National Pollution Funds Center Determination

Claim Number and Name:	**M06017-OC01** – *T/V Margara* Primary Restoration Costs
Claimant:	National Oceanic and Atmospheric Administration (NOAA)
Claim Type:	Natural Resource Damages, Upfront Restoration Costs
Amount Requested:	$5,932,380.02
Offer Amount:	$4,403,590.98
Contingency Available:	$794,183.46
Date:	February 8, 2019
NPFC Claims Manager:	[redacted]

The Incident

On or about 0033[1] on April 27, 2006, the *T/V Margara*[2] grounded three miles off the coast of Tallaboa, Puerto Rico while awaiting a pilot to transit the vessel to the Corco oil facility.[3] The 748-foot Cayman Island-flagged tanker, carrying approximately 315,693 barrels of No. 6 fuel oil[4] at the time of the incident, grounded in an area of dense coral reefs. The responsible party (RP) for the incident was Ernst Jacob (GMbh & Co. KG) (ErnstJacob), operator of the *T/V Margara.*[5] Shipowners Insurance & Guaranty Company, Ltd. (SIGCo) was subsequently identified as the RP's guarantor.[6]

Removal Activities

Sector San Juan received notice that the *T/V Margara* was aground and confirmed that the vessel's Master had activated the Vessel Response Plan (VRP). Pursuant to the VRP, the RP's Qualified Individual (QI), Captain [redacted], and the RP's management team were notified and made arrangements to arrive on scene. Also pursuant to the VRP, the RP hired National Response Corp. as its Oil Spill Response Organization (OSRO) and Titan Marine as its salvage contractor. The vessel was directed to cease all efforts to come off the reef and a 600-yard safety zone was established around the vessel. The vessel's crew conducted soundings in all tanks with no loss of product or taking on water from any of its tanks.

The Federal On Scene Coordinator's (FOSC) representative opened the Oil Spill Liability Trust Fund (OSLTF or the Fund) to cover costs associated with the Coast Guard's response to the incident. Thirteen Coast Guard personnel were mobilized to the site along with equipment. The

[1] All time references in the determination are local – Eastern Standard Time.
[2] The NPFC notes that documents in the Administrative Record alternately reference the *T/V Margara* as the *M/T Margara* and the *MT Margara*.
[3] SITREP-POL 1, Sector San Juan (SJP), 271244Z APR 06.
[4] SITREP-POL 2, Sector SJP, 280333Z APR 06.
[5] The Ship's Particulars at the time of the incident identified ErnstJacob as the vessel operator. The active Certificate of Financial Responsibility (COFR) identified Margara Shipping Company as the listed owner and operator of the *T/V Margara* at the time of the incident, but also associated the COFR with ErnstJacob.
[6] The SIGCo identification is discussed below.

FOSC stood up a Unified Command (UC) at the nearby Corco Facility to coordinate all activities conducted by the RP and the Coast Guard. The UC included the FOSC, RP representatives and support from the area natural resources trustees. A Notice of Federal Interest (NOFI) was issued to the Master at approximately 0600 on April 27, 2006. By mid-afternoon, the UC began developing salvage and lightering plans. It planned to deploy boom around the vessel and nearby cays identified as environmentally sensitive sites during the morning of April 28, 2006. The vessel's crew continued taking tank soundings every two hours.

The FOSC quickly began removal activities to free the vessel from its initial grounded location at the southern impact site. The length of the vessel required that it be first rotated 90 degrees, which moved it further westward into the southern impact site.[7] The vessel's Captain and the FOSC representative attempted to free the vessel using the vessel's power, tug assists and the rising tide. This activity did free the vessel for a short period of time but resulted in a wide area of prop-wash damage. The vessel re-grounded in an area referred to as the northern impact site. Eventually the vessel impacted a series of smaller reefs before it was freed and moved into deeper water at approximately 0030 on April 28, 2007. The Coast Guard directed the vessel to sea until agreement could be reached within the UC to bring the vessel into the well-protected Guayanilla Bay to conduct an initial dive survey of the hull.

The removal activities resulted in dislodged, broken and buried coral resources, along with fractured reef foundation that caused large amounts of coral rubble. The Trustees estimated that approximately 7,541 meters^2 of impacted coral reef were associated with the incident[8]. This included the loss of 54,623 hard corals and 112,151 soft corals for a total of 166,774 corals lost.[9]

Initial Natural Resource Damage Assessment Activities

Pursuant to the Oil Pollution Act of 1990 (OPA 90) and the Puerto Rico Commonwealth Law 147 of 1999, the National Oceanic and Atmospheric Administration (NOAA) and the Puerto Rico Department of Natural and Environmental Resources (PRDNER) (collectively the Trustees), initiated an assessment of natural resource damages (NRD) resulting from the incident, and notified the RP of their intent to pursue a natural resource damage assessment (NRDA). ErnstJacob acknowledged receipt of this notification and notified the Trustees that Independent Maritime Consulting, Ltd. (IMC) would act as the RP's representative on NRD caused by the incident. Within weeks of the incident, IMC began cooperative efforts with the

[7] While the claim states that this initial rotation of the vessel made it impossible to separate the impacts from the initial grounding from the response actions, pursuant to the April 14, 2017 email from NOAA to NPFC, impacts from the initial grounding were limited to Site 146 in the southern impact site and were not included in the areas designated for primary restoration associated with this claim. According to extraction graphics provided by the RP's surveyor (Alexakos and Simpson, Inc.), during the response the vessel was rotated by tugs across coral reefs in Sites 144, 145, 147, and 151 adjacent to the initial grounding. NOAA was also able to differentiate initial grounding vice response damages in the areas designated for primary restoration because the area damaged by the initial grounding only damaged corals but not the substrate, while the rest of the southern impact site had a lot of rubble created by the vessel rotation and fracture of the seafloor.

[8] Because the Trustees' estimate of injury (7,541 meters^2) included 153 meters^2 of injury from the initial grounding and 633 meters^2 of injury from Hurricane Dean, only 6,755 meters^2 of the estimated injury was a result of the *T/V Margara* incident.

[9] The number of lost corals was calculated using the 6,755 meters^2 of impacted area described in Footnote 8 along with the coral densities provided in Table 2 on page 22 of the Plan.

Trustees to address natural resource injuries. The Norwegian Hull Club[10], one of the RP's insurers, also cooperated and funded some Trustee activities.

On May 12, 2006, IMC met with the Trustees to cooperatively discuss assessing injuries to corals in the impacted areas.[11] At the same meeting, the Trustees and RP agreed that emergency restoration activities were needed to accelerate the recovery of the injured corals. IMC contracted with Continental Shelf Associates, Inc. (CSA) to conduct emergency restoration activities. CSA prepared a document, *Impact Delineation and Restoration Strategy: T/V Margara Grounding Offshore South Coast of Puerto Rico,* that outlined two impact areas: south (or initial) and north (or exit). Under this plan, CSA proposed to reposition, right and cache displaced corals, remove and dispose of fouling paint, stabilize rubble, and reattach cached corals and reef substrate. The RP funded CSA's proposed emergency restoration activities and monitored the long-term survival of the restored corals. CSA reported updates to IMC on all assessment and restoration activities...

In August 2007, Hurricane Dean passed approximately 200 miles from the incident location and some areas addressed during emergency restoration were damaged. CSA prepared a report in January 2008 defining the status of the NRDA and to present the RP's approach to settlement.[12] The report provided that initial emergency restoration activities applied to 80% of the impacted site[13] and more than 10,500 hard and soft corals were reattached, 950 staghorn corals were reattached, approximately 90 tons of on-site rubble was stabilized and anti-fouling paint was removed, but noted that Hurricane Dean confounded the restoration and habitat recovery. At the time the report was written, ongoing assessment activities included baseline monitoring of the emergency restoration activities and quantifying injuries resulting from the incident. The report stated that the Trustees and RP needed to address scaling for development of a habitat equivalency analysis (HEA)[14] and that settlement discussions must consider restoration planning and implementation.

Following Hurricane Dean, the RP conducted additional emergency restoration activities.[15] Previously attached coral were re-secured, additional hull paint was found and removed and a limited amount of rubble was stabilized. These efforts were completed in the spring of 2008 and all originally restored corals damaged by the hurricane were reattached.[16]

The RP and Trustees met in June 2008[17], where they continued to discuss injury assessment, primary and emergency restoration, global settlement, and a RP-identified compensatory restoration project.[18] NOAA contracted with Tetra Tech EC, Inc. (Tetra Tech) in January 2009

[10] [redacted], Esq. was the attorney representing Norwegian Hull Club.
[11] PRDNER letter to IMC, dated May 31, 2006.
[12] *Restoration Status and Settlement Considerations: T/V MARGARA Grounding Offshore, South Coast of Puerto Rico.*
[13] The areas restored under emergency activities are not in the same locations where primary restoration will be conducted.
[14] HEA analyses are used to determine compensatory restoration.
[15] Plan, page 58.
[16] Plan, page 7.
[17] Email from IMC to PRDNER/ NOAA, dated June 20, 2008.
[18] The RP proposed providing a full-time pilot boat in the area of the incident to provide navigational assistance for the prevention of future groundings.

for its expertise and experience in coral damages caused by groundings. In a report to Industrial Economics, Inc. dated May 8, 2009, Senior Scientist [redacted], stated two concerns that should be addressed in order for the impacted area to be physically and biologically restored: (1) the unconsolidated rubble, and (2) loss of structural integrity.

In October 2009, the RP paid $433,352.49 as partial settlement of NOAA's past assessment costs.[19] The RP also paid PRDNER[20] for past injury assessment and emergency restoration work.[21] CSA prepared a second Primary Restoration Plan dated January 2011 for IMC.[22] In this report, the RP consultants assert that the Trustees' plan to apply large amounts of cement was highly invasive and would create substrata in contrast to the conditions of the natural habitat; thus, it would not restore the ecosystem to a close approximation of its condition prior to the grounding. In contrast, IMC asserted that its approach would minimize the use of cement and maximize the benefits of natural recovery with the application of additional primary restoration, which would be applied in the largest unconsolidated rubble areas. Further, the RP consultants believed that the emergency restoration efforts were overall more successful than the Trustees' evaluation of those efforts.

In anticipation of further settlement negotiations, CSA prepared another Primary Restoration Plan dated June 2012 for IMC. This Plan accompanied a letter from RP counsel that addressed the purchase of a pilot boat[23] that would provide partial compensation for compensatory damages.[24] In a response to the RP proposal for settlement, the Trustees and the RP reached an agreement on primary restoration - 1,325 meters² of full restoration and 250 meters² of partial restoration.[25] The parties could not agree on the area requiring compensatory restoration.

