the Trustees and RPs began cooperatively discussing and identifying restoration alternatives by July of 2005.<sup>9</sup> The Trustees and RPs held several in-person meetings in 2005, 2006, and 2007 to broadly discuss all components of the NRDA and potential restoration alternatives. Throughout this period, the Trustees submitted interim reimbursement requests for their NRDA costs which, with limited exceptions, the RPs paid in a timely manner.

The Trustees issued a Notice of Intent to Conduct Restoration Planning on or about March 30, 2007, which notified the public that the Trustees would proceed with the NRDA process of assessing injury, identifying restoration alternatives, and implementing their restoration plan.<sup>10</sup> Soon after, the Trustees and RPs signed a Funding and Participation Agreement (FPA) that provided terms for continued cooperation between the parties.<sup>11</sup> The FPA provided that the RPs would continue providing funding to the Trustees to conduct the NRDA and that both parties would cooperate in the development of work plans, collection of data, exchange of data and reports, and attempt to reach consensus on interpretation and application of study results.

Through 2007 and 2008, the Trustees and RPs finalized the Preassessment Reports and cooperatively initiated studies to (1) assess the amount of oil lingering in the environment causing continued injury to resources, and (2) assess injury to seabirds from chronic exposure to oil contamination. Ongoing cooperative efforts between the Trustees and RPs to identify, evaluate, and discuss potential restoration options and meetings to discuss the overall NRDA case continued through 2012.

On January 27, 2012, the NPFC upheld the RPs' claim to limit their liability for the *Selendang Ayu* oil spill.<sup>12</sup> At that point, the RPs decreased their level of participation in the NRDA and notified the Trustees that, while they would not provide additional funding, advanced funding previously provided via the FPA could still be used to pay for (1) development of an assessment plan, (2) development of the Administrative Record, and (3) support for the quantification of seabird injuries. Limited cooperative efforts continued through March of 2016, when the RPs and Trustees formally amended the FPA. This amendment allowed for further cooperation specifically related to compiling the Administrative Record and assessing seabird injuries. The

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<sup>6</sup> Natural Resource Damage Funding and Participation Agreement for the *M/V Selendang Ayu* Incident

<sup>7</sup> Joint Protocol: *Selendang Ayu* Oil Spill Pre-Assessment Study Plan: Injury to Native Vegetation Communities on Unalaska Island

<sup>8</sup> Rocque, D. and G. Erickson. 2008. Pre-assessment Data Report #1: Assessment of Potential Injuries to Nearshore Vegetation Communities on Unalaska Island following the *Selendang Ayu* Oil Spill. U.S. Fish and Wildlife Service, Anchorage, AK

<sup>9</sup> Email from NOAA to Polaris, dated July 1, 2005

<sup>10</sup> Notice of intent to conduct restoration planning, Fed. Reg. 72, No 61, Mar. 30, 2007

<sup>11</sup> Natural Resource Damage Funding and Participation Agreement for the *M/V Selendang Ayu* Incident

<sup>12</sup> J05003-001

Trustees also agreed to continue giving the RPs opportunity to review and comment on Trustee documents and plans. Terms of the amended FPA allowed the Trustees to continue using the remaining advanced funds in support of the NRDA.

## **II. Summary of Claims for Natural Resource Damages to the Fund**

On October 28, 2016, the Trustees published their “Natural Resource Damage Assessment Plan for the *M/V Selendang Ayu* Oil Spill” (the Trustee Plan).<sup>13</sup> The Trustee Plan documented the Trustees’ past NRDA<sup>14</sup> activities, the RPs’ varying level of participation in the Trustees’ NRDA, and the future Trustee NRDA activities needed to complete restoration planning. The Trustees submitted a natural resource damages (NRD) claim to the NPFC for past and future uncompensated assessment costs related to the Trustee Plan. The NPFC provided the Trustees \$3,699,059.47 in assessment funding pursuant to the September 22, 2017 adjudication of Claim J05003-OI03.

On November 8, 2018, the RPs submitted a limit of liability claim for NRD to the Fund for reimbursement of additional assessment costs not included in the Trustee’s claim. The RPs’ claim initially sought \$11,373,659, but was increased to \$11,391,721.26 on May 21, 2021. Claimed costs include \$5,127,535.97 in NRDA costs reimbursed to the Trustees by the RP and \$6,264,185.29 in costs incurred directly by the RPs. The RPs’ claim for damages is supported, in part, by the Trustee Plan and the administrative record associated with the adjudication of Claim J05003-OI03.

## **III. Fund Authorities**

### ***A. Fund Authority to Reimburse a Responsible Party***

Under OPA, an RP is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.<sup>15</sup> Further, an RP’s liability is strict, joint, and several.<sup>16</sup> In the case of a vessel, an RP includes any person owning, operating or demise chartering the vessel.<sup>17</sup> When enacting OPA, “Congress explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim’s recoveries such as... burdens of proof unfairly favoring those responsible for the spills.”<sup>18</sup> OPA was intended to cure these deficiencies in the law.

Notwithstanding the above, under limited circumstances the OSLTF may reimburse an RP for its uncompensated removal costs or damages. In order to receive OSLTF reimbursement, an RP must show an entitlement to either a defense or limited liability under OPA as well as an entitlement to reimbursement for either removal costs or damages. Specifically, 33 U.S.C. § 2708(a) (emphasis added) provides that:

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<sup>13</sup> Claim Cover Letter, page 2 for Trustee Claim J05003-OI03

<sup>14</sup> Assessment and restoration planning activities

<sup>15</sup> 33 U.S.C. § 2702(a).

<sup>16</sup> See, H.R. Conf. Rep. No. 101-653, 102, 1990 U.S.C.C.A.N. 779 (August 1, 1990)

<sup>17</sup> 33 U.S.C. § 2701(32)(A).

<sup>18</sup> *Apex Oil Co., Inc. v. United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002)(citing S. Rep. No. 101-94 (1989); 1990 U.S.C.C.A.N. 722.).

The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title **only if the responsible party demonstrates** that--

- (1) the responsible party is entitled to a defense to liability under section 2703 of this title; or
- (2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

Under the plain meaning of 33 U.S.C. § 2708(a), an RP must demonstrate that either a defense or limited liability applies before the OSLTF can reimburse removal costs or damages. Consistent with this statutory requirement, the OSLTF's claims regulations also require all claimants to carry the burden of proving an entitlement to reimbursement.<sup>19</sup> Just like any other claimant, an RP must prove an entitlement under OPA before receiving reimbursement from the OSLTF. If an RP fails to establish an entitlement to the type of OSLTF reimbursement claimed, the NPFC must deny the claim.<sup>20</sup>

In this claim, the RPs has already established their entitlement to limited liability under 33 U.S.C. § 2704. On December 6, 2007, the RPs filed a claim under 33 U.S.C. § 2708 seeking reimbursement of all removal costs and damages that exceed its limit of liability. Because the *M/V Selendang's* gross tonnage was 39,755 tons and its limit at the time of the incident was \$600 per ton, the NPFC concluded that the RPs were entitled to reimbursement of OPA removal costs

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<sup>19</sup> See, 33 C.F.R. 136.105(a) ("The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim."); and 33 C.F.R. 136.105(e)(6) (requiring that each claim include evidence to support the claim).

<sup>20</sup> OPA's legislative history supports NPFC's conclusion that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708. As explained in the House Conference Report on OPA:

Section 1008 of the House bill allows a responsible party or the owner of oil on a tank vessel, or a guarantor for that responsible party or owner of oil, to assert a claim for removal costs and damages **only if the responsible party or owner can show that the responsible party or owner has a defense to liability, or is entitled to a limitation of liability.** In the latter case, a claim may be submitted only to the extent amounts paid by the responsible party or owner, or by a guarantor on the responsible party's or owner's behalf, exceeds the applicable limit on liability.

H.R. Conf. Rep. 101-653, 110, 1990 U.S.C.C.A.N. 779 (August 1, 1990) (emphasis added). See also, *Apex Oil Co., Inc. v. United States*, 208 F.Supp.2d 642 (E.D. La., 2002)(claimant failed to carry its burden of proof with respect to the "act of God" defense); *International Marine Carriers v. OSLTF*, 903 F.Supp. 1097 (S.D. Tex. 1994)(claimant must show elements of a "third party" defense by a preponderance of the evidence); *Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 86 (D.D.C. 2011)(the responsible party "had the burden of proof of establishing its entitlement to reimbursement on the administrative level" ...); and *Water Quality Ins. Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(holding that Water Quality Insurance Syndicate must prove that its insured was entitled to limited liability when making a claim against the OSLTF under 33 U.S.C. § 2708).

Placing the burden of proof on a responsible party claimant seeking compensation under 33 U.S.C. § 2708 is consistent with the general rule that a party seeking relief bears the burden of proving an entitlement to that relief. Requiring a responsible party claimant to prove its entitlement to OSLTF compensation is also consistent with the general rule that a party with particular knowledge of the facts ought to bear the burden of proving those facts. As the owner and operator of the *M/V Selendang*, the RPs had unique access to the facts surrounding this incident because they were in control of the operations resulting in the discharge and had dominion and control over the discharging vessel. This unique access to the discharging vessel makes Claimants peculiarly well positioned to actually know or discover the facts surrounding the incident. Placing the burden of proof on a responsible party and its insurers seeking compensation under 33 U.S.C. § 2708 incentivizes full disclosure of all relevant facts by Claimants who are well positioned to know or learn what happened during an OPA incident.

or damages exceeding \$23,853,000. Through a series of previous claims adjudications, the NPFC paid the RPs their OPA-compensable removal costs and damages, excluding any natural resource damages in excess of the limit on liability. With this submission, the RPs seek reimbursement of their OPA natural resource damages.

***B. Fund Authority to Reimburse a Responsible Party for Natural Resource Damages***

Before the OSLTF can reimburse any claim for natural resource damages, the claimant must demonstrate that it is entitled to recover those types of damages. Under 33 U.S.C. § 2706(a), OPA limits recovery of natural resource damages to only the United States, any State, any Indian tribe, or a foreign country. Each of these claimants must also show that it managed or controlled the resources damaged by the oil spill. The measure of OPA natural resource damages includes: (1) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (2) the diminution in value of those natural resource damages; and (3) the reasonable cost of assessing those damages. Sums recovered under OPA by a trustee must be retained in a revolving trust fund and can only be used to pay for or reimburse costs related to natural resource damages. 33 U.S.C. § 2706(f). OPA further provides that NOAA, with consultation from other agencies, shall promulgate regulations for conducting NRDA's under section 2702(b)(2)(A). 33 U.S.C. 2706(e)(1). NOAA's regulations are codified in 15 C.F.R. Part 990.

The RP claimants in this case argue that 33 U.S.C. § 2708(b) provides that an RP establishing entitlement to its statutory limitation may present a claim under 33 U.S.C. § 2713 for removal costs and damages incurred by, or on behalf of, the responsible party. Damages include natural resource damages; thus, the RPs posit that they are automatically entitled to recover natural resource damage costs from the Fund even though 33 U.S.C. § 2706(a) expressly restricts who can recover that type of damages. Although an RP may recover some natural resource damages under limited circumstances, any such recovery is subject to the restrictions imposed by OPA.

OPA provides that trustees act on behalf of the public to assess and recover for natural resource damages. The NOAA regulations instruct that trustees must invite the responsible parties to participate in the natural resource damage assessment. 15 C.F.R. 990.14(c). If the responsible party accepts the invitation to participate, the scope of that participation must be determined by the trustees; at a minimum, participation will include notice of trustee determinations and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment. Increased levels of participation of responsible parties may be developed at the mutual agreement of the trustees and the responsible parties. 15 C.F.R. 990.14(c)(4). Even if an RP voluntarily elects to engage in a cooperative assessment with the trustees, participating in that process does not transform an RP into a trustee authorized to recover natural resource damages under 33 U.S.C. § 2706(a). For example, during a cooperative assessment OPA trustees always retain full authority and responsibility to assess and determine the magnitude of injury and plan appropriate restoration. 15 C.F.R. 990.14(c)(6). Unlike OPA trustees, an RP who volunteers to take part in a cooperative assessment does so without any entitlement to OSLTF reimbursement for simply participating in the assessment.

Notwithstanding OPA's restrictions limiting who can recover natural resource damages, the NPFC acknowledges that in certain instances an RP entitled to limited liability may receive some OSLTF reimbursement for that type of damages. In the *Powhatan* claim determination dated January 16, 2020, the NPFC explained how an RP might recover a claim for natural resource

damages.<sup>21</sup> In that case, the NPFC granted the RP's limitation of liability and reimbursed some of the claimed removal costs and damages, but denied the claimed natural resource damages. The claimed natural resource damages were denied on the grounds that the RP: (1) failed to prove it had independent authority to incur and recover its own assessment and restoration costs; (2) failed to prove its claimed damages were eligible to be treated as trustee assessment and restoration costs; and (3) failed to establish that its claimed costs were eligible to be treated as OPA-compensable trustee costs as required by 33 C.F.R. 136.209.

Even though the NPFC denied all of the natural resource damages sought by the RP in the *Powhatan* claim, the NPFC recognizes that there may be instances when an RP is entitled to receive OSLTF reimbursement. For example, under 33 U.S.C. § 2715 an RP becomes subrogated to all the "rights, claims, and causes of action" held by a claimant when the RP pays compensation to a claimant. When an RP pays a claim by a trustee authorized under 33 U.S.C. § 2706(a) to recover natural resource damages, the RP becomes subrogated to all the trustees' rights including any entitlement to OSLTF compensation for the costs paid. Consistent with that rule, the NPFC explained in the *Powhatan* claim that an RP may also be allowed to seek OSLTF reimbursement upon showing that specific costs were incurred at the explicit direction of a trustee, and on behalf of the trustee, for activities determined by the trustee to be necessary to support the trustee-led assessment. Thus, if an RP reimburses a trustee's costs or expends funds at the direction of and on behalf of a trustee, those funds may be eligible for OSLTF reimbursement under 33 U.S.C. § 2708.

Despite the above limited exceptions, expenses incurred by an RP while participating in a natural resource damage assessment are generally not eligible for OSLTF compensation under 33 U.S.C. § 2708 because only trustees are authorized to recover those types of damages. Further, OPA does not provide any authority for OSLTF reimbursement of costs that were primarily intended to protect an RP's litigation interests.<sup>22</sup> Because RPs commonly participate in natural resource damage assessments as part of an effort to negotiate a settlement or mitigate their potential liability in a future lawsuit, the OSLTF will typically be unavailable to reimburse those expenses.