The Trustees published a Notice of Intent to Conduct Restoration Planning on March 6, 2013, focusing on the identification of remaining primary restoration activities along with compensatory restoration actions. The Trustees published a Notice that a Draft Primary Restoration Plan was available for public review and comment until October 20, 2014. In May 2014 the Norwegian Hull Club notified PRDNER that an owning company associated with the RP entered into bankruptcy proceedings in Germany.[26] In an email dated April 12, 2016, NOAA notified [redacted] that it completed a primary restoration implementation plan; however, Mr. O'Connor advised NOAA that he was advised by his client to stand down.

Primary Restoration Claim to the Fund

Because the Trustees had cooperatively conducted earlier assessment/ emergency restoration activities, NOAA presented its NRD claim to IMC and the Norwegian Hull Club on July 6, 2016. The claim, for $5,932,380.20, was to fund primary restoration activities. NOAA explained

[19] Payment was processed through the Norwegian Hull Club.
[20] Approximately $100,000.
[21] Email from NOAA to NPFC, dated March 5, 2018.
[22] Primary Restoration Plan: *T/V Margara* Grounding Offshore South Coast of Puerto Rico, dated January 2011.
[23] Pursuant to email from [redacted] to NOAA, dated December 4, 2012, the RP provided funding to acquire and operate the pilot boat to obtain compensatory restoration credits.
[24] Email from [redacted] to NOAA, dated July19, 2012.
[25] NOAA letter to [redacted], dated December 3, 2012.
[26] Email from Norwegian Hull Club to PRDNER /NOAA, dated May 9, 2014.

in the demand that IMC and the Norwegian Hull Club, as the RP's designated representative and insurer respectively, had cooperated with the Trustees and funded some activities. Neither IMC nor the Norwegian Hull Club responded to the demand letter.

Pursuant to OPA, if a claim is not settled by any person by payment within 90 days after the date the claim was presented, the claimant may elect to present the claim to the Fund. 33 U.S.C. § 2713(c). NOAA and PRDNER presented an interim claim to the Fund on December 16, 2016 for primary restoration costs resulting from the *T/V Margara* April 27, 2006 grounding in Tallaboa, Puerto Rico. The claim included costs to fund limestone stabilization and biological enhancement, monitoring and management, and administration activities in the amount of $5,932,380.02. When the NPFC discovered that SIGCo was the RP's guarantor[27] the NPFC advised the Trustees that the claim must be properly presented to SIGCo prior to presentment to the Fund. The NPFC administratively closed this claim on May 1, 2017[28], until proper presentment was made to SIGCo.

The claim was presented to SIGCo on or about April 14, 2017. The claim was not settled by payment within 90 days; therefore, consistent with 33 U.S.C. § 2713(c), NOAA and PRDNER presented the claim to implement their "Primary Restoration Plan and Environmental Assessment For The 2006 T/V Margara Grounding Guayanilla, Puerto Rico" (the Plan) to the Fund on October 11, 2017.[29] The claimed costs included $4,987,217.68 in upfront funding to implement the primary restoration project identified in the Plan and $945,162.34 in contingency funding. The NPFC initially notified SIGCo on October 12, 2017 that it received the Trustees' claim. On November 3, 2017, the NPFC provided SIGCo a letter stating that the NPFC would adjudicate the claim and seek recovery of any costs paid by the Fund. The letter invited SIGCo to provide comments to the NPFC regarding the restoration plan and funding.

In a letter dated March 7, 2018, attorneys for SIGCo, [redacted] and [redacted], argued that SIGCo had no liability for the claim because NOAA failed to establish that there was a substantial threat of discharge of oil from the vessel; therefore, the coral reef damages were not damages resulting from an OPA incident. There were numerous attachments to the letter, including two unsworn statements arguing that there was no substantial threat of a discharge of oil from the vessel. Additionally, [redacted], president of Polaris Applied Sciences, Inc., provided an expert opinion on the Trustees' primary restoration plan. These attachments are discussed below.

This determination presents the NPFC's findings with respect to the Plan and associated costs.

[27] Although IMC and/or Norwegian Hull Club may have participated in the *T/V Margara* NRDA on behalf of the RP at an earlier time, NOAA was unable to provide documentation to support that IMC and/or Norwegian Hull Club were current designated legal representatives of the RP that were qualified to receive claims on behalf of the RP. The NPFC located the COFR associated with the *T/V Margara* at the time of the incident, which identified SIGCo as the guarantor.

[28] Email from NPFC to NOAA, dated May 1, 2017.

[29] The Plan presented to the Guarantor and NPFC was augmented by additional claim materials that provide more detailed information on project implementation and the claimed costs, principally the "Margara Primary Restoration Implementation and Monitoring Plan" and "Margara Primary Restoration Budget".

NPFC's Authority to Adjudicate Natural Resource Damage Claims

When OPA was enacted, section 1012 (a)(2) (33 U.S.C. § 2712 (a)(2)) authorized use of the OSLTF for payment of costs to assess NRD resulting from an incident as well as developing and implementing plans to restore natural resources damages caused by an oil spill. Executive Order 12777 delegated the functions vested in the President by section 1012 (a)(2) to the Federal trustees designated by the National Contingency Plan. However, with section 6002 of OPA (33 U.S.C. § 2752) Congress specifically limited the availability of OSLTF payments under section 1012 (a)(2) to annual appropriations. As a result, the trustees must obtain an annual appropriation before section 1012 (a)(2) can provide authority for OSLTF compensation of NRD.

With section 1012 (a)(4) of OPA (33 U.S.C. § 2712 (a)(4)), Congress also authorized OSLTF use for payment of uncompensated OPA damages by claimants. In addition to the delegations of authority to the Federal trustees, Executive Order 12777 delegated to the Coast Guard the claims payment functions vested in the President by section 1012 (a)(4). Thus, the federal trustees have been delegated authority to use the OSLTF under section 1012 (a)(2) and the Coast Guard has been delegated the President's authority to use the OSLTF under section 1012 (a)(4). Unlike the Trustees' authority in section 1012 (a)(2), section 6002 (b) (33 U.S.C. § 2752 (b)) specifically allows OSLTF reimbursement of uncompensated OPA damages under section 1012 (a)(4) without an appropriation. Similarly, section 6002 (b) also allows amounts retained by trustees under section 1006 (f) (33 U.S.C. § 2706 (f)) to be used without further appropriations.

The issue of whether section 1012 (a)(4) provided authority to pay uncompensated NRD assessment costs was initially addressed by the Comptroller General *In the Matter of the U.S. Coast Guard—Oil Spill Liability Trust Fund*, B-255979, 1995 WL 632510 (Oct. 30, 1995). In that case, the Comptroller General concluded that NRD and assessment costs could not be reimbursed pursuant to section 1012 (a)(4) because section 1012 (a)(2) provided more specific reimbursement authority and any other interpretation would render meaningless the appropriation requirements in section 6002.

Notwithstanding the Comptroller General decision, the Department of Justice ("DOJ") subsequently concluded that the OSLTF could reimburse NRD and assessment costs under either section 1012 (a)(2) or section 1012 (a)(4). In *Funds Available for Payment Of Natural Resource Damages Under the Oil Pollution Act of 1990*, 21 U.S. Op. OLC 188 (DOJ Office of Legal Counsel, September 25, 1997), DOJ rejected the Comptroller General's conclusion that allowing payment of NRD claims under subsection (a)(4) would render meaningless the appropriation requirement for subsection (a)(2) reimbursement. When distinguishing between the statutes, DOJ noted that before any payment could be made under section 1012 (a)(4) the NPFC would adjudicate the claim to determine whether the amounts claimed should be compensated under the OPA and the applicable regulations. If NPFC denied a trustee claim under section 1012 (a)(4), the trustee could opt to pursue reimbursement through an appropriation from the OSLTF under section 1012 (a)(2). DOJ concluded that the different statutes provided reimbursement alternatives each of which had their own advantages and limitations. DOJ explained:

> [A] Trustee with limited resources might find it preferable to obtain payment for at least a portion of its allowable costs under subsection (a)(2) rather than complying with the procedural requirements for presentation and adjudication of a claim against the Fund under section 1012 (a)(4). Additionally, if a Trustee's claim is denied by the NPFC under subsection (a)(4)—due to noncompliance with the 33 C.F.R. pt. 136 procedural requirements, for example, see 33 C.F.R. § 136.105 (a)—it could have a basis for pursuing those portions of its claim that constitute costs incurred under the provisions of subsection (a)(2). Indeed, if Congress were to make available a significant portion of the Fund for payments under subsection (a)(2) in an annual appropriations act, see 33 U.S.C. § 2752(a), it seems unlikely that eligible Trustees would bother to pursue payment under section 1012 (a)(4) and 1013 for costs otherwise recoverable under subsection (a)(2) pursuant to the appropriation.

Id. at 197.

In this case, the Trustees have opted to file a claim with the NPFC seeking OSLTF reimbursement for NRD under section 1012 (a)(4). Because NPFC has been delegated the authority to adjudicate claims against the OSLTF and DOJ has ruled that trustee NRD claims may be paid by the OSLTF without an appropriation, NPFC has the authority to adjudicate this claim and authorize OSLTF reimbursement even in the absence of an appropriation. As part of that authority, NPFC acts as the fact-finder during the adjudication of this claim. In this role, the NPFC considers all relevant evidence and weighs its probative value when adjudicating the claim. The NPFC is not bound by the findings or conclusions reached by other entities. 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.

Claimant Eligibility

NOAA and PRDNER submitted the claim to the Fund for NRD. Pursuant to OPA, NRD are defined as damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee. 33 U.S.C. § 2702(b)(2)(A).

Federal natural resource trustees are designated by the President, pursuant to OPA (33 U.S.C. §2706 (b)(2)). NOAA, under the authority of the Secretary of Commerce, is an appropriate federal natural resource trustee pursuant to the President's designation of federal trustees under OPA, Executive Order 12777 (56 Fed. Reg. 54757, October 22, 1991), and Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. §300.600) and Section 1006(b)(2) of OPA. 33 U.S.C. §2706(b)(2).

The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this Act. 33 U.S.C. § 2706(b)(3). In the case of

Puerto Rico, PRDNER is the appropriate trustee pursuant to Law 147 of 15 July 1999, which provides that the Secretary of PRDNER develops, manages and protects coral reefs.

In this case, NOAA and PRDNER established that they are appropriate trustees for this claim to the Fund for injury to, and destruction of, natural resources resulting from the grounding of the *T/V Margara* on April 27, 2007.

Jurisdictional Information

In order to satisfy OPA's definition of a "claim" at 33 U.S.C. § 2701 (3), a claimant must show that its damages result from an OPA incident. An OPA incident includes "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of a discharge of oil." 33 U.S.C. §2701(14).

The OPA does not define the phrase "substantial threat".[30] Nevertheless, Congress intended for OPA to address cases where the threat of oil pollution was substantial and more than a mere potential of discharge. In OPA's legislative history, the House Committee on Merchant Marine and Fisheries explained with the following how a substantial threat of oil discharge ought to be distinguished from the mere possibility of a discharge:

> The Committee intends that liability for removal costs resulting from a threat of a discharge of oil should attach in the event that the threat is substantial. Thus liability may exist if a vessel were aground and actions were taken to prevent the vessel from breaking up and spilling oil. No liability would result, however, from the presence of tanker traffic alongside waterfront property resulting in reduced property values because of the potential for a discharge of oil.

H.R. Rep. No. 101-242, Part 2, 101st Cong., 1st Sess. 56 (1989).[31]

Just like a substantial threat of discharge satisfies OPA's definition of an incident, a substantial threat of an oil discharge also triggers a FOSC's authority to respond. Under section 311 (c) of the Federal Water Pollution Control Act ("FWPCA") (33 U.S.C. § 1321 (c)), the President shall ensure effective and immediate mitigation or prevention of a substantial threat of oil discharge to navigable waterways in accordance with the National Contingency Plan (NCP) as well as any

[30] While OPA does not provide a definition of substantial threat, a relevant definition is provided in the regulations regarding Tank Vessel Response Plans for Oil. 33 C.F.R. § 155.1020 specifies that "Substantial threat of such a discharge means any incident involving a vessel that may create a significant risk of discharge of cargo oil. Such incidents include….groundings."

[31] *See also*, Section-By-Section Analysis, H.R. 3394, The Oil Pollution Act of 1989, 135 Cong. Rec. H7898, H7900 (daily ed. Nov. 1, 1989)("Thus liability may exist if a vessel were aground and actions were taken to prevent the vessel from breaking up and spilling oil. No liability would result, however, from the presence of tanker traffic alongside waterfront property resulting in reduced property values because of a perceived potential for an oil spill.")

applicable Area Contingency Plan[32]. The President's FWPCA response authority has been delegated to pre-designated FOSCs. *See*, 33 C.F.R. § 1.01-80 (d) and 40 C.F.R. Part 300.

When a FOSC is considering whether to incur costs to mitigate or eliminate a substantial threat of discharge in a vessel case, the following factors should be considered: (1) The likelihood of a discharge under the circumstances; that the situation presents an unacceptable probability that a discharge will occur without FOSC intervention; (2) The proximity to navigable waters, the quantity of oil which may be discharged, and the lack of barriers to stop the oil from flowing to the water indicate that a spill will impact navigable waters; (3) The condition of or damage to the source, and the environmental factors or weather which may change the conditions, indicate that a spill will occur; (4) The potential impact of a discharge on the particular environment, including proximity to environmentally sensitive areas, populous areas, etc.; and (5) That action must be taken quickly to prevent a spill.[33]

In addition to the above, it's NPFC's policy that a substantial threat determination for a vessel should consider the following factors on a case-by-case basis: (1) Condition of the vessel; (2) Weather, e.g. storm forecast, river flooding, harsh winter, etc.; (3) FOSC's explanation of why a substantial threat exists; (4) The increased risk of an oil discharge due to complications of offloading cargo or fuel in shallow water; vessels maneuvering alongside in shallow water to facilitate offloading operations; or using over the top oil transfer procedures through portable pumps and mobile hoses rather than fixed piping transfer systems; (5) The increased risks due to duct keel fuel transfer lines running next to the hull and in the way of spaces where containers will be shifted; (6) The increased risks due to vessel movement/pivoting/shifting; (7) The increased risks due to anticipated lengthy cargo or fuel off-loading operations; and (8) The type of oil/hazardous materials/substances aboard, poor material condition (listing, holed, bad gaugings, etc.), no caretaker, expired insurance or safety certificates (i.e. COFR/COI), and the potential for problems during adverse weather.[34]

In this claim, the *T/V Margara* went aground in the Bay of Tallaboa off the coast of Puerto Rico with more than 315,000 barrels (13,230,000 gallons) of No. 6 oil in her tanks. The grounding resulted from the Master's negligent navigation of the vessel into a shallow area heading towards the Tallaboa Bay entrance instead of the Guayanilla Bay entrance as called for in the vessel's voyage plan. When the casualty occurred, the *T/V Margara* was well outside the navigational channel and hard aground. The impacted area included coral resources, reef biota and reef habitat and had been identified as an environmentally sensitive area in the relevant Area Contingency Plan.[35]

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[32] The Sector San Juan 2006 Area Contingency Plan (ACP) in place at the time of the incident was consistent with these statutory mandates. For example, page 46 of the ACP states that "If the discharge or substantial threat of discharge of oil or hazardous substance is of such size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the OSC shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge."

[33] NPFC INSTRUCTION M7300.1A, *Technical Operating Procedures for Determining Removal Costs Under The Oil Pollution Act of 1990*, pg. 30 (April 19, 2018).

[34] National Pollution Funds Center Policy CM13, *Substantial Threat Cases* (March 12, 1998).

[35] Area Contingency Plan, Environmentally Sensitivity Index Map, PR-59 (published May 2000).

The FOSC[36], with consultation from both [redacted] and [redacted] (retired), determined that the grounded *T/V Margara* posed a substantial threat of oil discharge. Specifically, the FOSC stated several variables that impacted their decision, including: (1) the size of the vessel and amount of oil onboard; (2) the vessel was hard aground in an area containing hard coral, (3) the remote location of the grounding where limited response resources existed; and (4) the potential for significant impact to public health and natural resources if the vessel breached.[37]

Incident command quickly began efforts to refloat the vessel, i.e., conduct removal activities to minimize, prevent or mitigate the substantial threat of a discharge. The FOSC personally participated in two overflights of the *T/V Margara* to visualize the vessel's circumstances and inform his analysis. The Coast Guard also deployed [redacted] to the *T/V Margara* as Investigating Officer (IO) to determine how the casualty occurred. Once on board, the IO issued a NOFI to the Master of the *T/V Margara* explaining that the grounding was at least a threatened oil pollution event that could result in liability for damages. The IO confirmed that the Master had activated the Vessel Response Plan (VRP) to be ready to respond to any actual discharge of oil. The vessel's crew also hired National Response Corp. to act as the vessel's OSRO and hired a salvor to develop a salvage plan and perform salvage operations. Additionally, the IO learned that the vessel's representatives were sounding the cargo tanks every two hours to monitor whether they had been breached and could discharge oil. Due to the nature of the grounding, the FOSC also consulted with the Trustees, NOAA and PRDNER, seeking their technical expertise regarding the coral reefs and biota that could be affected by the grounding.

The FOSC directed that a UC be stood up so that oil spill response personnel would be ready for immediate action in the event of a spill. A 55-foot Coast Guard ship took depth soundings around the *T/V Margara*. Boom was staged with the intention of deploying it around the grounded tanker to contain any discharged oil. Also, the UC planned to use Barge BB110 for lightering operations to remove the fuel from the grounded tanker. A 600-yard Safety Zone was established around the grounded tanker. The FOSC's representative opened a Federal Project Number (FPN) with the NPFC to obtain funding from the OSLTF for an oil spill response. The OSLTF can only be accessed in this manner after a determination that either oil has actually been discharged or there is a substantial threat of an oil discharge. The process for opening a FPN and accessing the OSLTF produced two messages[38,39] documenting the FOSC's determination that the grounded tanker created a substantial threat of discharge.

The National Response Center (NRC) received three reports[40] as a result of the grounded tanker. The NRC received these reports because it receives initial reports for pollution incidents and forwards that information to appropriate federal/state agencies for response. In NRC report 795303, [redacted] reported the grounded *T/V Margara* to the NRC.

[36] [redacted], retired.
[37] PHONECON between NPFC and (Ret.) [redacted] and [redacted] (former USCG) on September 25, 2018.
[38] FPN Notification M/V Margara – M06017, 271425Z ARP 06.
[39] Automated CANAPS email notification to [redacted] (NPFC), dated April 27, 2006.
[40] Report numbers 795301, 795303, and 795310.

After the grounding, the vessel remained stuck on the reef through the tidal cycle. Tugs made two unsuccessful attempts to pull the grounded tanker off the reef. The IO and vessel owner's representative reported that the tanker had moved about 700 feet towards shore while it was grounded. With the assistance of three tugs, the tanker eventually refloated before any oil was actually discharged. After the tanker was dislodged, its classification society performed a hull survey and noted the following damage: (1) the paint on the vessel's bottom shell was found variously scraped/gouged at the longitudinal direction with the heaviest abrasions being forward of midship on the starboard side; and (2) Bottom shell/bilge strike plating found gradually set-up 0-25 mm between frame numbers 169-173, 173-177, 181-185 & 185-189 just outboard of bottom longitudinal 1-13 (outboard most bottom longitudinal). Bottom longitudinal 1-13 found slightly distorted in way of frames 159-173. No welds were found fractured.

Consistent with the determinations made by the FOSC, on March 6, 2013, the Trustees published a Notice of Intent to Conduct Restoration Planning pursuant to 15 C.F.R. Part 990. That notice included several determinations relating to the Trustees' jurisdiction to pursue restoration planning. In particular, the Trustees determined that "[t]he grounding and subsequent removal of the vessel to prevent the substantial threat of discharge of oil into or upon navigable waters was an incident as defined in 15 C.F.R. § 990.30." This formal determination of an OPA incident was consistent with all correspondence between the Trustees and the RP dating back to the Trustees' initial written correspondence with the RP on May 31, 2006.