The NPFC acknowledges that the 2020 *Powhatan* determination setting forth the standard of proof for RP NRDA claims was issued nearly two years after the *Selendang* claim was presented to the Fund. Additionally, the *Selendang* RPs and the NPFC began discussing the issue of whether an RP claimant may present an NRDA claim to the Fund and if so, the standard of proof as early as 2005. The discussions were guided by two earlier NRDA adjudications for RP costs associated with cooperative agreements that focused on whether the assessment was conducted

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<sup>21</sup> J17008-0001

<sup>22</sup> In the absence of an agreement or statute expressly authorizing recovery, a RP's attorney fees are generally unrecoverable. Although 33 U.S.C. § 2715 (c) allows the United States to recover its litigation costs when suing a RP, OPA provides no authority for awarding any type of litigation cost to a RP. *See, U.S. v. Hyundai Merchant Marine Co.*, 172 F.3d 1187, 1192-93 (9<sup>th</sup> Cir. 1999)(holding that "[i]t was clearly Congress's purpose that the United States be reimbursed its attorney's fees when it must sue for such a recovery."). Consequently, the OSLTF will not be available to reimburse fees incurred by a RP for services by an attorney or expert, which were designed to protect the RP's litigation interests. As support for this conclusion, the NPFC notes that in *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 820-21 (1994), the Supreme Court rejected a CERCLA RP's argument that attorney fees ought to be recoverable as response costs. The Court reasoned that the fees were not recoverable because the work at issue was primarily intended to protect the RP's litigation interests. The Supreme Court's rationale in *Key Tronic* is particularly instructive here because RPs are not authorized to recover natural resource damages or the cost of assessing those damages. As RPs are not entitled to recover natural resource damages under OPA, then a RP's litigation costs spent to either mitigate or avoid liability for those costs certainly should not be reimbursed by the OSLTF.

in accordance with the NOAA regulations, whether the costs were duplicative and whether the restoration projects adequately compensated for the injuries.<sup>23</sup> However, NPFC's discussions with the RPs do not provide a basis to treat the RPs like they are trustees authorized by 33 U.S.C. § 2706(a) to recover natural resource damages. These discussions also don't provide authority for OSLTF reimbursement of an RP's litigation costs.

Despite the above, NPFC recognizes that the timing of the *Powhatan* determination may have created unique issues of proof for the Claimants. Without the benefit of the *Powhatan* determination, the RPs may not have known how to properly document their costs in a manner that would maximize eligibility for OSLTF reimbursement. In an effort to address this issue, the NPFC carefully considered the totality of circumstances surrounding the claimed costs when adjudicating whether they could be reimbursed by the OSLTF. When weighing the evidence in this administrative record, the NPFC gave significant weight to the portion of the Trustee Plan discussing the coordination of work between the Trustees and the RPs. In particular, the Trustee Plan notes that the RPs' participation in the assessment "reduced duplication of studies, increased the cost-effectiveness of the assessment process, and increased information exchange." Additionally, following the end of preassessment activities, the Trustees noted that "*they sought*" the RPs' participation in assessment activities and that many activities were conducted cooperatively.<sup>24</sup> The cooperative activities were substantially conducted in accordance with the NOAA regulations and there are funding agreements between the RPs and the Trustees for certain activities.

#### **IV. Requirements for Natural Resource Damage Claims to the Fund**

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

Pursuant to 33 U.S.C. § 2713(e), the President promulgated regulations for the presentation, filing, processing, settlement and adjudication of claims against the Fund. The Claims Regulations are found at 33 C.F.R. Part 136. Claimants bear the burden of proving an entitlement to reimbursement from the OSLTF.<sup>25</sup> Thus, as claimants, natural resource trustees must provide publically reviewed assessment and restoration plans, documented costs in order that the NPFC can determine that the activities and costs are reasonable and appropriate, and certification that the NRDA was conducted in accordance with applicable regulations. In the cases where an RP is the claimant, additional documents and evidence must be submitted to the NPFC, including evidence that the costs were incurred at the direction of, and on behalf of, the trustees for activities necessary to support the trustee-led NRDA.

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.<sup>26</sup> As a result, 5 U.S.C. §555(e) requires the NPFC to provide a brief

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<sup>23</sup> Trustee Plan, page 1-4

<sup>24</sup> Letter from DOI to RPs, dated March 29, 2007

<sup>25</sup> See, 33 C.F.R. 136.105(a) ("The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim."); and 33 C.F.R. 136.105(e)(6) (requiring that each claim include evidence to support the claim).

<sup>26</sup> The court in *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjudication process for OSLTF claims with the following: "[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, see 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting OPA was to 'streamline' the claims adjudication process . . . ."

statement explaining the basis for a denial. This determination is issued to satisfy that requirement.

The claims adjudication process is also subject to the regulations at 33 C.F.R. Part 136. During the adjudication of claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence. The NPFC is not bound by the findings or conclusions reached by other entities.

### ***B. Jurisdictional Information***

Claims to the Fund for uncompensated removal costs or damages must result from a discharge of oil, or a substantial threat of discharge of oil, from a vessel or facility into navigable waters of the United States after August 18, 1990.<sup>27</sup> In this incident, there was a discharge of oil from a vessel on December 8, 2004. The incident occurred off the coast of Unalaska Island, Alaska in waters connected to the Pacific Ocean and the Bering Sea, navigable waters of the United States.

### ***C. Plan Requirement***

Costs for NRD are determined with respect to plans adopted under 33 U.S.C. §2706(d)(2) that are developed and implemented after adequate public notice, opportunity for a hearing, and consideration of all public comments. 33 U.S.C. §2706(c)(5). The plan that forms the basis of this claim was published on DOI's website on October 28, 2016<sup>28</sup> and there were no comments on this Plan.<sup>29,30</sup>

### ***D. Period of Limitations for Claims to the Fund***

Claims to the Fund must be presented to the NPFC within three years after the date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care, or within three years from the date of completion of the natural resource damage assessment under OPA (33 U.S.C. §2706(e)), whichever is later. 33 U.S.C. §2712(h)(2), 33 C.F.R. §136.101(a)(1)(ii).

This claim for NRD costs submitted by the RPs was received at the NPFC on November 8, 2018. It was presented in writing to the Director, NPFC, supported by the Trustees' Plan that describes the assessment and restoration planning activities conducted, the need for the activities and how they connect to the NRDA process, deliverables produced, and timeframe of activities. Trustee efforts to assess injuries from the incident and plan appropriate restoration are ongoing; therefore, this claim was received within the period of limitations for claims to the Fund.

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<sup>27</sup> See section 1020 of Pub.L. 101-380.

<sup>28</sup> Claim Cover Letter for J05003-OI03, page 2

<sup>29</sup> Letter from DOI to NPFC, dated March 21, 2017

<sup>30</sup> Trustees indicated that public comments were received on an earlier draft of the Plan and the Trustees' responses to those comments are publically available at: [https://www.fws.gov/alaska/fisheries/contaminants/spill/pdf/selendang\\_Ayu/TrusteeResponsesToPublicComments\\_FinalOI0816.pdf](https://www.fws.gov/alaska/fisheries/contaminants/spill/pdf/selendang_Ayu/TrusteeResponsesToPublicComments_FinalOI0816.pdf).



## V. NPFC Adjudication of Costs

### A. Costs Reimbursed to the Trustees

The RPs request reimbursement for a total of \$5,127,535.97 in assessment costs that it provided to the Trustees to conduct the *Selendang Ayu* NRDA. These costs include \$4,300,062.20<sup>31</sup> for trustee assessment costs related to preassessment activities<sup>32</sup> and \$827,473.77<sup>33</sup> in assessment and restoration planning costs that were incurred following the Trustees' issuance of the Notice of Intent to Conduct Restoration Planning for the incident.

The NPFC adjudicated this request for reimbursement of Trustee costs on the Trustee Plan and the cost documentation, correspondence between the Trustees and the RPs, activities described in the IAA, and other documentation within the Administrative Record from Claim J05003-OI03. The Trustees provided the RPs with cost documentation to support all NRDA reimbursements requested by the Trustees. In the funding agreements, the RPs explicitly instructed the Trustees to provide the same level of documentation to the RPs that they would provide to the NPFC in a claim to the Fund. Email communications indicate that the RPs contacted the NPFC during the drafting of the funding agreements to better understand the NPFC's documentation requirements. Generally, the Trustees did provide the RPs with the same level of cost documentation required by the NPFC to support reimbursement of costs.

To support their claim, the RPs submitted to the NPFC all the documentation provided by the Trustees to support the original reimbursements. The Trustee costs claimed by the RPs for reimbursement are organized and described in the Trustee Plan by resource category. During the adjudication of the Trustees' earlier assessment claim<sup>34</sup>, the Trustees identified all funding provided by the RPs and related such funding to how it supported the various resource categories in the Trustee Plan. Costs incurred by the Trustees to assess injuries to intertidal, subtidal, and anadromous stream habitats are described in pages 3-5 through 3-12 of the Trustee Plan; costs incurred to assess injury to birds are described in pages 3-16 through 3-21; costs incurred to support restoration planning efforts are discussed in pages 4-3 through 4-10. In addition to the resource specific activities conducted by the Trustees, the Trustees also incurred significant costs related to public outreach, coordination, and case management. Such costs are discussed in pages 1-4, 1-5, and 5-2 of the Trustee Plan, were necessary to support the overall NRDA, and are included within the definition of "reasonable assessment costs" provided in 15 C.F.R. § 990.30. Additionally, with respect to the \$4,300,062.50 in preassessment funding, the RPs based their reimbursements to the Trustees for activities conducted from December 2004 through June 30, 2007<sup>35</sup> on the scope of work agreed to and negotiated by the NPFC in the IAA<sup>36</sup>.

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<sup>31</sup> The NPFC separately provided reimbursed funding to the Trustees in the amount of \$275,737 for preassessment activities through the IAA (J05003-OI1). The NPFC confirmed that such costs were not included in the damages requested for this claim.

<sup>32</sup> The RPs used the scope of work agreed to by the NPFC in the IAAs as basis for their reimbursements to the Trustees for preassessment activities

<sup>33</sup> The NPFC separately provided reimbursed to the Trustees in the amount of \$1,236,943.47 for past assessment activities. The NPFC confirmed that such costs were not included in the damages for this claim.

<sup>34</sup> J05003-OI03

<sup>35</sup> Based on how NOAA submitted costs to the RPs, some minimal costs from July through September of 2007 were included in the preassessment reimbursement.

<sup>36</sup> J05003-OI1

After reviewing the claim documentation for preassessment and assessment costs, the NPFC denies payment of (1) \$7,543.76 in claimed costs for purchases and associated indirect costs<sup>37</sup> for which the RPs required the Trustees to return possession of the purchases to the RPs as a condition of reimbursement, (2) \$350.91 for interest and dividend charges incurred by the RPs for late payment of Invoice 9, (3) \$3,383.26 in indirect charges for Alaska Department of Environmental Conservation labor cost for which no documentation was provided to support the indirect rate charged, (4) \$894.28 in travel charges and associated indirect costs failure to document two trips from Invoice 2 with travel vouchers, and (5) \$1,690.73 in costs incurred by DOI<sup>38</sup> using advanced funding from the RPs.

With respect to the remaining \$5,113,673.03 in documented costs, the NPFC finds that these costs are compensable in accordance with 33 C.F.R. §136.211(a). Based on the magnitude of potential injury and the complexity and expense of conducting a NRDA in a remote location, the NPFC finds that the claimed costs for preassessment<sup>39</sup> and assessment activities are reasonable. Notably, through the adjudication of Claim J05003-OI03, the NPFC had previously reviewed the NRDA activities described in the Trustee Plan that were associated with these costs, determined that the Trustee activities were reasonable and appropriate, and, with one limited exception<sup>40</sup>, provided significant additional funding to the Trustees to use the assessment information gathered through these activities to complete the restoration planning process.

### ***B. Costs Incurred Directly by the RPs***

The RPs claim \$6,264,185.29 for costs it directly incurred that are related to the Trustees' NRDA. This total consisted of \$816,468.47 in costs associated with the Trustees' preassessment activities and \$5,447,716.82 in costs associated with the Trustees' restoration planning activities. As described above in the "Claimant's Burden of Proof", to recover NRD for costs it incurred directly, the RPs must also provide evidence that the costs were incurred at the direction of, and on behalf of the trustees for activities necessary to support the trustee-led NRDA.<sup>41</sup>

Accordingly, the NPFC provided its adjudication of the RPs' costs in greater detail to support payment of the claimed damages and provide clarity of the NPFC's determinations. The NPFC organized the adjudication of costs by phase of the NRDA (preassessment vs assessment) and NRDA activity in the same manner in which the costs were claimed to the NPFC by the RPs.

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<sup>37</sup> Invoices 1, 3, and 5

<sup>38</sup> These costs were originally denied by the RPs for reimbursement in invoices 1, 2, 5, and 7. Based on Attachment 7 of Exhibit 29, DOI resubmitted these costs to support the advanced funding. However, no additional cost documentation was provided by the Trustees to support these costs. Additionally, the exact costs representing these amounts are not clearly identifiable within the invoice cost documentation.

<sup>39</sup> Specifically when looking at the reasonability of preassessment costs, which represented the large majority of Trustee costs claimed, the NPFC compared the amount claimed (\$4,300,062.20) to the amount originally obligated and determined reasonable by the NPFC for preassessment costs in the 2005 IAA (\$4,687,563). Similarly, the RPs based its reimbursements to the Trustees for preassessment work on the scopes of work negotiated and agreed to by the NPFC in the IAA.

<sup>40</sup> The NPFC denied funds for future costs to assess human use losses associated with the Plan because the scope of the work was not supported by previous assessment findings. However, human use activities previously conducted by the Trustees were extremely limited in scope and there was a reasonable belief that human use injuries likely occurred at the time those activities were conducted.

<sup>41</sup> The NPFC substantially relied on Trustee documentation from the Trustee Plan, the Administrative Record for the Trustee claim to the Fund (J05003-OI03), and correspondence between the RPs and the Trustees.

## 1. Adjudication Summary of RPs Incurred Costs for Preassessment

<b>Table 1 - RPs Incurred Costs for Preassessment</b>			
<b>Activity</b>	<b>Claimed Cost</b>	<b>Approved</b>	<b>Denied</b>
2005 Reference Beach Studies	\$113,448.04	\$100,629.52	\$12,818.52
Seabird Mortality Modeling	\$4,710.00	\$0	\$4,710.00
Cytochrome P450 Harlequin Ducks	\$4,867.50	\$0	\$4,867.50
2005 Anadromous Fish Survey	\$16,957.11	\$16,642.11	\$315.00
2005 Intertidal Survey	\$202,801.29	\$200,945.87	\$1,855.42
2005 Vegetation Survey	\$30,120.77	\$25,235.49	\$4,885.28
Assessment of Spill on Subsistence Foods	\$9,037.50	\$0	\$9,037.50
Preassessment Reports	\$33,655.00	\$33,655.00	\$0
Consideration of Restoration Alternatives	\$186,998.74	\$177,014.99	\$9,983.75
General NRDA	\$213,872.52	\$108,663.32	\$105,209.20
<b>TOTAL</b>	<b>\$816,468.47</b>	<b>\$662,786.30</b>	<b>\$153,682.17</b>

### 2005 Reference Beach Studies

The RPs claimed \$113,448.04 in costs related to the reference beach studies conducted by the Trustees in 2005 to support the assessment of injury to birds.<sup>42</sup> As described in the Trustee Plan<sup>43</sup>, the Trustees identified the Beached Bird Model (BBM) as their chosen method for quantifying the number of birds injured from direct oiling. The Trustees began developing and conducting beach studies soon after the spill to provide site specific data to use in the BBM. Specifically, these studies assessed: (1) how long carcasses remain on the beach after washing ashore, (2) how effective searchers are at finding carcasses on the beach, (3) the proportion of carcasses in the ocean that washed ashore, and (4) the number of carcasses that would normally be expected to wash ashore absent a spill.