In light of the above, the FOSC's "substantial threat" determination should be given deference and presumed correct unless it can be shown to be arbitrary and capricious.[41] Contrary to the assertions made in the statements submitted by SIGCo, the FOSC determined that the circumstances surrounding the grounded tanker amounted to a substantial threat of oil discharge and then took actions consistent with that determination. The FOSC took effective and appropriate actions to mitigate that threat. The mere fact that an oil spill was ultimately avoided does not undermine the FOSC's determination that the *T/V Margara* posed a substantial threat of an oil discharge. Furthermore, given the benefit of hindsight and knowing that oil never discharged, the FOSC continues to unwaveringly assert that the grounding posed a substantial threat of oil discharge.[42]

The NPFC determines that a preponderance of the credible evidence in the record supports that FOSC's determination that the *T/V Margara* was a substantial threat. The NPFC's determination is supported by OPA's legislative history and the NPFC's guidance and policies. The threats to the environment posed by the vessel were greater than the mere potential of an oil discharge created by tanker traffic near waterfront property. To the contrary, the Master's negligent navigation resulted in *T/V Margara* grounding in a shallow and environmentally sensitive area of the Bay of Tallaboa that was outside the shipping channel. The threats posed by the tanker were aggravated by the fact that it was loaded with approximately 315,000 barrels (13,230,000

[41] In *U.S. v. Kilroy & Associates*, 2009 WL 3633891, 71 ERC 1219 (W.D. Wa. 2009), the court recognized that a FOSC's "substantial threat" determination should be presumed to be valid and reversed only if it was arbitrary, capricious, or an abuse of discretion. Because the RP did not rebut the presumed validity of the FOSC's determination, the United States was entitled to a summary judgment for all removal costs and damages. *See also*, *U.S. v. English*, 2001 WL 940946, 2001 A.M.C. 1756 (D. HI 2001)("The Court finds that the designation of the SEA TIGER as posing a substantial threat to the environment was not arbitrary and capricious.").

[42] PHONECON between NPFC and (Ret.) [redacted] and [redacted] (former USCG) on September 25, 2018.

gallons) of No. 6 oil.[43] The casualty damaged the vessel's hull and the ocean's forces were pushing the tanker towards the shore where the likelihood of additional vessel damage would increase. The vessel was grounded and actions were taken to prevent the vessel from breaking up and spilling oil. Without an intervention, based on the information in the record, there was an unacceptable probability that an oil discharge would occur. The totality of circumstances surrounding this casualty establish that an OPA incident occurred when the *T/V Margara* grounded and created a "substantial threat" of oil discharge.

Attorneys for SIGCo argue that there was no discharge of oil and no substantial threat of a discharge of oil; therefore, the grounding was not an OPA incident that can provide the basis for compensation of NRD under OPA. In an unsworn statement, [redacted], Esq. asserts several reasons to support his conclusion that there was no substantial threat of an oil discharge. First, [redacted] contends that there is no documentation in the administrative record specifically identifying this casualty as a substantial threat of a discharge and no FOSC or Coast Guard official stated such. Second, [redacted] focuses on the fact that the *T/V Margara* was a double hulled vessel that suffered limited damages to the hull during the casualty. Based upon the hull's integrity after the grounding, he asserts that the vessel would not have discharged oil. Although [redacted] concedes "any vessel that is aground would, if not attended to, ultimately become a threat"[44] he contends that the *T/V Margara* did not satisfy that standard because it was successfully refloated in less than 24 hours. [redacted] theorizes that there was not enough time for weather or wave action to damage the vessel's hull sufficiently to create a substantial threat of discharge. He concedes that: (1) the Coast Guard issued a NOFI to the Master; (2) a UC was established; and (3) the Master implemented the vessel's response plan. [redacted], however, dismisses these actions as being only taken in an abundance of caution instead of evidence of a substantial threat of oil discharge.

[redacted] arguments are in hindsight and are not persuasive. As an attorney, [redacted] is obligated to advocate for his clients' best interests instead of objectively analyzing all of the facts. In an effort to bolster his credibility, [redacted] purports to rely on his previous experience as a Coast Guard officer to offer opinions that minimize his client's liability for this incident. However, [redacted] opinions are not as informed or as objective as the conclusions reached by the FOSC. Instead, [redacted] opinions are provided eleven years after the incident and without the benefit of having been on-scene when the casualty occurred. In contrast, the FOSC personally participated in two overflights of the grounded vessel and received input from the IO, who was actually on board the grounded tanker. Also, unlike [redacted] who is charged with minimizing his client's liability, the FOSC was responsible for protecting the waters of Tallaboa Bay from an oil spill. Because [redacted] is biased in favor of his clients and his opinions were not as informed as the FOSC's opinions, his unsworn statement is given much less weight than the conclusions reached by the FOSC.

[43] No. 6 oil can be particularly damaging to the environment. It is generally considered to be a persistent oil and only 5-10% of the total spilled can be expected to evaporate. Thus, No. 6 oil spilled in the ocean can be transported significant distances by winds and currents. *See*, *NOAA, Office of Response and Restoration Web Site*: https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/resources/no-6-fuel-oil-spills.html (last viewed on October 16, 2018).

[44] Statement of Rear Admiral (Ret.) [redacted], dated February 20, 2018, page 5.

A second unsworn statement submitted by SIGCo attorneys was executed by [redacted], the QI for the vessel.[45] He states that as liaison between the vessel and the FOSC, he was in close communications during the grounding. [redacted] contends that the tugs were only ordered as a precaution to steady the tanker. Moreover, [redacted] asserts that "[e]verything we did in this brief event was purely routine precautionary action and common in every grounding event where I am engaged as the QI." He notes that the *T/V Margara* was double hulled and ice hardened and then concludes that the vessel was never in danger of discharging oil.

[redacted] unsworn statement was also not persuasive. [redacted] statement emphasized that "[n]o one including any USCG personnel including the FOSC and his deputy ever mentioned there was any real threat and certainly not a 'substantial' threat of oil pollution." Notwithstanding [redacted] statement, the IO issued the Master a NOFI advising that a pollution incident occurred or threatened to occur. The NOFI further advised that the incident could result in financial liability and the federal government could take action to minimize or mitigate the damages threatened or caused by the grounding. [redacted] unsworn statement is also inconsistent with his reporting of the grounding to NRC.

More persuasive are the events and actions taken by the individuals responding to the casualty. As described above, the FOSC immediately began to take actions to mitigate the pollution threats posed by the tanker. The FOSC declared the grounded tanker a substantial threat of discharge, opened the OSLTF to provide funding to support a response to the substantial threat, and his actions thereafter were entirely consistent with what should have been done to mitigate and eliminate that threat. The FOSC created a safety zone around the vessel, staged contingency boom in case of discharge, used tugs to stabilize and maintain control of the vessel, and stood up a UC at the Corco facility. Further he launched significant Coast Guard resources during the response, including 13 USCG personnel, GVs, and a buoy-tender to conduct depth soundings. The FOSC also personally conducted two overflights during the incident to gain additional appreciation for the threat posed by the grounded tanker. Lastly, once the vessel did refloat, the FOSC ordered the ship out to sea and to continue with soundings of the tank. Only after additional inspection was complete, where the condition of the hull was discernable, did the FOSC allow the vessel to come into port.

The evidence in this case also establishes that, at the time of the grounding, the vessel's crew recognized the substantial threat of an oil discharge posed by the vessel. The Master initiated the VRP and both a salvor and an Oil Spill Response Organization were hired. A VRP is activated for all commercial tank vessel casualties that result in a discharge of oil or present a substantial threat of such a discharge.[46] Similarly, the crew conducted regular soundings of the tanks because they were concerned that the tanks could discharge oil. Boom was made available in case of a discharge and a barge was secured to conduct lightering operations and remove the fuel from the tanks. These actions were taken because the crew recognized that the grounded tanker

[45] Statement of [redacted], dated February 22, 2018.

[46] As explained in the regulatory history for VRPs, if the Master determines that the resources and personnel available on board cannot meet the needs of a discharge or substantial threat of a discharge, he is expected to follow the procedures approved in the VRP. 73 Fed. Reg. 80618, 80626 (Dec. 31, 2008). In this case, the Master activated the vessel's VRP and followed those procedures.

created a substantial threat of an oil discharge that needed to be quickly addressed before the situation worsened and grew into an environmental catastrophe.

Based upon the foregoing, the NPFC determines that the *T/V Margara* posed a substantial threat of an oil discharge into navigable waters that satisfied OPA's definition of an incident. Unlike SIGCo's belated arguments, this determination was originally issued by the NPFC in September 22, 2006 when it informed PRDNER that the OSLTF would be available for NRD claims associated with the *T/V Margara* incident.[47] Because the Trustees seek compensation for NRD resulting from an OPA incident, the NPFC concludes that it has jurisdiction to adjudicate this claim.

General Claim Requirements

The Fund is available to pay claims for uncompensated removal costs and damages. 33 U.S.C. §2712(a)(4). Covered damages include damage to natural resources for injury to, destruction of, loss of, or loss of use of natural resources, including the costs of assessing the damages, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee. 33 U.S.C. § 2702(b)(2)(A). The measure of NRD is the costs of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; the diminution in value of those natural resources pending restoration; plus the reasonable cost of assessing those damages. 33 U.S.C. §2706(d)(1)(A) – (C).

Trustees shall develop and implement a plan for the restoration, rehabilitation, replacement or acquisition of the equivalent, of the natural resources under their trusteeship. 33 U.S.C. § 2706(c)(1)(C). Costs shall be developed with respect to plans. 33 U.S.C. § 2706 (d)(2). Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment. 33 U.S.C. §2706(c)(5). NRD claims to the Fund must be presented within three years from the date of completion of the natural resource damage assessment under section 2706 (e). 33 U.S.C. §2712(h)(2).

NOAA, along with PRDNER presented this NRD claim to the Fund on October 11, 2017. It included a Plan and claim materials that describe the injuries to natural resources observed by the Trustees, assessment and restoration planning activities conducted by the Trustees, restoration project methods and deliverables, level of effort, timeframe, cost estimates for contractors and agency personnel, and provided a sum certain.

NOAA states that the Plan that forms the basis of this claim was made available for public review and comment for 30 days beginning on September 20, 2014 via an announcement and notice published in "Primera Hora", a newspaper of general circulation in Puerto Rico, and that there were no comments from the public on this Plan.[48] The Plan was finalized in April 2015, with official notice of its completion on May 9, 2015.[49] Because this claim was submitted to the NPFC on October 11, 2017, the Trustees filed this claim within the period of limitations for

[47] Letter from NPFC to PRDNER, dated September 22, 2006.
[48] Plan, page 12.
[49] Notice to the public of plan completion was also made in"Primera Hora".

filing a claim against the OSLTF. *See*, 33 U.S.C. §§ 2712 (h)(2) and 2706 (e). *See also*, 15 C.F.R. § 990.64(b) and 33 C.F.R. § 136.101(a)(1)(ii).