The specific costs claimed by the RPs for costs related to the reference beach studies include the following:

- a. \$40,335.79 for Polaris personnel to travel and participate in the field studies; review, analyze, and discuss results of studies; and help prepare the report on the field studies. These costs were documented by invoices, proofs of payment, travel documentation, time records, and statements of work;
- b. \$57,810.19 for Marzet personnel to discuss and develop bird studies with the Trustees, travel and participate in the field studies; review, analyze and discuss results of the studies; and help prepare the report on the field studies. These costs were documented by invoices, proofs of payment, time records, travel documentation, and statements of work;
- c. \$11,994.56 to reimburse Gallagher Marine Systems for docking fees for a research vessel used in the studies, all-terrain vehicle rentals used during the studies, and one night of lodging for FWS field personnel at the Alaska Maritime Refuge. These costs were documented by invoices, proofs of payment, and additional supporting documentation identifying and describing claimed costs;

<sup>42</sup> Claim Section I.B.3.a

<sup>43</sup> Trustee Plan, pgs. 3-16 - 3-18

- d. \$3,307.50 for KYL attorneys to coordinate the reference studies with the Trustees and with the RPs' technical experts, including developing a letter agreement to conduct the studies cooperatively with the Trustees. These costs were documented by a description of work and time records.

The NPFC previously determined that the use of a BBM was appropriate for the incident and provided additional funding to the Trustees to finalize the BBM using the results of the 2005 Beach Reference Studies.<sup>44</sup> Furthermore, the Trustees specifically identified in the Trustee Plan<sup>45</sup> and Trustees claim documentation<sup>46</sup> that (1) the RPs and Trustees developed study plans together to conduct beach studies<sup>47</sup>, (2) the RPs provided funding and field staff to assist in data collection for the studies, (3) the RPs and Trustees had a signed agreement to conduct these studies cooperatively<sup>48</sup>, and (4) the RPs produced a report<sup>49</sup> of the studies documenting the results of their joint field activities that was shared with the Trustees for review and comment.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of bird injuries. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC found that there were \$12,700 in costs from Marzet that were not incurred on behalf of the Trustees or at their direction. These costs related to Marzet activities occurring from December 21, 2004 through January 8, 2005 that were conducted independently from the Trustees and prior to any cooperative relationship. Correspondence from the Department of Justice clearly established that there was no cooperative activities between the RPs and Trustees prior to January 9, 2005.<sup>50</sup> This time period was confirmed by the RPs' documentation<sup>51</sup> which states that "approval to work with FWS on various bird carcasses experiments" was not granted until January 9, 2005. Because these costs were incurred before the RPs' cooperative agreement, and the descriptions of work did not relate to Trustee NRDA activities, the NPFC finds that the costs were not incurred on behalf of the trustees.

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<sup>44</sup> NPFC Claim Determination (J05003-OI03), dated September 22, 2017

<sup>45</sup> Trustee Plan, pgs. 3-17 and 3-18

<sup>46</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016, pgs. 2-4

<sup>47</sup> The RPs did not participate in the study assessing the proportion of carcasses that washed ashore

<sup>48</sup> Letter from DOI to RPs, dated January 24, 2005

<sup>49</sup> Varoujean, D., and Polaris Applied Sciences. 2005. *M/V SELENDANG AYU* oil spill, December 8, 2004, Unalaska, Alaska; NRDA Pre-Assessment Studies; Summary of field surveys of bird carcass persistence, searcher efficiency, and background bird stranding rates at Chernofski, Unalaska Island and Nikolski, Umnak Island, Alaska. Final report.

<sup>50</sup> Email from Department of Justice to the RPs, dated January 8, 2005

<sup>51</sup> Marzet Invoice MZ2005-1

The NPFC was also unable to document \$103.40 of the \$2,400.85 in Polaris travel and administrative expenses related to Invoice #1388. The invoice documentation included a variety of travel and administrative costs related to both the response and multiple NRDA activities, but were not clearly allocated between the various projects. While the NPFC was able to identify airfare and associated indirects in the amount of \$2,297.45 for (b) (6), the remaining balance of claimed costs was undocumented. Similarly, \$15.12 in travel and administrative expenses from Polaris Invoice #1405<sup>52</sup> were undocumented.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$100,629.52 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### Seabird Mortality Modeling

The RPs claimed \$4,710 in costs related to the identification and quantification of bird carcasses collected from shorelines in the area of the spill to support the assessment of injury to birds.<sup>53</sup> As described above, the Trustees identified early in the NRDA that they planned to use a BBM to quantify injuries to birds. The Trustee Plan describes how the number and type of bird carcasses collected during the spill serve as foundational data from which the BBM can then extrapolate.<sup>54</sup> Using the results of visual surveys and reports from collected carcasses, the Trustees documented their efforts to analyze and measure the diversity and abundance of bird carcasses in a preassessment report<sup>55</sup> and in the Trustee Plan<sup>56</sup>.

The specific costs claimed by the RPs for costs related to the carcass identification study include the following:

- a. \$2,660 for Polaris personnel to coordinate participation in the carcass identification study with Trustees and obtain results of the study. Additionally, the RPs prepared a tarball map and estimated bird losses/demographics. These costs were documented by invoices, proofs of payment, time records, and statements of work; and
- b. \$2,050 for KYL attorneys to coordinate participation in the study and to obtain results from the survey. Additionally, there were costs related to internal discussions and external discussions with DOJ regarding the carcass identification and criminal investigation. These costs were documented by a description of work and time records.

Trustee documentation provides clear evidence that the activities conducted by the RPs were not conducted at the direction of the Trustees or on their behalf, nor were they necessary for the Trustees' NRDA.<sup>57</sup> While there is correspondence that indicates the RP and Trustees had some

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<sup>52</sup> These costs are the administrative costs related to travel in Invoice #1405 that were billed to "General NRDA".

<sup>53</sup> Claim Section I.B.3.g

<sup>54</sup> Trustee Plan, p. 3-16

<sup>55</sup> Byrd, G. and G. Daniel. 2008. Pre-assessment Data Report #9: Bird Species Found Oiled, December 2004 – January 2005, at Unalaska Island Following the *M/V Selendang Ayu* Oil Spill. U.S. Fish and Wildlife Service, Homer, AK.

<sup>56</sup> Trustee Plan, p. 3-19

<sup>57</sup> Polaris activities related to creating tarball maps and estimating bird losses/demographics are particularly outside the scope of the Trustees' bird carcass identification study as described in the Trustee Plan.

limited communication regarding the study, there is nothing in the Trustee Plan<sup>58</sup>, Trustee claim documentation<sup>59</sup>, or preassessment report<sup>60</sup> that has any reference to carcass identification activities conducted by the RPs on behalf of the Trustees' NRDA. Rather Trustee correspondence establishes that the Trustees intended to conduct the carcass identification study independent from the RPs.<sup>61</sup> Additional Trustee correspondence documents that the Trustees only provided the RPs with the results of their bird carcass abundance analysis after work had been completed<sup>62</sup>. Information on the location and date carcasses were found was provided to the RPs by the Trustees, at the RPs' request, after the Trustees had completed their analysis on this data as well.<sup>63</sup> Furthermore, given that these costs were incurred after the Trustees' study was completed and they did not support the Trustees' results, they also cannot be considered necessary to the Trustees' NRDA. Accordingly, claimed costs in the amount of \$4,710 cannot be considered reasonable trustee assessment costs and are therefore denied.

Additionally, KYL costs related to discussions with DOJ and a criminal investigation are denied as not being related to the Trustees' NRDA. These costs must be denied because the administrative record shows that they are litigation costs intended to mitigate or avoid the RPs' liability.

### Cytochrome P450 in Harlequin Ducks

The RPs claimed \$4,867.50 in costs related to the study of chronic exposure of oil on harlequin ducks to support the assessment of injury to birds.<sup>64</sup> As described in the Trustee Plan<sup>65</sup>, in 2005 and 2006<sup>66</sup> the Trustees captured harlequin ducks from three heavily oiled bays and one minimally oiled reference site. They took liver biopsies from the ducks, tested the tissue for cytochrome P450<sup>67</sup>, and compared the results between the oiled and unoiled areas to observe if there was a significant increase of P450 activity in liver tissue obtained from heavily oiled areas.

The specific costs claimed by the RPs for costs related to the P450 study include the following:

- a. \$2,430 for Polaris personnel to discuss the study with Trustees and do background research on P450. These costs were documented by invoices, proofs of payment, time records, and statements of work; and
- b. \$2,437.50 for KYL attorneys to communicate with the Trustees, RPs, and the RPs' contractors regarding funding and participating in the P450 study. These costs were documented by a description of work and time records.

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<sup>58</sup> Trustee Plan, pgs. 3-14 – 3-19

<sup>59</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016, pgs.2-4

<sup>60</sup> Byrd, G. and G. Daniel. 2008. Pre-assessment Data Report #9: Bird Species Found Oiled, December 2004 – January 2005, at Unalaska Island Following the *M/V Selendang Ayu* Oil Spill. U.S. Fish and Wildlife Service, Homer, AK.

<sup>61</sup> Letter from DOI to RPs, dated May 27, 2005

<sup>62</sup> Letter from DOI to RPs, dated March 24, 2006

<sup>63</sup> Email from DOI to RPs, dated June 29, 2007

<sup>64</sup> Claim Section I.B.3.g

<sup>65</sup> Trustee Plan, pgs. 3-20 and 3-21

<sup>66</sup> The Trustees later conducted another sampling session in 2008; the RPs' costs related to the 2008 study are claimed separately.

<sup>67</sup> P450 is a widely used indicator of PAH exposure in wildlife.

The RPs did not participate in the 2005 and 2006<sup>68</sup> field studies and refused to provide funding to the Trustees during the period of the study.<sup>69</sup> After completing the field studies and analysis of their findings, the Trustees shared a draft of the report<sup>70</sup> with the RPs for review. However, the RPs' analysis and comments only served to contradict and dismiss the Trustees' findings from the study.<sup>71</sup> The Trustee documentation provides clear evidence that the RPs' costs were not incurred on the Trustees behalf or at their direction and, most compelling, the claimed costs cannot be considered necessary for the Trustees' NRDA. Accordingly, claimed costs in the amount of \$4,867.50 cannot be considered reasonable trustee assessment costs and are therefore denied.

Additionally, KYL costs related to communications between KYL and The Swedish Club, the vessel's insurer, are denied. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for a report from RPs' counsel to the RPs' insurance company are a litigation cost that is not OSLTF compensable.

### 2005 Anadromous Fish Study

The RPs claimed \$16,957.11 in costs related to the anadromous fish study conducted in 2005 to support the assessment of injury to juvenile salmonids.<sup>72</sup> As described in the Trustee Plan<sup>73</sup>, based on the results of SCAT surveys conducted by the response, the Trustees undertook additional surveys of streams in areas where oil was documented to more closely identify and document the presence and impact of oil. In March through May of 2005, passive water samplers were deployed to determine if the levels of PAH in the water were sufficient to cause fish injuries. Later, in June of 2005, the Trustees conducted shoreline surveys to look for the presence of oil and fish. While conducting these surveys, they collected newly hatched fish with nets and tested their tissue for the presence of PAHs.

The specific costs claimed by the RPs for costs related to the anadromous fish study include the following:

- a. \$14,272.11 for Polaris personnel to travel and participate in the study. These costs were documented by invoices, proofs of payment, travel documentation, time records, and statements of work;
- b. \$2,685 for KYL attorneys to coordinate the study with the Trustees and with the RPs' contractor. These costs were documented by a description of work and time records

The NPFC previously determined that conducting the anadromous fish study was appropriate for the incident and provided additional funding to the Trustees to finalize the assessment of impacts to marine resources using the results of this study.<sup>74</sup> Furthermore, the Trustees identified in the

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<sup>68</sup> The RPs were not invited to participate in the 2005 survey, but declined the Trustees' offer to participate in the 2006 survey.

<sup>69</sup> Facsimile from KYL to DOJ, dated January 27, 2006

<sup>70</sup> Flint, P., J. Schamber, K. Trust, K. Miles, and B. Wilson. 2008. Pre-assessment Data Report #10: Chronic exposure of sea ducks to oil released by the *Selendang Ayu* at Unalaska Island. U.S. Geological Survey-Alaska Science Center, Anchorage, AK 99503.

<sup>71</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016, p. 4

<sup>72</sup> Claim Section I.B.3.b

<sup>73</sup> Trustee Plan, pgs. 3-9 and 3-10

<sup>74</sup> NPFC Claim Determination (J05003-OI03), dated September 22, 2017

Trustee Plan<sup>75</sup> and claim documentation<sup>76</sup> that the Trustees and RPs worked together to survey anadromous streams. Additionally, the Trustees confirmed via letter<sup>77</sup> an agreement with the RPs to both fund and participate in the study of impacts on juvenile salmon through the deployment of passive water samplers.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of marine resources. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC found that there were \$315 in KYL costs that were clearly not incurred on behalf of the Trustees or under their direction<sup>78</sup>. These costs related to subsistence use, which as explained in more detail below, is not a part of NRDA.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$16,642.11 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### 2005 Intertidal Studies

The RPs claimed \$202,801.29 in costs related to the studies of shoreline, intertidal, and subtidal habitats conducted in 2005 to support the assessment of injury to marine habitat and wildlife. As described in the Trustee Plan<sup>79</sup>, the Trustees conducted visual surveys in 2005 to observe impacts of oil on various types of flora and fauna in intertidal rocky shore and beach habitats. Additionally, the Trustees collected mussels near the intertidal areas and analyzed tissue from the mussels for PAH concentrations<sup>80</sup>. Lastly, the Trustees conducted diving surveys of subtidal habitats in areas where surface oil was identified to observe the presence and impacts of oil on the seafloor.<sup>81</sup>

The specific costs claimed by the RPs for costs related to the intertidal studies include the following:

- a. \$81,862.54 to reimburse Gallagher Marine Systems for the cost of chartering the Ocean Olympic, which served as the host vessel from which the surveys were conducted. These costs were documented by invoices, proofs of payment, charter

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<sup>75</sup> Trustee Plan, p. 3-5

<sup>76</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016, page 1

<sup>77</sup> Letter from NOAA to RPs, dated March 23, 2005

<sup>78</sup> Time entry for (b) (6) on March 11, 2005

<sup>79</sup> Trustee Plan, pgs. 3-5 – 3-7

<sup>80</sup> Trustee Plan, p. 3-8

<sup>81</sup> Trustee Plan, p. 3-10



- party, and additional supporting documentation identifying and describing claimed costs;
- b. \$27,186.06 for Pentec Environmental personnel to travel and participate in the surveys. These costs were documented by invoices, proofs of payment, travel documentation, and statements of work;
  - c. \$92,177.69 for Polaris personnel to coordinate and plan the study with the Trustees, prepare and stock the vessel, travel and participate in the surveys, and process data collected from the surveys. These costs were documented by invoices, proofs of payment, travel documentation, time records, and statements of work; and
  - d. \$1,575 for KYL attorneys to negotiate the charter party for the Ocean Olympic and coordinate the surveys with the Trustees and the RPs' contractors. These costs were documented by a description of work and time records.

The NPFC previously determined that conducting the intertidal surveys were appropriate for the incident and provided additional funding to the Trustees to finalize the assessment of impacts to marine resources using the results of this study.<sup>82</sup> Furthermore, the Trustees identified in the Trustee Plan<sup>83</sup>, Trustee claim documentation<sup>84</sup>, and preassessment report<sup>85</sup> that the RPs worked together with the Trustees to cooperatively conduct the surveys and that the RPs paid for the charter vessel that supported the survey teams.

NPFC finds that based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of marine resources. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC was unable to document \$1,855.42 of the \$7,361.62 in Polaris travel and administrative expenses related to Invoice #1470. The invoice documentation included a variety of travel and administrative costs related to both the response and multiple NRDA activities, but were not clearly allocated between the various projects. Because the RPs failed to properly document these costs, they must be denied.

The NPFC determines that, based on (1) correspondence between the Trustees and the RP, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$200,945.87

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<sup>82</sup> NPFC Claim Determination (J05003-OI03), dated September 22, 2017

<sup>83</sup> Trustee Plan, p. 3-5

<sup>84</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016, p. 1

<sup>85</sup> Cubit, J., L. DiPinto, A. Fukuyama, D. Hahn, J. Hudson, N. Iadanza, J. Krukoff, C. Kurle, S. Lindstrom, D. Savarese, L. Syverson, and I. Zelo. 2008. Pre-assessment Data Report #2: *M/V Selendang Ayu* Oil Spill Surveys of Intertidal, Subtidal, and Anadromous Stream Habitats. National Oceanic and Atmospheric Association, Anchorage, AK.

in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as past reasonable trustee assessment costs.

### 2005 Vegetation Survey

The RPs claimed \$30,120.77 in costs related to the study of vegetated shorelines to support the assessment of injury to marine habitats and wildlife that use these habitats for food and shelter.<sup>86</sup> As described in the Plan<sup>87</sup>, the Trustees conducted a nearshore vegetation survey in July 2005 in oiled areas and unoiled control sites to look for oil impacts and compare plant species abundance and diversity.

The specific costs claimed by the RPs for costs related to the intertidal studies include the following:

- a. \$28,995.77 for Polaris personnel to coordinate and plan the study with the Trustees, travel and participate in the surveys, process data collected from the surveys, and write a report of the study findings. Additional costs were related to an issue regarding weed seeds and soybeans. These costs were documented by invoices, proofs of payment, travel documentation, time records, and statements of work; and
- b. \$1,125 for KYL attorneys to coordinate the surveys with the Trustees and the RPs' contractors. Some costs also related to the weed seed issue identified above. These costs were documented by a description of work and time records.

The NPFC previously determined that conducting the vegetation survey was appropriate for the incident and provided additional funding to the Trustees to finalize the assessment of impacts to marine resources using the results of this study.<sup>88</sup> Furthermore, the Trustees identified in the Trustee Plan<sup>89</sup> and Trustee claim documentation<sup>90</sup> that the RPs worked together with the Trustees to cooperatively conduct the surveys and confirmed via letter<sup>91</sup> an agreement with the RPs to both fund and participate in the study. The Trustees also published a preassessment report<sup>92</sup> discussing the results of these studies that was jointly authored by the RPs.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of injuries to marine resources. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

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<sup>86</sup> Claim Section I.B.3.d

<sup>87</sup> Trustee Plan, pgs. 3-7 and 3-8

<sup>88</sup> NPFC Claim Determination (J05003-OI03), dated September 22, 2017

<sup>89</sup> Trustee Plan, p. 3-7

<sup>90</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016 p. 5

<sup>91</sup> Letter from DOI to RPs, dated July 13, 2005

<sup>92</sup> Rocque, D. and G. Erickson. 2008. Pre-assessment Data Report #1: Assessment of Potential Injuries to Nearshore Vegetation Communities on Unalaska Island following the *Selendang Ayu* Oil Spill. U.S. Fish and Wildlife Service, Anchorage, AK.

With respect to the specific costs claimed by the RPs for these activities, the NPFC was unable to document \$4,097.78 of the \$7,909.52 in Polaris travel and administrative expenses related to Invoice #1483. The invoice documentation included a variety of travel and administrative costs related to both the response and multiple NRDA activities, but the costs were not clearly allocated among the various projects. Because the RPs failed to properly document these costs, they must be denied.

Additionally, there were \$787.50 in costs from both KYL (\$652.50) and Polaris (\$135) regarding soybeans and a weed seed project. These costs were incurred several months after the RPs' work on the study report had concluded and there was no connection between this work and the Trustees' vegetation study. Additional documentation indicates that the RPs did not consider costs related to this project as NRDA<sup>93</sup> and the Trustees themselves did not bill costs for this project as NRDA<sup>94</sup>. Accordingly, the NPFC denied these costs as they were clearly not in support of the Trustees' vegetation study or the Trustees' NRDA in general and are therefore not compensable as trustee assessment costs.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$25,235.49 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

#### Assessment of Impact of Spill on Subsistence Foods

The RPs claimed \$9,037.50 in costs related to the study of the effects of the spill on the ability of residents of Unalaska to hunt and fish for subsistence foods.<sup>95</sup>

The specific costs claimed by the RPs for costs related to subsistence use include the following:

- a. \$8,407.50 for Polaris personnel to participate in Subsistence Fishery Advisory Group activities, support subsistence fishery sampling efforts, and work related to health evaluation and seafood health advisories. These costs were documented by invoices, proofs of payment, time records, and statements of work; and
- b. \$630 for KYL attorneys to coordinate and support subsistence fishery sampling efforts. These costs were documented by a description of work and time records.

Trustee documentation provides clear evidence that the activities conducted by the RPs were not conducted at the direction of the Trustees or on their behalf, nor were they necessary for the Trustees' NRDA. Lost subsistence use is not a part of NRDA<sup>96</sup>. Further, there is nothing in the Plan<sup>97</sup>, Trustee claim documentation<sup>98</sup>, or preassessment report<sup>99</sup> that has any reference to human use assessment activities conducted by the RP on behalf of the Trustees' NRDA. The

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<sup>93</sup> Email from RPs to FWS, dated May 10, 2006

<sup>94</sup> Email from FWS to RPs, dated May 15, 2006

<sup>95</sup> Claim Section I.B.3.e

<sup>96</sup> Lost subsistence use is a separate claim under 33 USC §2702(b)(2)(C).

<sup>97</sup> Trustee Plan, pgs. 3-23 and 3-24

<sup>98</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016

<sup>99</sup> Kohout, J. and N. Meade. 2008. Pre-assessment Data Report #12: Potential Human Use Losses Associated with the *Selendang Ayu* Oil Spill.

activities identified by the RP, such as participating in the Subsistence Fishery Advisory Group, conducting sampling to determine if fish could be safely eaten, and issuing safety advisories to the public, were conducted in support of the response and public health rather than to support the NRDA. Correspondence from Polaris<sup>100</sup>, the Plan<sup>101</sup>, and meetings notes<sup>102</sup> from the Subsistence Advisory Group confirm that this workgroup and associated seafood sampling and seafood advisories were conducted to support public health at the direction of the Unified Command.

While personnel from FWS, NOAA, and the State of Alaska were involved in the Subsistence Fishery Advisory Group, this participation was not in support of the NRDA, rather they were operating pursuant to their participation in the response. Even though the Trustees later reviewed the results of the work conducted by the Subsistence Fishery Advisory Group during their assessment of human use losses, the instigating purpose<sup>103</sup> for the work was to support the response. Accordingly, claimed costs in the amount of \$9,037.50 cannot be considered reasonable trustee assessment costs and are therefore denied.

### Preassessment Reports

The RPs claimed \$33,655 in costs related to reviewing and providing comments on the Trustees' preassessment reports<sup>104</sup> during the Preassessment Phase of the NRDA. As identified in the Trustee Plan, the Trustees summarized the results of all preassessment activities in twelve reports that were organized by study and posted on the FWS website.<sup>105</sup> The Trustees drafted these reports as part of the assessment work described in each individual resource category of the Trustee Plan. Ultimately, the preassessment reports served to not only document the various activities conducted by the Trustees and RPs, but established a basis for the Trustees' continued efforts to conduct additional assessment and restoration planning activities.

The Claim includes \$33,655 in costs associated with reviewing pre-assessment reports prior to initiation of the Restoration Planning phase and \$121,868.75<sup>106</sup> during the early Restoration Planning phase following the execution of the cooperative agreement.

The specific costs claimed by the RPs for costs related to reviewing preassessment data reports during the preassessment phase include the following:

- a. \$28,780 for Polaris personnel to review, analyze, and conduct research regarding the reports. These costs were documented by invoices, proofs of payment, time records, and statements of work; and
- b. \$4,875 for KYL attorneys to review the reports and coordinate activities with the RP contractors. These costs were documented by a description of work and time records.

Throughout the Trustee Plan and additional Trustee claim documentation<sup>107</sup>, the Trustees documented the significant participation of the RPs in a large majority of activities that were discussed in the preassessment reports, which provided the RPs direct and in-depth knowledge of

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<sup>100</sup> Email from Polaris to Subsistence Fishery Advisory Group, dated February 17, 2006

<sup>101</sup> Trustee Plan, p. 3-23

<sup>102</sup> *Selendang Ayu* Subsistence Fishery Core Group Meeting Minutes, August 9, 2005

<sup>103</sup> Similar to Trustees reviewing and relying on SCAT data gathered during a response

<sup>104</sup> The Preassessment Reports were not finalized prior to the Trustees issuing a Notice of Intent to Conduct Restoration Planning and beginning formal restoration planning efforts.

<sup>105</sup> Trustee Plan, p. 3-2

<sup>106</sup> Cost claimed in Claim Section II.A.2.a and adjudicated later in determination

<sup>107</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016

the assessment studies undertaken and the resulting analyses. The significant level of the RPs' participation in the preassessment was best reflected by the RPs co-authoring the preassessment report for the 2005 vegetation study<sup>108</sup>. Additional correspondence establishes that the Trustees invited the RPs to participate in technical group meetings that were organized, in part, to finalize the preassessment reports.<sup>109</sup> Agendas from the technical meetings confirm that the preassessment reports were part of joint discussions between the Trustees and RPs.<sup>110</sup> Subsequent Trustee correspondence documents that the Trustees requested that the RPs complete review of the preassessment reports by the end of August 2007.<sup>111</sup>

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the overall NRDA and fulfill their administrative obligations of documenting the results of their preassessment efforts. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, \$33,655 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

#### Consideration of Potential Restoration Alternatives

The RPs claimed \$186,998.74 in costs related to the research, analysis, and discussion of potential restoration alternatives during the preassessment phase of the NRDA.<sup>112</sup> As identified in the Trustee Plan, early after the oil spill began, the Trustees and RPs began to develop potential restoration alternatives.<sup>113</sup> Some of the projects identified and evaluated during the preassessment phase of the NRDA included: removal of predator species, habitat protection through easement or acquisition, removal of marine debris, improving salmon spawning habitat, and funding the construction of a waste oil facility.<sup>114</sup>

The specific costs claimed by the RPs for costs related to supporting restoration planning during the preassessment phase include the following:

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<sup>108</sup> Rocque, D. and G. Erickson. 2008. Pre-assessment Data Report #1: Assessment of Potential Injuries to Nearshore Vegetation Communities on Unalaska Island following the *Selendang Ayu* Oil Spill. U.S. Fish and Wildlife Service, Anchorage, AK.

<sup>109</sup> Email from DOI to Polaris, dated June 15, 2007

<sup>110</sup> *Selendang Ayu* – Nearshore Resources Agenda for July 9, 2007; *Selendang Ayu* – Seabird Mortality Agenda for July 10, 2007

<sup>111</sup> Email from DOI to RPs, dated September 5, 2007

<sup>112</sup> Claim Section II.A.2.f

<sup>113</sup> Trustee Plan, p. 4-3

<sup>114</sup> Restoration Work Group Meeting Agenda for April 4, 2006

- a. \$164,752.49 for Polaris personnel to identify and conduct background research on restoration alternatives, evaluate restoration alternatives, discuss restoration alternatives with Trustees, travel and attend restoration meetings with Trustees, and identify contractor support to provide expert review of alternatives. These costs were documented by invoices, proofs of payment, travel documentation, time records, and statements of work; and
- b. \$22,246.25 for KYL attorneys to evaluate restoration alternatives and discuss restoration alternatives with Trustees and Polaris personnel. These costs were documented by a description of work and time records.

The NPFC previously determined that efforts to conduct restoration planning were appropriate for the incident and provided additional funding to the Trustees to complete the restoration planning activities necessary to develop alternatives that will adequately compensate the public for all damages.<sup>115</sup> Trustee correspondence documents that the Trustees and RPs had already begun meeting together and evaluating restoration alternatives as early as June of 2005.<sup>116</sup> Further correspondence indicates that the Trustees encouraged the RPs to identify their own restoration alternatives in November of 2006.<sup>117</sup> The Trustees also requested meetings with the RPs to discuss restoration alternatives in both February<sup>118</sup> and June of 2006<sup>119</sup>. Additional documentation evidences that meetings between the Trustees and the RPs to discuss restoration alternatives were held on April 4, 2006<sup>120</sup>, September 5-9, 2006<sup>121</sup>, July 11, 2006<sup>122</sup>, and May 4, 2007<sup>123</sup>.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the development of appropriate restoration alternatives. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC found that there were \$9,826.25<sup>124</sup> in KYL costs that were clearly not incurred on behalf of the Trustees or under their direction. These costs related to communications between KYL and The Swedish Club, the vessel's insurer. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on

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<sup>115</sup> NPFC Claim Determination (J05003-OI03), dated September 22, 2017

<sup>116</sup> Email from NOAA to Polaris, dated July 1, 2005

<sup>117</sup> Email from NOAA to Polaris, dated November 22, 2006

<sup>118</sup> Email from DOI to Polaris, dated February 24, 2006

<sup>119</sup> Email from DOI to Polaris, dated June 8, 2006

<sup>120</sup> Restoration Work Group Meeting Agenda for April 4, 2006

<sup>121</sup> *Selendang Ayu* Oil Spill Natural Resource Damage Assessment Restoration Planning Trip Report: Unalaska, AK September 5-9, 2006 (October 30, 2006 draft)

<sup>122</sup> Restoration Work Group Meeting Minutes for 11 July 2006

<sup>123</sup> *Selendang Ayu* Cooperative Assessment & Restoration Planning Meeting Agenda for May 24, 2007

<sup>124</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

Additionally, the NPFC found that there were \$157.50 in KYL costs that were clearly not incurred on behalf of the Trustees or under their direction<sup>125</sup>. These costs related to subsistence use, which as explained above, is not a part of NRDA.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$177,014.99 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### General NRDA

The RPs claimed \$213,872.52 in general NRDA activities conducted during the preassessment phase, including participating in meetings with the NRDA Trustees, attending public meetings related to the NRDA, corresponding with the Trustees regarding the NRDA, and reviewing Trustees NRDA costs for reimbursement.<sup>126</sup> As identified in the Trustee Plan, the Trustees claimed costs for similar activities under Trustee Coordination and Public Outreach, which include, but are not limited to<sup>127</sup>, funding to (1) participate in meetings, (2) review Trustee produced documents, and (3) engage the public in the NRDA.<sup>128</sup>

The specific costs claimed by the RPs for General NRDA during the preassessment phase include the following:

- a. \$114,386.31 for Polaris personnel to travel to attend meetings with the Trustees, conduct background research on impacted resources, communicate with the Trustees regarding the NRDA, and review and reimburse Trustee NRDA costs. These costs were documented by invoices, proofs of payment, travel documentation, and statements of work;
- b. \$18,500 for The O'Brien's Group (TOG) personnel to review and approve Trustee NRDA invoices for reimbursement. These costs were documented by invoices, proofs of payment, and statements of work;
- c. \$6,548.71 for (b) (6) (The Swedish Club) to travel for a meeting with the Trustees to discuss the NRDA; These costs were documented by travel vouchers and proofs of payment; and
- d. \$74,437.50 for KYL attorneys to draft joint funding and participation agreements with Trustees, discuss NRDA with Trustees, coordinate reimbursements with Trustees, and discuss and coordinate NRDA activities with RPs contractors. These costs were documented by a description of work and time records.