Claim Presentment to the Guarantor

As discussed above, NOAA and PRDNER presented the claim for primary restoration implementation costs to SIGCo,[50] on April 14, 2017.[51] On July 5, 2017, SIGCo responded to NOAA, declining to provide funding on the basis that the grounding was not an OPA incident and, even if it was an OPA incident, there were no damages resulting from the incident.[52] On October 11, 2017, after SIGCo declined to pay and more than 90 days after presenting its claim to SIGCo, NOAA presented this claim to the Fund.

The NPFC notified SIGCo on October 12, 2017 that this claim had been received[53] and further instructed SIGCo on November 3, 2017[54] that the NPFC would receive any comments from SIGCo regarding NOAA's claim. On March 12, 2018,[55] SIGCo provided the NPFC with their comments on the Plan.[56]

Trustees' Burden of Proof

Trustees bear the burden of proving their entitlement to the amount claimed as compensation of NRD. 33 C.F.R. § 136.105 (a). Unlike other types of claimants, Trustees are assisted by the rebuttable presumption found at 33 U.S.C. § 2706 (e)(2) and 15 C.F.R. § 990.13 when meeting their burden.

Under OPA's rebuttable presumption, Trustee determinations or assessments of damages to natural resources made in accordance with 15 C.F.R. Part 990 are initially presumed correct. However, in order to benefit from the rebuttable presumption, the Trustees must first show that they complied with 15 C.F.R. Part 990. 33 U.S.C. 2706 (e)(2). For example, Trustees must show that their damage assessment procedures were reliable and valid as required by 15 C.F.R. § 990.27 (a)(3) before the assessment will be presumed valid. Once Trustees establish that the presumption applies, responsible parties are burdened with presenting alternative evidence and persuading the fact finder that the Trustees' incorrectly measured damages. *See*, *Natural Resource Damage Assessments*, 61 Fed. Reg. 440, 443 (January 5, 1996). Although determinations made in compliance with 15 C.F.R. Part 990 will initially be presumed correct, the presumption of correctness may be rebutted. If the fact-finder determines that the rebuttal evidence is of sufficient weight, the claim may be denied in whole or in part.

[50] SIGCo is the listed guarantor in the Certificate of Financial Responsibility (COFR) records associated with the *T/V Margara* at the time of the incident. [redacted], of SIGCo signed the COFR application on November 25, 2003.
[51] Letter from NOAA to SIGCo transmitting their claim for primary restoration costs, dated April 14, 2017.
[52] Letter from SIGCo to NOAA, dated July 5, 2017.
[53] Email from NPFC to SIGCo, dated October 12, 2017.
[54] RP Notification Letter from NPFC to SIGCo, dated November 3, 2017.
[55] Email from Guarantor to NPFC, dated March 12, 2018.
[56] Additional materials were provided via courier on March 14, 2018.

The Claimed Injuries Resulted From a Substantial Threat of Oil Discharge

In this case NOAA and PRDNER submitted the claim, $5,932,380.02, which included the Plan and documentation and costs estimates in support of the claim. According to the Plan, 1,662 meters^2 of rubble areas require stabilization and approximately 1550 coral colonies and other assorted coral clippings will be used to enhance the speed of recovery on the constructed reefs in the damaged coral areas.[57]

In response to the Trustees' submission, SIGCo argued that the claimed injuries were not compensable under the OPA because the reef damage resulted from the grounding instead of a substantial threat of an oil discharge.[58] In support of this argument, SIGCo cited *Gatlin Oil Co. v. U.S.*, 169 F.3d 207 (4th Cir. 1999). The plaintiff in *Gatlin* filed suit to contest NPFC's construction of OPA that limited compensable damages to those resulting from either an actual oil discharge or a substantial threat of oil discharge. With the following, DOJ's brief in *Gatlin* explained how NPFC would identify compensable damages in a hypothetical incident involving a tanker grounded on a reef and creating a substantial threat of discharge:

> The situation is reported in the national press, and, as a result, some vacationers cancel their plans to stay at the resort just ashore from the tanker. The hotel's losses in that case are attributable to the threat of a discharge of oil, and are compensable under OPA. The damage to the reef caused by the initial impact, however, is not, since it was caused by the collision, rather than by any threat that the oil would spill. But if further damage to the reef were caused by the vessels responding to the threat, then that incremental damage would be covered by OPA, since it resulted from the threat. The key is whether the substantial threat of a discharge, rather than some other cause, is the cause of the injury.

Brief for Appellant at 36, *Gatlin Oil Co. v. U.S.*, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079).

The Fourth Circuit affirmed NPFC's construction in *Gatlin* and held that OPA compensable damages must "result from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or the adjacent shoreline." *Id*. at 211.

The NPFC determines that the injuries addressed by this Determination resulted from the substantial threat of discharge presented by the *T/V Margara* after it grounded. The NPFC acknowledges that any injuries resulting from the initial grounding are not compensable. However, the injuries compensated by this Determination resulted from the efforts to eliminate the substantial threat of discharge posed by the *T/V Margara* while it was grounded. i.e., the attempts to refloat the vessel and the subsequent success of refloating the vessel. In particular, as attempts were made to free the vessel, it injured corals in the southern impact site and then the northern impact area, which included a series of smaller reefs. Thus, because they resulted from

[57] Margara Primary Restoration Implementation Plan, pages 4-5.

[58] As discussed previously in footnote 7, the area impacted by the grounding itself was limited to Site 146 and was not included in primary restoration actions identified in this claim.

a substantial threat of oil discharge, the injuries compensated by this Determination are similar to the damages approved by the Fourth Circuit in *Gatlin*.[59]

Injury Determination and Quantification

As the NPFC began to adjudicate this claim, it reviewed the earlier documents compiled during the cooperate assessment activities with the RP's representative, IMC. Immediately following the incident in 2006, the Trustees conducted surveys using divers and GPS technology to map the area of impact resulting from the response to the incident. The Trustees observed a large area of impact and significant coral injuries; in November 2006 they pursued a more thorough survey approach that utilized boat-mounted SONAR.[60] These survey results were later updated in 2007 by post-Hurricane Dean observations from a joint RP/Trustee diving trip. Based on the results of these surveys, the Trustees and RP developed a consensus area of impact and used GIS software to quantify the area of impact into square meters. Ultimately, the area of impact was organized into three separate geographic sections, with the Southern Area of impact measuring 1051 meters^2, the Central Propwash Area measuring 174 meters^2, and the Northern Area measuring 5,530[61] meters^2, with the total area of impact directly resulting from the incident equaling 6,755 meters^2.

After developing an overall geographic footprint of injury, the Trustees and RP continued the assessment of total coral injury by studying the long-term recovery of the injured coral areas. They classified the affected areas by level of injury and/or sea bottom types.[62] Of particular concern to the Trustees were areas characterized as Majority Unconsolidated Rubble ("rubble areas"). The Trustees and RP conducted additional surveys in 2008 and 2012 to more accurately identify the rubble areas that would require primary restoration. Following the 2012 surveys, the Trustees used an underwater GPS mapping system to calculate an area of 1,662 meters^2 of rubble where primary restoration was needed.

From 2008 to 2012 the Trustees monitored the recruitment and survival of corals to determine whether coral recovery was occurring in the response-caused rubble areas. The results of these monitoring efforts indicated that the survival of coral recruits in rubble areas was drastically lower than in reference sites[63] and that coral recovery is not occurring in rubble areas. Specifically, densities of coral recruits for corals were lower in 2012 than in 2008 and there were almost no surviving hard coral recruits at all. In addition, since 2012, the Trustees annually measured reef height in the rubble areas that were flattened by the incident and measurements

[59] When implementing the regulations relating to natural resource assessments under OPA, NOAA specifically recognized that compensable injuries could result from response-related activities. See 15 C.F.R. § 990.51 (b)(2)(ii) and *Natural Resource Damage Assessments*, 61 Fed. Reg. 440, 447 (January 5, 1996)("For injuries resulting from response actions or from a substantial threat of a discharge of oil, an injury to a natural resource or an impairment of use of a natural resource service has occurred as a result thereof. Thus, under this rule, injury may result from direct or indirect exposure to oil, as well as from response-related activities, and loss of services is explicitly included in the definition of injury.").

[60] The multi-beam SONAR uses acoustic energy by sending out soundings to the ocean floor and measuring the reflected echoes to assess the depth and condition of the seafloor.

[61] Not including the 633 meters^2 impacted by Hurricane Dean.

[62] Hard Substrate, Compacted Sediment, Partially Impacted, Restored, and Majority Unconsolidated Rubble

[63] Reference cites included non-rubble area impacted by the Margara incident, Margara emergency restoration areas, nearby unimpacted sites, and the site of another local grounding where there was little, if any, rubble.

have shown that the average height difference between the high and lowest areas remains at 10 cm, compared to an average of 50 cm in unimpacted areas.

The monitoring results are consistent with results from other scientific studies conducted on coral recovery in rubble areas. The Trustees cite a Fox Report[64] which states that low survival rates in rubble fields were due to post-settlement mortality and not recruitment limitations, therefore observations of coral recruitment in rubble fields are not reliable indicators of recovery. Importantly, according to a Raymundo Report,[65] recruits in reference areas display significant growth compared to those recruits that settled onto unconsolidated rubble, which exhibited signs of abrasion and partial mortality. Consistent with published literature and results observed on site, timeframes from other coral recoveries located in in rubble fields indicate prohibitively longer recovery for coral, if any.[66]

After review of the submitted claim materials, the NPFC requested that NOAA provide additional information regarding the injury assessment.[67] Notably, the NPFC asked whether natural recovery had occurred in the impacted areas because, in 2009, the Trustees determined that 2,600 meters^2 needed restoration and in 2012 they determined that only 1,662 meters needed restoration.^{2} Additionally, the NPFC asked how the Trustees distinguished between rubble caused by the incident and naturally-occurring rubble fields when determining areas needing restoration.

On January 22, 2018, NOAA responded to the NPFC stating that the reduction in injured area requiring primary restoration was a result of using more advanced assessment techniques.[68] Survey work in 2009 used measuring tapes and was intended primarily to identify locations for primary restoration and to obtain a general estimate of the total area needing restoration. In 2012 the Trustees used an underwater GPS system to delineate the injury areas on a much finer scale with greater accuracy. With respect to distinguishing rubble areas, NOAA stated that naturally occurring rubble fields are located in the grooves between the reefs, while the response-caused rubble areas are located on top of the reefs.

The NPFC reviewed the assessment information provided by the Trustees that established an area of 1,662 meters^2 requiring primary restoration. The NPFC finds that the Trustees' use of surveys, mapping, and established literature are valid and reliable techniques to determine that 1,662 meters^2 of coral reef habitat requires primary restoration.

Primary Restoration Alternative

The Trustees' objectives for primary restoration are to increase coral recruitment success and survival, restore the original reef topography, promote coral biota growth, and generally reduce the recovery time of coral resources in the rubble fields to baseline. They considered a range of

[64] [redacted] and [redacted] 2003. "Recovery in Rubble Fields: Long Term Impacts from Blast Fishing." Marine Pollution Bulletin. 46: 1024-1031.

[65] [redacted] and [redacted] C. 2007. "Can Dynamite-Blasted Reef Recover? A Novel, Low-Tech Approach to Stimulating Natural Recovery in Fish and Coral Populations."

[66] Final Primary Restoration Plan, pages 24-25.

[67] Email from NPFC to NOAA, dated November 22, 2017.

[68] Email from NOAA to NPFC, dated January 22, 2018.

restoration alternatives to restore the 1,662 meters² of injured coral resources in the rubble areas and evaluated each alternative. They evaluated five restoration alternatives plus a No Action alternative, using the criteria provided at 15 C.F.R. §990.54. Criteria included: (1) the cost of the alternative; (2) prevention of future injury; (3) multiple source benefits; (4) the effect on public health and safety; and (5) likelihood of meeting the Trustees' primary restoration goals.

Trustees will first conduct preparatory activities, including permitting and final mapping to determine the specific limestone placement locations. They will then source the limestone needed to build the reefs, set up the equipment and machinery[69] needed to deploy the limestone, and conduct the actual deployment of the limestone to the designated restoration locations. Next, the Trustees will secure the limestone boulders[70] and stabilize the rubble by laying concrete. They will also anchor the manufactured reefs to existing hard substrate using rebar[71] to provide additional long-term stability.

Once the reef structures are constructed, the Trustees will attach adult corals and sponges from other local sites[72], including a coral nursery within the Margara site, to the manufactured reefs using cement and epoxy.

The NFPC finds that the Trustees reasonably and appropriately considered and evaluated the various restoration alternatives using the criteria provided in 15 C.F.R. §990.54. The Trustees' Plan documents the Trustees' consideration of these factors for each alternative and provided qualitative scoring matrixes that supported the Trustees' evaluation of all alternatives and selection of the preferred alternative.

The Trustees determined that the creation of limestone patch reefs in rubble areas and then enhancing those reefs with previously developed corals was their preferred restoration alternative. This alterative best accomplished their primary restoration objectives and could restore the coral areas to their baseline condition,[73] as well as scoring highest in the Trustees' evaluation of the other criteria.

The limestone reef structures will stabilize the loose rubble, provide fertile habitat for future coral growth[74], and reestablish the height and complexity of the original reef habitat. Given the length of time it takes for natural recruitment and growth of corals,[75] attachment of adult corals to the manufactured limestone reefs will accelerate the growth of corals and reduce the recovery time for coral in the rubble areas.

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[69] Deployment of the heavy limestone will require a barge, crane, and stable moorings to anchor the barge.
[70] The Trustees relied on expert analysis to determine the size and weight of boulders needed to adequately stabilize the restoration structures from anticipated high energy storm events.
[71] Where anchoring is not possible due to the thickness of rubble, the Trustee will use limestone of at least 4 tons to ensure the structure can withstand volatile weather.
[72] Abandoned vessels and oil facility sites.
[73] The Trustees measured coral densities at reference sites adjacent to the impacted areas to establish baseline.
[74] Limestone rocks used are made of the same material as the coral reefs, are porous, and have many holes, crevices, and grooves, which promotes better coral recruitment.
[75] Natural recruitment and growth of coral takes many years, with some of the injured species requiring decades.

The general restoration method of constructing limestone coral reefs has been successfully used for coral restoration at several other grounding sites in both Puerto Rico[76] and Florida[77]. The RP proposed a similar project[78] using fabricated limestone reefs and adult corals to provide primary restoration in the rubble areas as well. Furthermore, to help confirm project viability, in 2010 the Trustees placed limestone samples at the rubble sites and reported high rates of coral recruitment and survival after 3 years.

The Plan also provides that the Trustees will transplant enough *A. cervicornis* colonies to the site to ensure survival of at least 1200 colonies. Additionally, approximately 150 Scleractinian colonies and approximately 200 Octocorals will be transplanted, along with 100 Octocoral clippings. A second event of *A. cervicornis* transplanting will be conducted in Year 2 to further enhance biological function.

After evaluating the Trustees' primary restoration alternative, the NPFC finds that (1) the creation of limestone reef will restore the rubble areas and (2) the transplanting of adult corals will restore the natural resources and services to baseline on an accelerated time frame. Therefore the claimed primary restoration project is reasonable and appropriate under OPA.

The NPFC considered Mr. [redacted] Expert Opinion in its adjudication of the claim.

As noted above, attached to the SIGCo letter dated March 7, 2018, was [redacted] expert opinion on the Primary Restoration Plan.[79] [redacted] was retained by the hull underwriters for the *T/V Margara* in 2008 and states that he was engaged in extensive mediation and negotiation of this claim with the Trustees. He conducted joint surveys with PRDNER and NOAA at the site between 2008 and 2012 and provided the underwater SONAR mapping for the areas to be restored in 2012 that was used in the Trustees' Primary Restoration Plan. He notes that his company has concluded 21 coral settlements between 1997 and 2010.

[redacted] agrees with the conceptual goals and objectives of the Trustees' Primary Restoration Plan – to promote recovery of unstable areas unlikely to recover on their own in reasonable time frames. He recognizes that some unstable areas at the grounding site are likely to inhibit normal coral growth and recruitment. He seems to agree that approximately 1600 meters^2 require some stabilization. However, he has concerns that some of the Plan's conclusions and proposed actions are not technically justified and are too costly.

<u>Stabilization of rubble and coral survival</u>.

[redacted] disagrees with the Trustee position that stabilized areas will not recover without biological enhancement (attaching or recruiting coral colonies). According to [redacted] biological enhancement is not necessary for recovery but it does speed recovery. He argues that he has been involved in 21 coral site settlements between 1997 and 2012, although only five of

[76] *T/V Matthew* and *T/V Port Stewart*.
[77] *Allie B* and *Igloo Moon.*
[78] Primary Restoration Plan: T/V MARGARA Grounding Offshore South Coast of Puerto Rico.
[79] Statement of [redacted].

those sites were in Puerto Rico. He appears to rely solely on his experience and does not cite to literature or professional studies to support his conclusion on recovery in rubble areas.

Alternately, NOAA relies on literature when it states that injured coral reefs located in rubble fields do not naturally recover to their previous condition. Coral recruits attach to loose rubble and are typically buried and abrased by the unstable nature[80] of the rubble and do not survive.[81]

Related to his issue of whether coral growth can occur in rubble areas, he questions why NOAA used the 2012 survey data in its preparation of the current 2018/2019 budget because it is possible that some growth and stabilization could have occurred in the six years since the 2012 mapping was conducted. And. if so, some of the proposed restoration areas may have coral growth that could prohibit the use of boulders.

While NOAA did not conduct additional comprehensive surveys of the impacted area when it prepared its budget, it has conducted bi-annual surveys since 2012 where coral height is measured. Coral reef height is indicative of the quality of habitat for fish and invertebrates in the rubble areas. According to NOAA, the flattened reefs have persistently failed to regain their prior height complexity; therefore, they do not believe restoration has occurred in those areas. Importantly, NOAA will survey the proposed restoration areas before it determines where the limestone boulders will be placed. This will ensure that boulders are only placed in those areas that still require restoration.[82]

To further his argument that corals have survived in rubble areas, [redacted] provides a 2012 Polaris picture of a mapped area where restoration is planned but where he sees signs of coral growth and rubble consolidation. To bolster this argument he argues there is evidence that some recovery is ongoing because 2008 surveys reflect 6,908 meters^2 of affected reef, but in 2012 he and the Trustees agreed that there were 1,600 meters^2 where some level of restoration should occur. There is no evidence in the administrative record nor [redacted] opinion that either he or Polaris have been involved in the impacted area since 2012.

The NPFC questioned NOAA about the reduction in the area of requiring primary restoration. NOAA explained that advanced survey and measuring techniques were used in 2012, thus reducing the area of the impacted area and the reduction was not related to coral growth or survival. Further, as previously mentioned, literature cited by the Trustees established that evidence of coral recruitment doesn't equate to recovery because coral recruits in rubble areas have a low survival rate.

The NPFC recognizes [redacted] concerns with calculating the area of injury needed to accomplish primary restoration based on 2012 surveys. However, (1) based on the literature provided by the Trustees, (2) examples of coral recovery in other reference rubble sites provided by the Trustees, and (3) lack of meaningful coral recovery observed in the rubble fields from

[80] Especially in areas like the *Margara* incident, where there are ocean currents and routine high energy weather events.

[81] [redacted] and [redacted] C. 2007. Can Dynamite-Blasted Reefs Recover? A Novel, Low-Tech Approach to Stimulating Natural Recovery in Fish and Coral Populations. Marine Poll Bulletin. 54 (7): 1009-1019.

[82] Email from NOAA to NPFC, dated January 22, 2018.

2006 to 2012, the NPFC finds that the information provided by [redacted] is not persuasive. The NPFC determines that the Trustees provided sufficient evidence to support that their injury determination is reasonable.

Monitoring

According to the Plan the Trustees will monitor the primary restoration areas for 10 years after project implementation. Monitoring will occur in the first year to determine baseline conditions of the reef and that, at twelve months, minor corrective actions or management adjustments may be required. They would then monitor annually through year 5, then in years 7 and 10. The Trustees also request funds for two additional monitoring events following anticipated coastal storms or hurricanes that could affect the restoration of the site for a total monitoring cost of $754,894.40 .

They stress that monitoring for ten years would provide more than 15 years of data compiled since the incident occurred in 2006 and that monitoring provides assurance of success of the plan in the long term.

Evidence in the Plan reflects that the Trustees plan to begin recruitment of coral colonies after installation of the restoration structures and that, during the first twelve months, minor corrections may be needed to support the recruitment of the coral colonies.