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<sup>125</sup> Time entry for (b) (6) on August 9, 2005

<sup>126</sup> Claim Section I.B.3.j

<sup>127</sup> The Trustees include a caveat in their Plan that the specific Trustee Coordination activities listed are representative of the type of costs incurred, but that anticipated costs are not limited to those activities specifically identified

<sup>128</sup> Trustee Plan, p. 5-2

As defined by 15 C.F.R. 990.30, reasonable assessment costs include “administrative costs, legal costs, and other costs necessary to carry out this part... [And] costs associated with public participation”. Similar to the study specific costs previously discussed in the determination, an RPs’ general NRDA costs may be considered trustee costs if such costs were necessary to support the trustee’s NRDA and were associated with costs incurred at the trustees’ direction.

Throughout the Plan and additional claim documentation<sup>129</sup>, the Trustees documented the significant participation of the RPs in the preassessment studies, including providing personnel to support field activities; funding the Trustees’ costs of the NRDA; directly paying for vessels and other field support costs of the preassessment studies; attending meetings with the Trustees to discuss the NRDA; reviewing and analyzing study results and drafting and/or commenting on reports documenting the preassessment; and identifying and developing restoration alternatives to restore damages from the oil spill.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, some of the RP-incurred General NRDA costs were necessary to support the Trustee NRDA. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs’ activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs’ general participation in the Trustees’ NRDA and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees’ direction.

With respect to the specific costs claimed by the RPs for these activities, Polaris served as the RPs’ primary NRDA consultant, helping plan, and directly participating in, much of the preassessment work conducted by the Trustees. Polaris also coordinated extensively with the Trustees and RPs to provide funding and other resources necessary for the Trustees’ NRDA. The NPFC confirmed that claimed travel costs related to meetings and/or preassessment studies that were initiated by the Trustees.

Despite the above, NPFC determined that \$56,294.24 of Polaris’ claimed costs of \$114,386.31 were clearly not incurred in support of the Trustees’ NRDA, on the Trustees’ behalf, or at their direction. First, there were \$46,291.40<sup>130</sup> in costs that were incurred prior to cooperative NRDA activities taking place between the RPs and the Trustees. As discussed above in the 2005 Reference Beach Studies, while there were some communications exchanged prior to January 9, 2005<sup>131</sup>, the Trustees had already begun conducting studies independently from the RPs and, likewise, the RPs were incurring costs conducting activities independently from the Trustees. Given that there were no cooperative NRDA activities taking place during this period, any Polaris costs during this period were not incurred at the Trustees’ request or on their behalf.

Additionally, there were \$5,951.38 in travel and administrative expenses that the NPFC was unable to identify and document because costs were not clearly allocated between the response

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<sup>129</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016

<sup>130</sup> Invoice 1375

<sup>131</sup> The date where Trustees agreed to being cooperative for the Beach Reference Studies



and the various preassessment activities.<sup>132</sup> Lastly, Polaris claimed certain costs in the amount of \$5,611.46 that, based on Trustee documentation in the record, were clearly not in support of the Trustees NRDA including costs for: meetings with the insurer<sup>133</sup>; travel and labor related to subsistence use work<sup>134</sup>; work related to “calculating for area of oil on landowners property” and “review landowner SUTZ segments”<sup>135</sup>; and travel for an “OPS” meeting with a re-insurer<sup>136</sup>.

Claimed costs of \$6,548.71 for (b) (6) representative of The Swedish Club are denied. To the extent that the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs’ behalf rather than directly in support of the Trustees’ NRDA. These costs are not NRDA costs nor costs incurred for activities requested by the Trustees.

KYL served as the primary representative of the RPs for the *Selendang Ayu* NRDA. They communicated and coordinated with the Trustees, assisted in acquiring and coordinating resources for the Trustees’ NRDA activities, and coordinated with the RPs’ contractors that provided technical support to the Trustees. With respect to the claimed costs of \$74,437.50, the NPFC determined that there were \$40,806.25 of claimed KYL costs that were clearly not incurred in support of the Trustees’ NRDA, nor incurred on the Trustees’ behalf or at their direction.

First, there were \$10,302.50<sup>137</sup> in costs related to an independent audit of the indirect rate charged by NOAA. While the NPFC understands that some level of cost documentation review was necessary to issue reimbursement payments, the NOAA indirect rates charged were published in the Federal Register<sup>138</sup>. The Federal Register affirmed that the rates were developed in compliance with federal accounting standards, provided the names of two public accounting firms that had evaluated and approved NOAA’s indirect rates, and directed the public how to access the reports developed by the accounting firms explaining how they validated the rates. To the extent that KYL chose to conduct an independent audit of the indirect rate, including engaging Price Waterhouse Cooper<sup>139</sup> to provide additional professional accounting review, such costs were clearly not incurred at the Trustee’s direction or on their behalf and were beyond the scope of the *Selendang* NRDA.

Secondly, there were \$4,795<sup>140</sup> in costs related to reviewing and responding to bills issued to the RPs by the NPFC. When the RPs refused to pay certain NRDA costs, the Trustees sought and received payment from the NPFC for such costs. After paying these costs to the Trustees, the NPFC billed the RPs for these costs. The RPs costs related to these recovery efforts were clearly not incurred at the Trustees’ direction or on their behalf. While the subject costs related to the NRDA, the actual costs claimed by the RP are related to an NPFC cost recovery action, rather than in support of the Trustees’ NRDA.

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<sup>132</sup> Invoice 1405 – \$151.20; Invoice 1417 - \$905.67; Invoice 1442 - \$672.72; Invoice 1505 - \$2,386.12; Invoice 1546 - \$1,835.67

<sup>133</sup> Invoice 1442 - \$1480; Invoice 1732 - \$780; Invoice 1775 - \$390; Invoice 1843 - \$390

<sup>134</sup> Invoice 1505 - \$1100.79; Invoice 1843 - \$292.50

<sup>135</sup> Invoice 1598 - \$787.50

<sup>136</sup> Invoice 1792 - \$390.67

<sup>137</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

<sup>138</sup> “Notice of Indirect Cost Rates for the Damage Assessment and Restoration Program for Fiscal Year 2002”. Federal Register 68:193 (October 6, 2003) pgs. 57672-57673.

<sup>139</sup> December 27, 2006 time entry for (b) (6)

<sup>140</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

Next, the RPs claimed \$4,331.25<sup>141</sup> in KYL costs that were incurred prior to the January 9, 2005 date discussed above, which is the earliest possible date that cooperative NRDA efforts began between the Trustees and the RPs. Additionally, there were \$15,911.25 in costs related to communications with The Swedish Club. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

Lastly, there were \$5,466.25 in assorted costs that were clearly not incurred at the Trustees' direction and/or on their behalf. These costs related to response issues, case settlement, subsistence, and other non-NRDA activities that were clearly not incurred at the Trustees' direction nor necessary for the NRDA and cannot be considered reasonable trustee assessment costs<sup>142</sup>.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$108,663.32 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as past reasonable trustee assessment costs.

## 2. Adjudication Summary of RPs Incurred Costs for Restoration Planning

<b>Activity</b>	<b>Claimed Cost</b>	<b>Approved</b>	<b>Denied</b>
Review of Preassessment Reports	\$121,868.75	\$121,463.75	\$405.00
Lingering Oil	\$695,213.73	\$567,640.23	\$127,573.50
Harlequin P450	\$312,399.63	\$262,032.10	\$50,367.53
Rat Eradication	\$76,663.00	\$0	\$76,663.00
Oil Abatement	\$217,378.08	\$216,298.08	\$1,080.00
Kasatochi Island Restoration	\$1,117.50	\$0	\$1,117.50
Auklet Habitat Manipulation/Vegetation Removal	\$3,088,898.39	\$0	\$3,088,898.39
Seabird Mortality Estimates and 2010 Beach reference Study	\$626,755.72	\$94,358.83	\$532,396.89
General NRDA	\$307,422.02	\$179,897.59	\$127,524.43
<b>TOTAL</b>	<b>\$5,447,716.82</b>	<b>\$1,441,690.58</b>	<b>\$4,006,026.24</b>

### Review of Preassessment Data Reports

The RPs claimed \$121,868.75 in costs related to reviewing and providing comments on the Trustees' preassessment reports during the Restoration Planning phase – this is a continuation of the effort begun during the last month of the Preassessment Phase.<sup>143</sup> As identified in the Plan,

<sup>141</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

<sup>142</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

<sup>143</sup> Claim Section II.A.2

the Trustees summarized the results of all preassessment activities in twelve reports that were organized by study and posted on the FWS website.<sup>144</sup> The Trustees drafted these reports as part of the work described in each individual resource category of the Plan. Ultimately, the preassessment reports served to not only document the various activities conducted by the Trustees and RP, but established a basis for the Trustees' continued efforts to conduct additional assessment and restoration planning activities.

The specific costs claimed by the RPs for costs related to reviewing preassessment data reports during the early Restoration Planning phase include the following:

- c. \$94,192.50 for Polaris personnel to review, analyze, and conduct research regarding these reports. These costs were documented by invoices, time records, proofs of payment, and statements of work;
- d. \$5,200.00 for Marzet personnel, specifically [REDACTED] to review and comment on preassessment data reports of studies relevant to seabird mortality issues. These costs were documented by invoices, proofs of payment, and statements of work;
- e. \$3,420 for Terrastat personnel to review the statistical methods and results presented in various preassessment data reports, prepare summary findings, and review other comments. The costs were documented by invoices, proofs of payment, and statements of work;
- f. \$15,400 for Neff & Associates personnel to review various preassessment data reports, prepare comments, and prepare heavy fuel oil toxicity report. These costs were documented by invoices, proofs of payment, and statements of work; and
- g. \$3,656.25 for KYL attorneys to review the reports and coordinate activities with the Trustees and RP contractors. These costs were documented by a description of work and time records.

Throughout the Plan and additional claim documentation<sup>145</sup>, the Trustees documented the significant participation of the RPs in a large majority of activities that were discussed in the preassessment reports, which provided the RPs direct and in-depth knowledge of the assessment studies undertaken and the resulting analyses. The significant level of the RPs participation in the preassessment was reflected by the RPs co-authoring the preassessment report for the 2005 vegetation study<sup>146</sup>. Additional correspondence establishes that the Trustees invited the RPs to participate in technical group meetings which were organized, in part, to finalize the preassessment reports.<sup>147</sup> Agendas from the technical meetings confirm that the preassessment reports were part of joint discussions between the Trustees and RPs.<sup>148</sup> Subsequent Trustee correspondence documents that the Trustees requested that the RPs complete review of the preassessment reports by the end of August 2007.<sup>149</sup>

The NPFC finds that based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the overall NRDA and fulfill their administrative obligations of

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<sup>144</sup> Trustee Plan, p. 3-2

<sup>145</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016

<sup>146</sup> Rocque, D. and G. Erickson. 2008. Pre-assessment Data Report #1: Assessment of Potential Injuries to Nearshore Vegetation Communities on Unalaska Island following the *Selendang Ayu* Oil Spill. U.S. Fish and Wildlife Service, Anchorage, AK.

<sup>147</sup> Email from DOI to Polaris, dated June 15, 2007

<sup>148</sup> *Selendang Ayu* – Nearshore Resources Agenda for July 9, 2007; *Selendang Ayu* – Seabird Mortality Agenda for July 10, 2007

<sup>149</sup> Email from DOI to RPs, dated September 5, 2007

documenting the results of their preassessment efforts. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC found that there were \$405.00 in costs from Polaris toward the assessment of subsistence use losses, an activity that is not part of NRDA <sup>150</sup>.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$121,463.75 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### Lingering Oil Study

The RPs claimed \$695,213.73 in costs to conduct a lingering oil study to support the assessment of injury to marine resources.<sup>151</sup> In 2008, the Trustees proposed conducting cooperative follow-up studies to determine the extent that oil remained within the spill area and, if it remained, whether it was in a location and form that was continuing to cause injuries to natural resources.<sup>152</sup> In response to the Trustees request, the RPs agreed to cooperatively participate in and fund the Trustees' studies. The Trustees' produced a detailed study plan with input from the RP and relied on direct coordination and funding of the vessel charters from the RPs for the study. The RPs provided personnel to participate in the study, but the remainder of the study components (sample analysis and report generation) were largely conducted by the Trustees and Trustees' contractors.<sup>153</sup>

The specific costs claimed by the RPs for costs related to the lingering oil study include the following:

- a. \$207,201.06 for Polaris personnel to help develop the study, coordinate and participate in the field activities, and coordinate development of a report upon completion of the study. These costs were documented by invoices, time records, travel vouchers, receipts, statements of work and proofs of payment;
- b. \$11,050.00 for Exponent personnel to help develop the study design. Costs were documented by invoices, descriptions of work, and proofs of payment;
- c. \$86,983.50 for NewFields Laboratory to provide analysis of NOAAs data and prepare an independent report. These costs were documented by invoices, descriptions of work, and proofs of payment;

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<sup>150</sup> Exhibit 20. Polaris Invoice 2115. (b) (6) description of work on 6/7/2007 includes "create PAH subsistence results files" – subsistence loss is not a component of natural resource damages.

<sup>151</sup> Claim Section II.A.2.c

<sup>152</sup> Trustee Plan, pp. 3.11-3.12

<sup>153</sup> *M/V Selendang Ayu* 2008 Study Plan for Assessment of Remaining Oil, 21 pages.

- d. \$375,463.54 for Gallagher Marine Services to coordinate and provide vessel charter services and mission support. These costs were documented by invoices, personnel time records, descriptions of work, receipts, contracts/charters, and proofs of payment; and
- e. \$14,515.63 for KYL attorneys to coordinate the RPs' activities with Trustees and contractors and arrange charter of the vessel and land access. These costs were documented by descriptions of work and time records.

The NPFC previously determined that conducting the lingering oil survey was appropriate for the incident and provided additional funding to the Trustees to finalize the assessment of impacts to marine resources using the results of this study.<sup>154</sup> The RPs' cooperative efforts for the study are documented in the Trustees' study plan<sup>155</sup>, Trustee Assessment Plan<sup>156</sup>, and Trustee claim documentation<sup>157</sup>.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of marine injuries. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC determined that certain costs claimed by the RPs were duplicative of Trustee activities and were neither requested nor directed by the Trustees. Specifically, the NPFC found costs incurred by NewFields Laboratory<sup>158</sup> (totaling \$86,983.50 for independent data analysis and generation of an independent report on behalf of the RP), and those costs incurred by Polaris<sup>159</sup> (totaling \$34,565.00) and KYL<sup>160</sup> (\$1,393.75) for activities conducted after finalization of the Trustee's report in early 2010<sup>161</sup> did not support, and were not necessary for, the Trustees' NRDA.<sup>162</sup>

Additionally, there were \$4,631.25<sup>163</sup> in costs related to communications between KYL and The Swedish Club, the vessel's insurer. To the extent the RPs engaged and relied upon the funding

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<sup>154</sup> NPFC Claim Determination (J05003-OI03), dated September 22, 2017

<sup>155</sup> *M/V Selendang Ayu* 2008 Study Plan for Assessment of Remaining Oil, 21 pages.

<sup>156</sup> Trustee Plan, pp. 3-11 - 3-12

<sup>157</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016 p. 1

<sup>158</sup> Claim, Exhibits 31 and 32. Trustees' study plan and report indicate data analysis and report generation would be completed by Trustee contractors. Newfield's data analysis and independent report are duplicative, were not requested or directed by the Trustees, and did not contribute to the Trustees' assessment.

<sup>159</sup> Claim, Exhibits 20-22 (invoice 2722 onward) and 31

<sup>160</sup> Claim, Exhibit 36

<sup>161</sup> Assessment of Remaining Oil from the *M/V Selendang Ayu* Spill as of 2008. March 2010. *M/V Selendang Ayu* NRDA Administrative Record IV.B.1.h

<sup>162</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.A, pp 1-2 references the duplicative analysis and reports generated by the RP beyond what was described in the Trustees' study plan

<sup>163</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

The remaining \$567,640.23 in costs claimed for Exponent,<sup>164</sup> Polaris,<sup>165</sup> KYL,<sup>166</sup> and GMS<sup>167</sup> are associated with vessel charter and trip coordination, sampling support,<sup>168</sup> study design and review of the draft report. These costs were determined to be related to NRDA activities that were necessary to support the Trustee-led Lingering Oil Study.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, \$567,640.23 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### Harlequin P450 Study

The RPs claimed \$312,399.63 in costs related to the 2008 study of chronic exposure of oil on harlequin ducks to support the assessment of injury to birds.<sup>169</sup> The 2008 study was a continuation of assessment work conducted by both the Trustees and the RPs in 2005 and 2006<sup>170</sup> to assess impacts to seabirds from chronic exposure to residual oil. The Trustees proposed<sup>171</sup>, and the RPs agreed to fund, another season of sampling that was conducted in 2008. During the 2008 survey, they captured live ducks, took biopsies from their livers, and then conducted chemical analyses to study PAH exposure.<sup>172</sup>

The specific costs claimed by the RPs for costs related to the harlequin P450 study include the following:

- a. \$60,844.22 for Polaris for personnel and subcontractor support to participate in field activities/sample collection, study design, and analysis of results. These costs were documented by invoices, time record, travel vouchers, receipts, statement of work, and proofs of payment;
- b. \$16,930.00 for NewFields Laboratory to conduct data analysis and produce an independent report. These costs were documented by invoices, descriptions of work, and proofs of payment;
- c. \$857.48 for TerraStat to provide statistical analysis of study data. These costs were documented by invoices, descriptions of work, and proofs of payment;
- d. \$13,853.55 for Biota Pacific to provide veterinary technician support for sample collection. These costs were documented by invoices, receipts, travel vouchers, descriptions of work, and proofs of payment;

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<sup>164</sup> Claim, Exhibits 31 and 38

<sup>165</sup> Claim, Exhibits 20-22 and 31

<sup>166</sup> Claim, Exhibit 31 and 36

<sup>167</sup> Claim, Exhibits 24-25

<sup>168</sup> Michel, J., Z. Nixon, and M.G. Carls. 2010. Remaining Oil Report, Chapter 1: Assessment of remaining oil from the *M/V Selendang Ayu* Spill as of 2008. 9 pp.

<sup>169</sup> Claim Section II.A.2.b

<sup>170</sup> Costs related to the 2005 and 2006 surveys are discussed previously in the determination

<sup>171</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.c, p. 4-5

<sup>172</sup> Trustee Plan, pp. 3-20 - 3-21

- e. \$4,700 for Neff & Associates to provide technical scientific analysis of study results. These costs were documented by invoices, descriptions of work, and proofs of payment;
- f. \$199,655.00 for Gallagher Marine Services to coordinate and provide vessel charter services and mission support. These costs were documented by invoices, personnel timesheets, descriptions of work, receipts, contracts/charters, and proofs of payment; and
- g. \$15,559.38 for KYL for attorneys to coordinate vessel and support study design. These costs were documented by descriptions of work and timesheets.

The NPFC previously determined that conducting the P450 survey was appropriate for the incident and provided additional funding to the Trustees to finalize the assessment of impacts to birds using the results of this study. The RPs' cooperative efforts for the study are documented in the Trustees' Assessment Plan<sup>173</sup> and Trustee claim documentation<sup>174</sup>.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of birds. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, the NPFC finds that certain costs claimed by the RPs were clearly not incurred at the request of the Trustees, directed by the Trustees, or necessary for the Trustees' NRDA. According to the Trustees<sup>175</sup>, the RPs added a mussel collection and analysis component to the study to evaluate paralytic shellfish poisoning, an activity which the Trustees did not participate, request, nor direct the RPs to conduct. The NPFC determined that costs incurred by NewFields Laboratory<sup>176</sup> (totaling \$16,930.00), certain costs incurred by Biota Pacific<sup>177</sup> (totaling \$311.45), and certain costs incurred by Polaris<sup>178</sup> (totaling \$24,269.83) related to the RPs' mussel PSP study. Therefore, the NPFC found that costs in the amount of \$41,511.28 are not compensable as reasonable trustee assessment costs.

Additionally, there were \$8,856.25<sup>179</sup> in costs related to communications between KYL and The Swedish Club, the vessel's insurer. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred

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<sup>173</sup> Trustee Plan, pp. 3-20 - 3-21

<sup>174</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.c, p. 4-5

<sup>175</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.c, pp-4-5

<sup>176</sup> Claim, Exhibits 31 and 32, Newfield Invoices 21002 and 21357

<sup>177</sup> Claim, Exhibit 34. Invoice 10162 includes \$311.45 for mussel sampling equipment

<sup>178</sup> Claim, Exhibits 20-22. Invoices 2218, 2238, 2261, and 2278 include costs related to PSP study. Invoice 2397, 2418, and 2431 includes costs for contract not adequately documented and which appears to be a duplicative analysis of trustees' report.

<sup>179</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

The remaining \$262,032.10 in costs claimed for TerraStat,<sup>180</sup> Biota Pacific,<sup>181</sup> Neff & Associates,<sup>182</sup> Polaris,<sup>183</sup> KYL,<sup>184</sup> and GMS<sup>185</sup> are related to study design, vessel charter costs, and review of study results. These costs were determined to be related to NRDA activities that were necessary to support the Trustee-led Harlequin P450 Study.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, \$262,032.10 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### Rat Eradication Feasibility Study

The RPs claimed costs of \$76,630.00 to conduct preliminary analysis of a proposed feasibility project to study rat eradication as a potential restoration alternative.<sup>186</sup> The Trustees identified rat eradication as a desirable restoration project to restore injuries to birds and developed a study plan to implement a feasibility study on Kiska Island<sup>187</sup>. The Trustees requested funding from the RPs to cooperatively conduct the feasibility study together.

The specific costs claimed by the RPs for costs related to the Kiska Island Rat Eradication feasibility assessment include the following:

- a. \$25,520.82 for Polaris personnel to work with subject matter experts to review and analyze rat eradication projects conducted on other islands, and to assess the practicality of the proposed project. These costs were documented by invoices, time records, travel vouchers, receipts, statements of work and proofs of payment;<sup>188</sup>
- b. \$7,475.22 for Everett & Associates personnel to review and analyze reports on rat eradication project on Rat Island and meet with the Trustees to discuss findings. Costs were documented by invoices, time record, travel voucher, receipts, descriptions of work, and proofs of payment;<sup>189</sup>
- c. \$38,431.96 for (b) (6) personnel to review and analyze published scientific literature on rat predation on auklet eggs and chicks on Kiska Island and meet with the Trustees to discuss findings. Costs were documented by invoices, time record, travel voucher, receipts, descriptions of work, and proofs of payment;<sup>190</sup>

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<sup>180</sup> Claim, Exhibit 31 and 33

<sup>181</sup> Claim, Exhibit 31 and 34

<sup>182</sup> Claim, Exhibit 31 and 35

<sup>183</sup> Claim, Exhibits 20-22 and 31

<sup>184</sup> Claim, Exhibit 31 and 36

<sup>185</sup> Claim, Exhibits 24, 25 and 31

<sup>186</sup> Claim, Section II.A.2.e, pp. 44-46

<sup>187</sup> Trustee Plan, pp. 4-5 to 4-7

<sup>188</sup> Claim, Exhibits 20-22 and 31

<sup>189</sup> Claim, Exhibits 31 and 40

<sup>190</sup> Claim, Exhibits 31 and 41



- d. \$5,235.00 for KYL for attorneys to support trustee and contractor coordination and restoration credit research. These costs were documented by descriptions of work and time record.<sup>191</sup>

Trustee documentation provides clear evidence that the activities conducted by the RPs were not conducted at the direction of the Trustees or on their behalf, nor were they necessary for the Trustees' NRDA. The Trustees had already begun focusing on rat eradication as a restoration alternative and engaged a contractor to develop a proposal for a feasibility study to further study the alternative. The RPs engaged its own contractors to provide additional review of the proposal and then independently decided to submit the proposal to ITOPF to provide even further review.<sup>192</sup> Furthermore, the RPs declined to fund the feasibility study for rat eradication, which remains one of the Trustees' favored alternatives in their current restoration planning efforts.<sup>193</sup> Accordingly, claimed costs in the amount of \$76,630 cannot be considered reasonable trustee assessment costs and are therefore denied.

Additionally, costs related to communications between KYL and The Swedish Club, the vessel's insurer, are denied. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

#### Oil Abatement Study

The RPs claimed costs of \$217,378.08 to conduct a feasibility study of various oil abatement projects that would provide restoration for injuries to marine resources. In 2009, the Trustees requested, and the RPs agreed to fund, a cooperative feasibility study to identify and evaluate potential oil abatement projects (i.e., projects that would remove existing oil in the environment and/or prevent future releases).<sup>194</sup> The feasibility study included a literature review to identify candidate projects and preliminary scaling calculations for several potential restoration projects.

The specific costs claimed by the RPs for costs related to the Oil Abatement Study include the following:

- a. \$99,039.04 for Polaris personnel to coordinate project activities, collect and evaluate alternatives, and meet with Trustees. These costs were documented by invoices, time records, travel vouchers, receipts, statements of work and proofs of payment;<sup>195</sup>
- b. \$17,440.00 for NewFields Laboratory to conduct a study and prepare a report on the benefits of removing creosote pilings and oil abatement. These costs were documented by contractor cost sheets and proof of payment;<sup>196</sup>
- c. \$99,377.79 for Oasis Environmental personnel to conduct the oil abatement project feasibility study. These costs were documented by a contract scope of work, cost sheets,

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<sup>191</sup> Claim, Exhibits 31 and 36

<sup>192</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section I.c, p. 4-5

<sup>193</sup> *Id.*

<sup>194</sup> Trustee Plan, pp 4-3 to 4-5

<sup>195</sup> Claim, Exhibits 20-22 and 31

<sup>196</sup> Claim, Exhibit 31 and 32

deliverable, personnel and task schedules, travel and supply expense details, and proofs of payment;<sup>197</sup>

- d. \$1,521.25 for KYL attorneys to execute contracts and coordinate with the project management team. These costs were documented by descriptions of work and time records.<sup>198</sup>

The RPs' cooperative efforts for the study are documented in the Trustees' Assessment Plan<sup>199</sup> and claim documentation<sup>200</sup>. The Trustees and the RPs' contractors worked together to conduct the study and jointly completed a draft final report of the Oil Abatement Study findings in 2012, with the RPs' efforts to support the Trustees' study continuing even after its liability limitation has been granted.<sup>201</sup>

The NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support restoration planning efforts. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' general participation in this assessment activity and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

With respect to the specific costs claimed by the RPs for these activities, there were \$1,080<sup>202</sup> in costs related to communications between KYL and The Swedish Club, the vessel's insurer. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$216,298.08 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

#### Auklet Habitat Manipulation - Kasatochi Island Restoration

The RP claimed costs of \$1,117.50 to evaluate a habitat manipulation project that would restore injuries to auklets.<sup>203</sup> In November 2009, the RPs conducted preliminary analysis of a feasibility

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<sup>197</sup> Claim, Exhibits 31 and 42

<sup>198</sup> Claim, Exhibits 31 and 36

<sup>199</sup> Trustee Plan, pp 4-3 to 4-5

<sup>200</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section 11.A, pp. 5-6

<sup>201</sup> *Id.*

<sup>202</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

<sup>203</sup> Claim, Section II.A.2.d, pp. 43-44

project to determine if removing volcanic ash from auklet nesting sites on Kasatochi Island would increase auklet breeding.

The specific costs claimed by the RPs related to the Kasatochi Island Study include the following:

- a. \$577.50 for Everett & Associates personnel to coordinate and draft the project proposal. These costs were documented by an invoice, time record, and proof of payment;<sup>204</sup>
- b. \$540.00 for a KYL attorney to coordinate the proposed project with the RP contractor. These costs were documented by descriptions of work and time record.<sup>205</sup>

Trustee documentation evidences that the RPs identified and proposed this feasibility project at their own initiation.<sup>206</sup> There is nothing in the record that indicates this project was pursued by the RPs at the request and/or direction of the Trustees, nor is there documentation indicating a feasibility project for this restoration alternative would have been pursued by the Trustees in the absence of the RPs' own instigation and self-funding. Additionally, the RPs incurred scoping costs prior to determining whether the land manager for Kasatochi Island would even permit such a project – ultimately, the land manager rejected the RPs' proposal to conduct such a project.<sup>207</sup>

The RPs may spend funds on any number of activities related to a NRDA, but those costs do not automatically become Trustee costs, even if there is communication with the Trustees regarding the activities. As such, the NPFC found that these costs were clearly not incurred on the behalf of the Trustees or at the Trustees' direction. Nor is there any evidence indicating that these costs were necessary to support the Trustee NRDA. Accordingly, claimed costs in the amount of \$1,117.50 cannot be considered reasonable trustee assessment costs and are therefore denied.