[redacted] argues that ten years of monitoring is excessive. He states that five monitoring periods are typically industry standards for monitoring the efficiency of restoration projects. Specific to corals, he states that case studies have shown that once a re-attached coral has survived and is stable for a year or two, it behaves similarly to any other natural coral.

The NPFC agrees that certain monitoring is needed to ensure that the activities are implemented according to the Plan; however, there is no evidence that ten years is needed to ensure that implementation of the Plan is complete. The Trustees do not anticipate that the reef structures will require correction or maintenance. Because storms and strong currents are common in this area, the Trustees specifically designed the project to withstand environmental factors, including the size of boulders used, anchoring of structures, and the liberal use of cement and epoxy. Furthermore, no money was allotted in the budget for corrective actions; thus, any corrective actions would be outside the scope of the Plan and any NPFC funds used to conduct such activities would be outside the approved Plan. The NPFC determines that the Trustees have not provided sufficient evidence to establish that ten years of monitoring is necessary to ensure implementation of the Plan.

In this case the NPFC determines that one year of monitoring is needed to ensure that the recruitment of coral colonies have been established. Accordingly, the Fund is available to pay for baseline monitoring for one year after the implementation of the biological enhancement of the Plan for a total amount of $171,267.70.

Cost of the Plan

NOAA claims $4,725,811.68 in primary restoration costs for permitting and project preparation ($237,655.68), sourcing and deployment of limestone ($981,756.40), stabilization of limestone and coral enhancements ($2,751,505.20), and monitoring ($754,894.40).

[redacted][83] questions the Trustee budget and asserts that pre-deployment, site reconnaissance and mapping, limestone boulder deployment, restocking and monitoring costs are higher than industry costs. According to his expert report Polaris completed 18 coral settlements between 1997 and 2010. Four of these settlements were in Puerto Rico – two were completed in 1998 and two in 2010. These settlements were at least eight years old and none had comparable areas of injured coral resources. Additionally, the settled amounts did not include permitting, oversight or monitoring costs; therefore, which are included in this claim. Nor is it certain that the magnitude and type of damages in the cases cited by [redacted] or the primary restoration action required, are equivalent to those in this claim.[84] Many other restorations cited by [redacted] occurred decades previously and the comparison of costs to a present day restoration are not relevant to the costs in this Plan.

NOAA sub-contracted an independent coastal engineering firm in 2015 to create a budget for the Trustees to implement primary restoration. It was consistent with restoration requirements described in the Plan and the Implementation Plan. Specifically, the contractor was asked to prepare a project budget for the placement of material and subsequent reef stabilization using industry standard costs for coastal construction. It was requested to reflect the cost of the construction activity and appropriate planning costs and contingencies. The contractor was informed that NOAA would use this budget with the development of a claim for NRD.

The contractor's budget did not include the cost of Trustee oversight, biological restoration, monitoring, and/or corrective actions. This component of the budget was developed by NOAA based on over ten years of experience with this type of work in Puerto Rico and at the *Margara* site.

The NPFC determines that [redacted] argument that the Trustee budget costs are excessive is not persuasive. The NPFC determines that the Trustees' have contracted with an engineering firm to create a budget and they have provided the NPFC with sufficient supporting evidence for their oversight and monitoring costs. Accordingly, the NPFC offers $4,142,184.98[85] for NOAA to implement the primary restoration project.

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[83] The NPFC notes that the Plan specifically references that the RP could implement the project themselves. Accordingly, if the RP believes is could implement the project at a cheaper price, that option was available to the Guarantor.

[84] For example, [redacted] references the costs of restoration for *T/V Port Stewart* and *LNG Matthew* sites several times. Pursuant to the June 2, 2018 email from NOAA to NPFC, NOAA indicates that those sites were very different than the situation found at the *Margara* site. Those sites involved a fractured but still stable hard bottom that could be stabilized (and rugosity restored) with broken sections of reef, dislodged corals, cement, and a small amount of limestone bolder augmentation. The Margara site on the other-hand involves widespread and deep "fields" of rubble that cannot be stabilized using the same methods used successfully at the *Matthew* and *Port Stewart* sites. Rather, as the plan describes, the *Margara* site will require extensive limestone bolder augmentation in order to restore the rugosity and stabilize the rubble.

[85] Claimed amount less the $583,626.70 denied for monitoring.

Trustee Management and Administration of Approved Restoration Project

The Trustees claim $261,406 for management and administrative costs associated with implementation of the restoration project. The Trustees request funds for contracting, contract management, cost documentation, oversight, and reporting. NOAA, as the Claimant, will serve as the FLAT responsible for tracking expenditures and reporting this information to the NPFC.

The NPFC finds the claimed management and administrative costs to be reasonable and appropriate given the length of the project and the amount of contract assistance required to complete the project. Accordingly, the NPFC approves payment of $261,406 for management and administration of the approved restoration project.

Contingency

The Trustees requested a 20% contingency on all restoration project implementation costs, resulting in claimed costs of $945,162.34. While the NPFC enacted policy[86] that ended claim contingency payments for claims on January 5, 2017, the NPFC originally received this claim on January 3, 2017. Accordingly, since the original claim was received by the NPFC while the policy[87] allowing contingency funding was still in place, the NPFC applies that previous policy to the present claim.

The Trustees stated that "20% contingency is typical for any construction project, especially one in a marine environment that is susceptible to weather delays".[88] The NPFC recognizes the uncertainties inherent in the preliminary cost estimates of the approved project and that costs may unexpectedly increase, and/or that new and unforeseeable costs may surface in the future.

The NPFC, however, denies claimed contingency funding in the amount of $150,978.88 for monitoring. The NPFC notes that the budgets provided by NOAA indicate that an annual 5% increase was already included in the cost estimates for monitoring. Additionally, it is unclear to the NPFC how the cited justification of weather delays would have the same financial impact on monitoring as it would on the actual project construction schedule. Accordingly, the NPFC has determined that the OSLTF will remain available for contingency costs in the amount of $794,183.46.

Contingency funding will be made available in accordance with the NPFC Contingency Policy (attached), when and if needed, and when supported by appropriate justification and documentation of costs incurred to date. If the need for contingency funds arises, NOAA should make a formal request to the NPFC. Such a request can be made through the annual cost and progress reporting described below, and must include a justification for the additional funds and documentation of past expenditures.

[86] NPFC Policy CN10 NRD Contingency Payments.
[87] NPFC Policy CN09 NRD Contingency Payments.
[88] Email from NOAA to NPFC dated March 5, 2018.

Summary

NOAA presented its claim to the Fund, which is administered by the NPFC. The NPFC adjudicates claims to the Fund and is authorized to pay claims from the Fund pursuant to OPA and the associated claims regulations at 33 C.F.R. Part 136. Specifically with respect to 33 C.F.R. § 136.105(a), the NPFC determined that NOAA met its burden of providing all the necessary documentation required by the NPFC to support their claim. The NPFC offers $4,403,590.98 to implement the Plan ($4,142,184.98) and the associated management and administrative costs ($261,406). The NPFC denies payment of $583,626.70 of monitoring costs.

Future contingency funding in the amount of $794,183.46 may be available to implement the restoration project under the terms and conditions of the original Contingency Policy. The NPFC denies $150,978.88 in contingency related to monitoring.

Reconsideration of Claim Determination

NOAA 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 within 30 days from when the determination is received, whichever comes first. 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. During the reconsideration adjudication, the NPFC will conduct a de novo review and reevaluate your entire claim. Disposition of the reconsideration will constitute final agency action. All correspondence should include the corresponding claim number M06017-OC01.

Revolving Trust Fund and Return of Unused Funds to the OSLTF

Sums recovered under OPA by a Federal, State, Indian, or foreign natural resource trustee for NRD under section 2702(b)(2)(A) shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund. 33 U.S.C. §2706(f).

The NPFC will deposit $4,403,590.98 for costs for the Plan into NOAA's Damage Assessment and Restoration Revolving Fund Account, which NOAA has demonstrated[89] to be a non-appropriated, revolving trust fund. NOAA shall reimburse the Fund for any amounts paid from the Fund in excess of that amount to accomplish the activities in the Plan. 33 U.S.C. §2706(f) and 33 CFR 136.211(b).

Cost Documentation, Progress Reporting, and Final Report

As the claimant, NOAA shall ensure that all expenditures of OSLTF funds for future activities are documented appropriately and spent according to the Plan for the activities approved in this

[89] Email from NOAA to NPFC, dated October 15, 2013.

determination. Any funds not spent or appropriately documented shall be returned to the Fund. 33 U.S.C. §2706(f).

One year from the date of this determination, and annually thereafter, NOAA shall provide the NPFC with a report on the status of implementation and expenditures. These annual progress reports should include:

1. Certification by NOAA that all restoration activities approved in this determination have been conducted in accordance with the Plan;
2. A progress report that includes a description of work accomplished, timeline for future activities, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (i.e., labor, consultant/contractors, and travel); and
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress of the work for the year. Enough detail should be included to determine reasonableness of costs for each employee when cost documentation is received with the final report.

NOAA shall submit a final progress report within 120 days from the date project implementation is complete. This report should include:

1. Certification by NOAA that all expenditures of OSLTF funds were in accordance with the plan as approved by the NPFC;
2. A summary of project implementation and restoration benefits achieved;
3. Copies of final reports and/or studies;
4. "As-built" construction plans, as available (e.g. plans approved or accepted by the local or state permitting authority);
5. Available final project implementation photos;
6. Documentation of OSLTF funds remaining in the Revolving Trust Fund for this claim, including account balance and interest earned; and
7. Documentation of all expenditures as follows:

a. Labor: For each employee –
   i. A narrative description of the work accomplished by each individual and how that work fit into the plan. Enough detail should be included to determine reasonableness of costs; and
   ii. The number of hours worked, labor rate, and indirect rate. An explanation of indirect rate expenditures, if any, will be necessary;
b. Travel: Paid travel reimbursement vouchers and receipts;
c. Contract: Activities undertaken, lists of deliverables, and contract invoices and receipts;
d. Purchases/Expendables: Invoices and receipts, along with an explanation of costs;
e. Government Equipment: Documentation of costs, including the rate (i.e., hourly, weekly) and time for all equipment used for which costs were incurred; and
f. Grants: Grant proposals, activities undertaken, and proof of grant disbursement.

With the final report(s), the NPFC will reconcile costs and all remaining funds and/or inadequately documented costs will be returned to the OSLTF. 33 C.F.R. 136.211(b).

The NPFC has prepared standardized templates with instructions to facilitate final cost reporting (enclosed).