#### Auklet Habitat Manipulation – Vegetation Removal Pilot Study

The RPs claimed costs of \$3,088,898.39 to conduct a pilot project to evaluate vegetation manipulation as an alternative to restore injuries to auklets.<sup>208</sup> In April 2009, the RPs proposed a study to assess whether the removal of vegetation from auklet breeding colonies on Gareloi Island<sup>209</sup> would increase suitable nesting sites for those colonies.<sup>210</sup> The study was conducted during the summers of 2009, 2010, and 2011<sup>211</sup> and results of the study indicated that restoration benefits of vegetation removal were difficult to quantify and that a large-scale project using the same methods would not be allowed on the island because of Refuge land management policies<sup>212</sup>.

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<sup>204</sup> Claim, Exhibits 31 and 40

<sup>205</sup> Claim, Exhibits 31 and 36

<sup>206</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section 11.B, p. 6

<sup>207</sup> Letter from FWS to RPs, dated December 7, 2009

<sup>208</sup> Claim Section II.A.2.f

<sup>209</sup> The island is part of the Alaska Maritime National Wildlife Refuge

<sup>210</sup> Proposal from Responsible Party to evaluate habitat restoration at Gareloi Island, April 24, 2009. *Selendang Ayu* NRDA Administrative Record, IV.C.3.a.

<sup>211</sup> Trustee Plan, pp. 4-7 to 4-8

<sup>212</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, Response to NPFC Item #8, Section 11.B, p. 6

The specific costs claimed by the RPs for costs related to the Vegetation Removal Pilot Study include the following:

- a. \$143,876.56 for Polaris personnel to assist with developing the study protocol, executing the study, interpreting study data, preparing annual reports, and discuss study results with the Trustee. These costs were documented by invoices, time records, travel vouchers, receipts, statements of work and proofs of payment;<sup>213</sup>
- b. \$84,032.04 for a (b) (6) seabird biologist, to provide technical support and advice on the project along with data analysis and report generation. These costs were documented by invoices, descriptions of work, travel expenditures, receipts, and proofs of payment;<sup>214</sup>
- c. \$37,856.24 for (b) (6) seabird biologist, to develop and execute the study, analyze data, generate reports, and meet with and/or coordinate with the RP and Trustees.<sup>215</sup> These costs were documented by invoices, descriptions of work, travel expenditures, receipts, and proofs of payment;
- d. \$34,164.19 for a Kusko Consulting auklet biologist to assist in the design of the vegetation removal project and to evaluate similar projects on additional islands. These costs were documented by invoices, descriptions of work, travel expenditures, receipts, and proofs of payment;<sup>216</sup>
- e. \$2,725,805.61 for Gallagher Marine Services costs. Between 2009 and 2011, GMS provided logistical support and services for the study. The study costs paid by GMS in 2009, 2010 and 2011 were \$745,610.95, \$1,136,329.43, and \$843,865.23 respectively. Costs included vessel charter hire, surveys, insurance costs, costs of equipment and supplies used in the study, labor costs of persons performing the field studies, and GMS fees and costs for project administration. These costs were documented by invoices, statements of work, receipts, contracts/charters, travel expenditures, summary spreadsheets, and proofs of payment;<sup>217</sup>
- f. \$63,163.75 for a KYL<sup>218</sup> attorney to communicate with Trustees', review contracts and vessel charters, and coordinate with the RP and their consultants. These costs were documented by descriptions of work and time records.<sup>219</sup>

The Trustees concede that they discussed the project with the RPs and shared their concerns regarding the project.<sup>220</sup> However, there is nothing in the record that indicates this project was conducted at the request and/or direction of the Trustees, nor is there documentation indicating the project would have been pursued by the Trustees in the absence of the RPs' own instigation and self-funding. Documentation reflects that the RPs identified, proposed, developed, and conducted this study at their own initiation. The Trustees had previously identified a rat eradication project as their preferred alternative to compensate for bird injuries<sup>221</sup> and the RPs' lead technical consultant had agreed with the Trustees that such a project would be ecologically and cost effective<sup>222</sup>. However, the RPs later became concerned about the cost of a rat

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<sup>213</sup> Claim, Exhibits 20-22 and 31

<sup>214</sup> Claim Exhibits 31, 37, and 41

<sup>215</sup> Claim, Exhibits 31, 37 and 45

<sup>216</sup> Claim, Exhibits 31 and 44

<sup>217</sup> Claim, Exhibits 24, 25, 31, and 39

<sup>218</sup> Claim exhibits 31 and 36

<sup>219</sup> Claim, Exhibits 31 and 36

<sup>220</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, 2016 Response to NPFC Item #8, Section 11.B, p. 6

<sup>221</sup> Id.

<sup>222</sup> Email from Polaris to RPs, dated February 7, 2005

eradication project and instead wanted to find a cheaper alternative<sup>223</sup>, as well as expressing concerns about non-target species mortality<sup>224</sup>. The Trustees maintained that they, the public, and NGOs were satisfied with the rat eradication project, but if the RPs wanted to pursue another alternative they needed to identify it themselves.

While the Trustees were open to considering vegetation removal as an alternative, they expressed skepticism from the beginning about the study<sup>225</sup>, documented extensive concerns to the RPs about the vegetation project<sup>226</sup>, and informed the RPs prior to beginning the study that “they were unable to determine whether the feasibility study will effectively address the issues that need to be resolved for the trustees to determine whether habitat manipulation would be a feasible restoration project.”<sup>227</sup> Despite the Trustees significant reservations, the RPs proceeded with field work in 2009 and informed the Trustees that they would not be able to effectively address the Trustees’ concerns until after completion of both the 2009 and 2010 work.<sup>228</sup>

Correspondence states that the Trustees initially only agreed to cooperate in the vegetation study in order to acquire funding from the RPs to conduct a feasibility project studying their preferred rat eradication alternative<sup>229</sup>. Further correspondence indicates the RPs planned on proceeding with the habitat feasibility project without cooperation from the Trustees, only finding out after the initial project stages had begun that the Trustees were willing to conduct the activity “cooperatively”.<sup>230</sup> While the Trustees did discuss study design and results with the RPs, the Trustees continued to express significant concerns with the study and its results throughout the project.<sup>231</sup>

15 C.F.R. §990.54(c) provides that studies<sup>232</sup> to evaluate the feasibility and likelihood of restoration alternatives should only be implemented when, in the trustees’ judgement, the project is *likely* to provide information useful in evaluating restoration alternatives<sup>233</sup> and can be conducted at a reasonable time cost and in a reasonable timeframe. Based on the significant amount of Trustee skepticism and criticism found in the Administrative Record for this study from its inception, it is clear that this project did not meet the standard of likely providing useful information in evaluating restoration alternatives. Furthermore, there is no basis to consider the cost and timeframe of the project reasonable. The project spanned over three years of study and came at a costs representing a significant proportion of the entire NRDA. Notably, the cost of the feasibility study preferred by the Trustees’ to evaluate rat eradication would have cost, at most ~\$600,000, and they were considering feasibility project options for as low as ~\$90,000.<sup>234</sup>

While the Trustees may have been considering habitat manipulation as a restoration alternative, there is no evidence that they needed or desired to implement a study such as the one conducted by the RPs; especially at the considerable cost incurred by the RPs. As such, the NPFC found

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<sup>223</sup> Memorandum from the RPs to NPFC, dated May 21, 2020

<sup>224</sup> *Id.*

<sup>225</sup> Email from DOI to RPs, dated March 18, 2009

<sup>226</sup> *Trustee Question & Concerns.8-12-09*

<sup>227</sup> Email from DOI to RPs, dated August 3, 2009

<sup>228</sup> Email from Polaris to DOI, dated August 11, 2009

<sup>229</sup> Email from DOI to RPs, dated June 5, 2009

<sup>230</sup> Email from RPs to DOI, dated June 29, 2009

<sup>231</sup> Email from DOI to RPs, dated March 11, 2010

<sup>232</sup> Referred to as “pilot projects”

<sup>233</sup> Specifically the evaluation criteria in 15 C.F.R. 990.54(a)

<sup>234</sup> *Feasibility assessment for the removal of introduced Norway rats from Kiska Island: a proposal; February 2009*

that the costs of \$3,088,898.39 incurred by the RPs were clearly not incurred at the direction of the Trustees or on the Trustees behalf. Nor were such costs reasonable or necessary for the Trustees' NRDA. Ultimately, as identified by the Trustees from the beginning, the results from the study did not provide information useful to their evaluation of restoration alternatives. Accordingly, claimed costs in the amount of \$3,088,898.30 cannot be considered reasonable trustee assessment costs and are therefore denied.

#### 2010 Reference Beach Study and Seabird Mortality Estimates

The RPs claimed costs of \$626,755.72 to estimate seabird mortality and to conduct a reference beach study to assist in their mortality estimate.<sup>235</sup> As described previously, early in the NRDA the Trustees identified the BBM as their preferred method to quantify injury to seabirds from direct oiling.<sup>236</sup> The Trustee and RPs cooperatively conducted reference beach studies<sup>237</sup> in 2005 to provide site specific data to use as inputs for the BBM.

In 2007, the Trustees and RPs engaged in cooperative discussion involving the interpretation of bird injury data, including the results of the 2005 reference beach studies.<sup>238</sup><sup>239</sup> The Trustees' directed their technical expert to proceed with the data from the studies and calculated a preliminary estimate of injury with the BBM. The draft technical report of the Trustees' BBM was shared with the RPs. The RPs disagreed with the analysis and results of the Trustees' BBM. In response, the RPs planned a 2009 aerial survey to detect auklet locations, conducted a separate set of reference beach studies in 2010, and developed its own model to estimate seabird mortality.<sup>240</sup>

The specific costs claimed by the RPs related to the 2010 Reference Beach Study and Seabird Mortality estimates include:

- a. \$131,504.35 for Polaris personnel to coordinate with the Trustees, provide input and review of the Trustees' BBM, bird feather chemistry, 2009 overflight, 2010 reference Beach Study, and development of the RPs' BBM. These costs were documented by invoices, time records, travel vouchers, descriptions of work and proofs of payment;
- b. \$23,081.64 for Everett & Associates personnel to provide advice and technical assistance to the RP on seabird mortality estimates. These costs were documented by invoices, time record, travel voucher, receipts, descriptions of work, and proofs of payment;
- c. \$33,347.50 for NewFields Laboratory personnel and analytical costs to analyze oiled bird feathers, independently review the trustees' draft report, and prepare a separate report on behalf of the RP. These costs were documented by invoices, descriptions of work, and proofs of payment;
- d. \$98,015.55 for Marzet personnel to provide technical review and advice related to the Trustees' BBM, the RPs' BBM, the 2010 Reference Beach Study, and the RPs' planned

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<sup>235</sup> Claim Section II.A,2,h

<sup>236</sup> Trustee Plan, pp. 3-16 to 3-19

<sup>237</sup> Studies assessing carcass deposition rate, carcass persistence, searcher efficiency, and background mortality

<sup>238</sup> The Trustees report that the results of the background bird mortality study were complicated by the presence of oiled birds (the study was conducted at an unoiled reference beach site, thus there should not have been any oiled birds found in the study)

<sup>239</sup> Enclosure G of Trustee Additional Information Response for Claim N10036J05003-OI03, dated October 7, 2016, p 3.

<sup>240</sup> Proposed Bird Background Mortality Study in the Region of the *Selendang Ayu* Grounding, Unalaska Island, Prepared By: (b) (6), 2010, 2 pages

2009 overflight. These costs were documented by invoices, travel vouchers, statements of work proofs of payment;

- e. \$10,596.10 for (b) (6) to coordinate the 2009 aerial survey. These costs were documented by an invoice, travel expenses, statement of work, and proof of payment;
- f. \$288,511.83 for Gallagher Marine Services to coordinate and provide vessel charter services and mission support for the 2010 Reference Beach Study. These costs were documented by invoices, personnel time records, descriptions of work, receipts, contracts/charters, and proofs of payment; and
- f. \$41,698.75 for KYL attorneys to coordinate with the Trustees, coordinate with the RPs and the RPs' contractors, and review contracts. These costs were documented by descriptions of work and time records.

The Trustees did not direct the RPs to conduct the 2010 Reference Beach study or endorse it as something that would provide more useful data than was obtained in 2005; nor would the Trustees have pursued many of the additional activities related to estimating sea bird mortality.<sup>241</sup> Specifically, the Trustees did not request or direct (1) development of a separate BBM from that prepared by the Trustees, (2) a second field study of background mortality in 2010, (3) a planned, but aborted, overflight of seabird rafting locations, (4) or and oil source analysis of oiled feathers from previously collected carcasses. Costs incurred specific to these activities include: \$23,081.64 for Everett & Associates<sup>242</sup>, \$33,347.50 for NewFields Laboratory<sup>243</sup>, \$60,308.79 for Marzet<sup>244</sup>, \$10,596.10 for (b) (6)<sup>245</sup>, 93,316.03 for Polaris<sup>246</sup>, \$16,122.50 for KYL<sup>247</sup>, and \$288,511.83 for GMS<sup>248</sup>. The NPFC found that these costs, totaling \$525,284.39 were clearly not incurred at the direction of the Trustees or on the Trustees behalf. The RPs may spend funds on any number of activities related to a NRDA, but those costs do not automatically become trustee costs, even if the activities are discussed with the Trustees. As such, costs in the amount of \$525,284.39 are not considered reasonable trustee assessment costs.

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<sup>241</sup> Enclosure G of Trustee Additional Information Response for Claim N10036J05003-OI03, dated October 7, 2016, pp. 2-3

<sup>242</sup> Claim, Exhibit 31, 37, and 40. Everett & Associates incurred expenses of \$23,081.64 for this activity support development of the RPs' BBM and 2010 Reference Beach Study

<sup>243</sup> Claim, Exhibits 31 and 32. NewFields Laboratory expenses of \$33,347.50 for this activity support analysis of and interpretation of oiled bird feathers.

<sup>244</sup> Claim, Exhibit 23 and 31. Marzet Invoices MZ2009-4 expenses of \$15,808.77 include activities associated with the 2009 overflight and MZ2009-7 and MZ2010-1,4, and 6 expenses of \$44,500.02 include activities related to the 2010 beach reference study and the RPs' separate BBM

<sup>245</sup> Claim, Exhibits 31 and 46. (b) (6) expenses of \$10,596.10 support the 2009 overflight.

<sup>246</sup> Claim, Exhibit 20-22 and 31. Invoice 2117 - \$340.00 of work described for (b) (6) includes subsistence (non-NRD); Invoice 2153 - \$892.50 of work described for (b) (6) includes TPC activities (non-NRD); Invoice 2397 - \$210.00 of work described for (b) (6) includes bird feather chemistry related activity (denied activity); Invoice 2477 - \$5,050.00 of work includes preparation for 2009 overflight (denied activity); Invoice 2589 - \$735.00 of work described for (b) (6) include study plan for RPs' BBM (denied activity); and Invoices 2611 onward - \$86,088.53 for activities specifically related to the 2010 reference beach study and RPs' BBM (denied activities).

<sup>247</sup> Claim, Exhibits 31, 36 and 37. The NPFC denies a total of \$16,122.50 of KYL costs: Invoice 218503 - \$1,260.00 activities described include Chernofski reference beach study (denied activity); Invoice 210391 - \$3,510.00 activities described include coordination of 2009 aerial survey (denied activity); Invoice 216679-247181 - \$11,352.50 activities described include 2010 Reference Beach study and RPs' BBM (denied activities).

<sup>248</sup> Claim, Exhibits 24, 25, 31 and 39. NPFC denies the totality of Gallagher Marine Services costs of \$288,511.83 in support the 2010 Reference Beach Study

Additionally, there were \$7,112.50<sup>249</sup> in costs related to communications between KYL and The Swedish Club, the vessel's insurer. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

The remaining costs were incurred for data analysis, technical review, and cooperative discussions during the development of the Trustees' BBM and the review period of the Trustees' draft report on the BBM. Documentation indicates the Trustees specifically engaged the RPs to review and provide comment<sup>250</sup> regarding the Trustee produced BBM. With respect to these specific costs, the NPFC finds that, based on the Trustee documentation in the Administrative Record, the RPs were cooperatively participating with the Trustees in NRDA activities that the Trustees identified as necessary to support the assessment of bird injuries. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs' activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs' participation in certain activities and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, \$94,358.83 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

### General NRDA Activities

The RPs claimed \$307,422.02 in General NRDA administrative costs related to planning, coordinating, and managing NRDA activities; contracting, invoice payment, and other administrative support tasks; and disposal of supplies and equipment. As identified in the Plan, the Trustees claimed costs for similar activities under Trustee Coordination and Public Outreach, which include, but are not limited to<sup>251</sup>, funding to participate in meetings, review trustee produced documents, and engage the public in the NRDA.<sup>252</sup>

The specific costs claimed by the RPs for General NRDA activities include:

- a. \$150,343.87 for Polaris personnel to travel to meet with the Trustees, coordinate with the Trustees, assess various restoration options, develop the administrative record, and

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<sup>249</sup> See Enclosure 3 to the Claim Determination for specific time entries denied

<sup>250</sup> Claim Exhibit 2, p.756 of 1432. Communication regarding RPs review and comment on Trustees' draft Seabird Mortality Report.

<sup>251</sup> The Trustees include a caveat in the Plan that the specific Trustee Coordination activities listed are representative of the type of costs incurred, but that anticipated costs are not limited to those activities specifically identified

<sup>252</sup> Trustee Plan, p. 5-2



contribute to and review the assessment plan. These costs were documented by invoices, time records, travel voucher, descriptions of work and proofs of payment;<sup>253</sup>

- b. \$21,880.94 for ITOPF ((b) (6)) to provide technical advice to the RPs on various activities and attend meetings with the RP and Trustees. These costs were documented by travel vouchers and proofs of payment;<sup>254</sup>
- c. \$28,636.49 for Gallagher Marine Services to dispose of excess equipment and supplies following the completion of NRDA field activities. These costs were documented by invoices, personnel costs, inventory lists, receipts, statements of work, and proofs of payments;<sup>255</sup>
- d. \$24,329.47 for ((b) (6)) of the Swedish Club to attend meetings with the Trustees in September 2007<sup>256</sup> and March 2012<sup>257</sup> and for an internal meeting in April 2009.<sup>258</sup> These costs were documented by travel vouchers and proofs of payment;<sup>259</sup>
- e. \$82,231.25 for KYL attorneys to assist in developing the assessment plan, audit trustee invoices, communicate with the Trustees, review contracts, develop the administrative record, coordinate disposal of NRD equipment, conduct internal discussions among the RPs and consultants, legal research, and participate in public meeting. These costs were documented by descriptions of work and time record.<sup>260</sup>

As defined by 15 C.F.R. 990.30, reasonable assessment costs include “administrative costs, legal costs, and other costs necessary to carry out this part... [And] costs associated with public participation”. Similar to the study specific costs previously discussed in the determination, an RPs’ general NRDA costs may be considered Trustee costs if such costs were necessary to support the Trustee’s NRDA and were associated with costs incurred at the Trustees’ direction.

Throughout the Plan and additional claim documentation<sup>261</sup>, the Trustees documented the significant participation of the RPs in restoration planning including participating in assessment and restoration planning studies; funding the Trustees’ costs of the NRDA; directly paying for vessels and other field support costs; attending meetings with the Trustees to discuss the NRDA; reviewing and analyzing study results and drafting and/or commenting on reports documenting the restoration planning results; and identifying and developing restoration alternatives to restore damages from the oil spill.

The NPFC finds that, based on the Trustee documentation in the Administrative Record, some of the RPs incurred General NRDA costs were necessary to support the Trustee NRDA. When identifying which of the RPs actions were taken on behalf of the Trustees, the NPFC gave significant weight to the cooperative nature of the RPs’ activities during the NRDA to infer that some of those activities were undertaken at the direction of the Trustees, even though the Administrative Record does not clearly document each instance when the RPs acted on behalf of the Trustees. Given the Trustee evidence supporting the RPs’ general participation in the

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<sup>253</sup> Claim, Exhibit 20-22, and 31

<sup>254</sup> Claim Section II.A Exhibit 37, and Exhibit 43

<sup>255</sup> Claim, Exhibits 24, 25, and 39.

<sup>256</sup> *Selendang Ayu* Cooperative Assessment Overview Meeting, September 6, 2007 USFWS Anchorage, Alaska. Claim, Exhibit 2, pp.460-462 of 1432. Meeting to discuss status of cooperative assessment and proposed activities for the restoration planning phase

<sup>257</sup> Claim, Exhibit 2, pp. 1087-1160 of 1432. Communications coordinating and scheduling of meeting to discuss RP participation and remaining NRDA activities following the RP being granted their limit of liability by the NPFC.

<sup>258</sup> Claim, Exhibit 37, p. 10 of 14. Meeting to discuss assessed seabird injury parameters and restoration proposals.

<sup>259</sup> Claim, Exhibit 57

<sup>260</sup> Claim, Exhibit 36 and 37

<sup>261</sup> Enclosure G of Trustee Additional Information Response for Claim J05003-OI03, dated October 7, 2016

Trustees' NRDA and the totality of the facts surrounding this claim, the NPFC also considered the absence of any evidence suggesting that the RPs engaged in specific activities for their own purposes instead of acting at the Trustees' direction.

The Claim includes \$150,343.87 in labor, travel, and supplies costs incurred by Polaris for General NRDA activities. Polaris served as the RPs' primary NRDA consultant, helping plan, coordinate, and directly participating in many of the Trustees' NRDA activities. Polaris's activities are generally described as related to trustee coordination, assessing various restoration options, development of the administrative record, and contribution to and review of the assessment plan. The NPFC reviewed the specific work described associated with each invoice and found that \$25,632.53 of Polaris' claimed costs were clearly not incurred in support of the Trustees' NRDA, on the Trustees' behalf, or at their direction.

First, there \$6,976.81 in Polaris costs claimed as "General NRDA" that were explicitly in support of other assessment activities that the NPFC had determined were not in support of the Trustees' NRDA.<sup>262</sup> Polaris claimed additional costs in the amount of \$9,850.72 that, based on Trustee documentation in the record, were also clearly not in support of the Trustees NRDA, including costs for: background research on pre-assessment and regulations<sup>263</sup>; hard drive purchase<sup>264</sup>; cost assessment review<sup>265</sup>; data archival<sup>266</sup>; and creating summary reports and matrix tables in support of Limit of Liability claim<sup>267</sup>. Lastly, there were \$8,805 in Polaris costs related to meetings with the insurer<sup>268</sup> and conducting restoration estimates for the insurer<sup>269</sup>. To the extent the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

The Claim includes travel costs for (b) (6) who was acting on behalf of the International Tank Owners Pollution Federation Limited (ITOPF). ITOPF provided technical advice to the RPs on seabird mortality calculations and seabird restoration alternatives the RP and attended several meetings with the RPs and Trustees<sup>270</sup>. The NPFC found that ITOPF participated at the RPs' request.<sup>271</sup> The Trustees did not request ITOPF's participation and support, which they could have solicited themselves with ease through an existing MOU with the International Group of P&I Clubs<sup>272</sup>. In fact, the Trustees were confused by ITOPF's participation in certain

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<sup>262</sup> Claim, Exhibit 20-22, General NRDA, the NPFC denies: Invoice 2115 - \$320 for (b) (6) work relating to Subsistence; Invoice 2477 - \$420 for (b) (6) work related to overflight coordination; Invoice 2535 - \$665.00 for (b) (6) work described as associated with vegetative habitat study; Invoice 2722 - \$3,450 for compiling costs for 5 studies, which were denied as non-Trustee activities; Invoice 3019 - \$84.31 - Photocopies of Gareloi Reports; and labor for (b) (6) to (non-NRD claim preparation); and Invoice 3235- \$2,037.50 in support of vegetation removal project

<sup>263</sup> Invoice 2117 - \$405; Invoice 2153 - \$45

<sup>264</sup> Invoice 2238 - \$155.72

<sup>265</sup> Invoice 2518 - \$570

<sup>266</sup> Invoice 2611 - \$475

<sup>267</sup> Invoice 3019 - \$8,200

<sup>268</sup> Invoice 2477 - \$6,720 and Invoice 3188 - \$1,800

<sup>269</sup> Invoice 2380 - \$285

<sup>270</sup> Claim Section II.A Exhibit 37, and Exhibit 43

<sup>271</sup> ITOPF reviewed the Study Plan for the Assessment of Remaining Oil, the proposed Kiska Island Rat Eradication Project, and the Bird Mortality Estimations, all activities for which there were other principal experts involved

<sup>272</sup> MOU between the International Group of P&I Clubs and NOAA's Damage Assessment, Remediation, and Restoration Program. 2007.

discussions and meetings.<sup>273</sup> Accordingly, the NPFC found that the \$21,880.94 in costs incurred by ITOPF to provide technical advice to the RP are duplicative of other technical experts, were clearly not requested or directed by the Trustees, and were not in support of the Trustees' NRDA.

The Claim includes \$28,636.49 in costs incurred by GMS to dispose of excess equipment and supplies following the completion of their participation in NRDA field activities. The description of disposed equipment indicates that the bulk of the excess equipment was associated with the Auklet Habitat Manipulation Study and the 2010 Reference Beach Study<sup>274</sup> - activities of the RPs that were previously determined as being not in support of the Trustees' NRDA. As such, the NPFC found that the \$28,636.49 in claimed costs for GMS were clearly not incurred in support of the Trustees' assessment.

(b) (6) is the RPs' representative and responsible for approving the RPs participation in and funding for the Trustees' NRDA. To the extent that the RPs engaged and relied upon the funding and participation of The Swedish Club during the course of the NRDA, such costs were incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. These costs, in the amount of \$24,329.47, are not NRDA costs nor costs incurred for activities requested by the Trustees. Also, costs incurred by an RPs' insurance company while defending an RP are not OSLTF compensable because they are litigation costs.

Finally, the Claim includes \$82,231.25 in labor costs incurred by KYL for General NRDA activities. KYL's costs are generally described as related to assisting in the development of the Trustees' assessment plan, auditing Trustee invoices, communicating with the Trustees, reviewing contracts, developing the administrative record, coordinating disposal of NRD equipment, internal discussions among the RP and consultants, legal research, and public meetings. The NPFC reviewed the specific work described and found \$3,875 related to activities clearly not in support of the Trustees' NRDA.<sup>275</sup> Additionally, there were \$23,170 in costs related to communications between KYL and The Swedish Club, the vessel's insurer, which were costs incurred on the RPs' behalf rather than directly in support of the Trustees' NRDA. Also, costs incurred for communications between RPs' counsel and RPs' insurance company are a litigation cost that is not OSLTF compensable.

The NPFC determines that, based on (1) correspondence between the Trustees and the RPs, (2) the Trustee Plan, and (3) the Administrative Record for J05003-OI03, the remaining \$179,897.59 in the RPs' costs are compensable in accordance with 33 C.F.R. §136.211(a) as reasonable trustee past assessment costs.

## VI. Summary

The NPFC has reviewed the Claim submitted by the RPs for past assessment and restoration planning costs in accordance with OPA (33 U.S.C. §2701 et seq.) and associated OSLTF Claims Regulations (33 C.F.R. Part 136). Through this determination, the NPFC offers payment of

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<sup>273</sup> Email from FWS to ITOPF, dated June 5, 2009

<sup>274</sup> Per descriptions of excessed items in Claim Exhibit 25 and corroborated by declarations by (b) (6), Claim Exhibit 39, and (b) (6), Claim Exhibit 37.

<sup>275</sup> Claim, Exhibit 36, General NRDA, the NPFC denies \$1,868.75 in costs associated with cost recovery/claim preparation activities, \$1,556.25 in costs associated with equipment disposal associated with denied activities, \$450.00 associated with other denied activities or non-NRD activities (work supporting the RPs' limitation claim, future insurance coordination, and the denied Gareloi Island vegetation study), See Enclosure 3 to the Claim Determination for specific time entries denied

\$5,113,673.03 for past assessment costs incurred directly by the Trustees and \$2,104,476.88 for costs incurred directly by the RPs. The NPFC denies claimed costs in the amount of \$13,862.94 for Trustee incurred costs and \$4,159,708.41 for the RPs' incurred costs.

<b>Table 3 - Claim Adjudication Summary</b>			
<b>Cost Type</b>	<b>Claimed</b>	<b>Approved</b>	<b>Denied</b>
Trustee	\$5,127,535.97	\$5,113,673.03	\$13,862.94
RP Preassessment	\$816,468.47	\$662,786.30	\$153,682.17
RP Assessment	\$5,447,716.82	\$1,441,690.58	\$4,006,026.24
<i>RP Sub-Total</i>	<i>\$6,264,185.29</i>	<i>\$2,104,476.88</i>	<i>\$4,159,708.41</i>
<b>Total</b>	<b>\$11,391,721.26</b>	<b>\$7,218,149.91</b>	<b>\$4,173,571.35</b>

## **VII. Reconsideration of Denied Costs**

Through this determination, the NPFC has denied \$4,173,571.35 for costs claimed as past Trustee NRDA costs.

The RPs may make a written request for reconsideration of this determination. The reconsideration request must be received by the NPFC within 60 days after the date of this determination or 30 days after receipt, whichever is sooner. The request for reconsideration must be in writing and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. NPFC reconsiders claims based upon a de novo review of the administrative record and the NPFC is not bound by any conclusions reached during the initial claim determination. Thus, any of the amounts offered in this settlement offer may not be offered again on reconsideration.<sup>276</sup> Disposition of the reconsideration will constitute final agency action. All correspondence should include the corresponding claim number J05003-RP04.

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<sup>276</sup> *Smith Property Holdings, 4411 Connecticut L.L.C. v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004)(noting that under 33 C.F.R. § 136.115 (b) a settlement offer in an initial determination becomes automatically void if not accepted by the claimant and holding that NPFC is not bound by anything included in the initial offer).