U.S. Department
of Homeland Security

**United States
Coast Guard**

Director
United States Coast Guard
National Pollution Funds Center

CG National Pollution Funds Center
US Coast Guard STOP 7605
2703 Martin Luther King Jr Ave. SE
Washington, DC 20593-7605
Staff Symbol: (CN)
Phone: [redacted]
E-mail: [redacted]

Claim Number: M06017-OC01	Claimant Name: National Oceanic and Atmospheric Administration

On October 11, 2017, the National Oceanic and Atmospheric Administration (NOAA) on behalf of itself and the Puerto Rico Department of Natural and Environmental Resources (PRDNER), presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the amount of $5,932,380.02 for costs to conduct primary restoration of natural resource damages resulting from the *T/V Margara* incident. The NPFC assigned Claim Number M06017-OC01 to this claim. The Trustees' claim totaled $4,987,217.68 to implement the primary restoration project and $945,162.34 in contingency funding.

The Federal and Puerto Rican trustees, through their authorized representatives, accept the NPFC's settlement offer of $4,403,590.98 as full, final and complete settlement and satisfaction for all primary restoration costs described in the February 8, 2019 determination (M06017-OC01).

The NPFC approves $794,183.46 in contingency funding to support implementation of the primary restoration project and will authorize the payment of this contingency award if and when a permissible contingency occurs during the implementation of the approved restoration activities. To support a request for contingency payment, NOAA acknowledges that it must provide documentation and justification to support the request.

NOAA, as the Federal Lead Administrative Trustee, shall comply with 33 U.S.C. § 2706(f) by depositing into its revolving trust account the $4,403,590.98 awarded in the February 8, 2019 determination, as well as any future contingency funds provided. NOAA shall disburse costs to PRDNER in the amounts described in the budgets submitted to support the claim.

NOAA and PRDNER hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that he or she may have against any party, person, firm or corporation that may be liable for the payment of the $4,403,590.98 paid, as well as contingency paid in the future, from the Fund for Claim Number M06017-OC01. NOAA and PRDNER authorize the United States to bring suit, compromise or settle in the name of the Trustees and for the United States to be fully substituted for, and subrogated to all rights arising from, and associated with this amount paid by the Fund for which each Trustee is compensated under this settlement. Each Trustee warrants that no legal action has been brought regarding this matter, and no settlement has been or will be made, by them or any person acting on their behalf with any other party for amounts which are the subject of this claim against the Fund.

Each Trustee warrants that no settlement will be made by any person on their behalf with any other party to recover the compensation paid by the Fund for the February 8, 2019 determination without consultation with the NPFC.

Upon acceptance of this offer the Trustees will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the Fund. Cooperation shall include, but not be limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, and providing any documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person.

NOAA and PRDNER certify that to the best of their knowledge and belief that the information contained in this claim represents all material facts and is true, and it understands that misrepresentation of facts is subject to prosecution under federal law including, but not limited to, 18 U.S.C. §§287 and 1001.

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Title of NOAA Authorized Representative	Date of Signature
Name of NOAA Authorized Representative	Signature

FOR THE PUERTO RICO DEPARTMENT OF NATURAL AND ENVIRONMENTAL RESOURCES

Title of PRDNER Authorized Representative	Date of Signature
Name of PRDNER Authorized Representative	Signature

National Pollution Funds Center Determination

Claim Number and Name:	M06017-OC01 Primary Restoration Costs
Claimant:	National Oceanic and Atmospheric Administration (NOAA)
Claim Type:	Natural Resource Damages, Upfront Restoration Costs
Amount Requested:	$5,932,380.02
Offer Amount:	$4,403,590.98
Contingency Available:	$794,183.46
Date:	May 30, 2019
NPFC Division Chief:	[redacted]

This determination reconsiders the monitoring cost portion of the determination issued by the National Pollution Funds Center on February 8, 2019 for Claim M06017-OC01 T/V Margara Primary Restoration Costs. This determination represents final agency action.

Summary of the Incident and Claim

The incident arose from the grounding of the *T/V Margara* on or about 0033 on April 27, 2006, three miles off the coast of Tallaboa, Puerto Rico. A Claim for Natural Resource Damages (Claim) associated with the incident was submitted by the National Oceanic and Atmospheric Administration (NOAA) on behalf of itself and the Puerto Rico Department of Natural and Environmental Resources (PRDNER, Trustees) on October 11, 2017. The National Pollution Funds Center (NPFC) issued its initial determination for Claim M06017-OC01, on February 8, 2019.

Through the adjudication of the Claim, the NPFC determined that the *T/V Margara* posed a substantial threat of an oil discharge into navigable waters, satisfying the definition of an incident as defined in the Oil Pollution Act (OPA), 33 U.S.C. §2701 *et seq*., and the NPFC further determined that the natural resource injuries addressed in the Claim resulted from the substantial threat of discharge presented by the *T/V Margara* after it grounded.[1] The NPFC also determined that the Trustees are eligible claimants[2] and that NOAA met the general presentment requirements for a natural resource damages claim to the Oil Spill Liability Trust Fund (OSLTF or Fund).[3]

The *Final Primary Restoration Plan and Environmental Assessment for the 2006 T/V Margara Grounding, Guayanilla, Puerto Rico, April 2015* (Plan) served as the basis for the Claim and the foundation for the NPFC's adjudication of the Claim. The NPFC found that the Trustees' injury assessment method - use of surveys, mapping, and established literature - are valid and reliable techniques to determine that 1,662 meters^2 of coral reef habitat requires primary restoration as a result of the incident.[4] Likewise, the NPFC found that the proposed primary restoration project - creation of limestone reef to restore the rubble areas and the transplanting of adult corals to restore the natural resources and services to baseline

[1] Determination, pp. 10-18
[2] Determination, p. 9
[3] Determination, pp. 16-17
[4] Determination, pp. 19-20

on an accelerated timeframe (and the associated costs) - are reasonable and appropriate with the exception of a portion of the monitoring activities (described below).[5] On February 8, 2019, the NPFC offered $4,403,590.98, and approved as much as $794,183.46 in contingency funds, to implement the Plan. The NPFC denied $583,626.70 in monitoring costs and $150,978.88 in contingency related to monitoring on the grounds that NOAA provided insufficient evidence to establish that ten years of monitoring was necessary and reasonable. [6]

Request for Reconsideration

The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR §136.115(d).

On March 7, 2019, the Director, NPFC, received NOAA's written request for reconsideration of the monitoring costs in the February 8, 2019 initial determination. NOAA argues that the NPFC erred in denying funds for ten years of monitoring for three reasons: (1) Trustees are responsible for making the public whole for injured natural resources; (2) Trustees cannot comply with its regulatory requirements with only one year of monitoring, and (3) Trustees are entitled to rebuttable presumption because they followed the Natural Resource Damage Assessment Regulations (NRDA Regulations). 15 CFR Part 990. In support of its request for reconsideration NOAA provided the *T/V Port Stewart* Monitoring Plan, 2016 Monitoring Report for Emergency Restoration following the *T/V Port Stewart* grounding in 2009, and the *LNG-C Matthew* Monitoring Strategy. NOAA cited the NRDA Regulations.

The following constitutes the NPFC's reconsideration of the monitoring cost portion of the Claim (in the context of the new information provided by NOAA) and the NPFC's determination that it will not pay the additional monitoring costs requested in the Request for Reconsideration.

Basis for Denying Certain Monitoring Costs in the February 8, 2019 Determination

According to the Plan, the Trustees proposed to monitor the primary restoration areas for ten years after project implementation with the first monitoring event occurring at 90-days post completion of the restoration activities. Monitoring would occur in the first year to determine baseline conditions of the reef, and then NOAA would monitor annually for the next five years and in years 7 and 10. The Trustees also requested funds for two additional monitoring events following anticipated potential storm events because coastal storms or hurricanes could affect the restoration of the site and could require monitoring.[7]

In its Determination, the NPFC agreed that certain monitoring is needed to ensure that the activities are implemented according to the Plan; however, the NPFC found that there is insufficient evidence that ten years of monitoring is reasonable and appropriate to ensure that implementation of the Plan is complete. As discussed in the Determination and

[5] Determination, pp. 20-26
[6] Determination, p. 27
[7] Plan, Section 4.6.2

described in the Plan, the Trustees do not anticipate that the reef structures will require routine maintenance.[8] Because storms and strong currents are common in this area, the Trustees specifically designed the project to withstand environmental factors, including the size of boulders used, anchoring of structures, and the liberal use of cement and epoxy. Furthermore, no money was allotted in the budget for corrective actions; thus, any corrective actions would be outside the scope of the Plan, and any NPFC funds used to conduct such activities would be outside the approved Plan. The NPFC determined that one year of monitoring (two monitoring events) is sufficient to ensure the restoration activities cited in the Plan are completed, and the Fund is available to pay for the Baseline and the Year One monitoring events for a total amount of $171,267.70.

Therefore, the NPFC determined that the Trustees did not provided sufficient evidence to establish that ten years of monitoring is necessary to ensure implementation of the Plan.[9]

Whether the Trustees have established that ten years of monitoring is required, reasonable, and necessary.

As support for its Request for Reconsideration (the Request) NOAA submitted a monitoring plan and report for the *T/V Port Stewart* grounding in 2009 and a monitoring strategy for the *LNG-C Matthew*. NOAA focuses on the NRDA Regulations as additional support.

Neither OPA nor the OSLTF Claims Regulations contain specific provisions with regard to monitoring. The NRDA Regulations discuss monitoring as a component of a Draft Restoration Plan, and describe reasonable monitoring and oversight costs as those necessary to gauge the progress, performance, and success of the restoration actions developed under the plan. 15 CFR §990.55(b)(3). Reasonable monitoring costs are inherently tied to those performance criteria which will constitute success, such that responsible parties are relieved of responsibility for further restoration actions, or necessitate corrective actions in order to comply with the terms of a restoration plan or settlement agreement. 15 CFR §990.55(b)(2).

This claim for primary restoration of injured natural resources is based on a Plan to be executed by the Trustees; therefore, the cost of monitoring will be evaluated according to its function in determining the Trustees' compliance with the terms of the Plan. Specifically, the NPFC is evaluating the evidence supporting monitoring as a regulatory requirement under other laws and regulations and the role of monitoring in determining whether the activities are implemented in accordance with the Plan.

Ten Years of Monitoring as a permit requirement under other laws and regulations

Citing the NRDA Regulations, NOAA argues that ten years of monitoring are necessary in order to comply with regulatory requirements necessary to implement the project. 15 CFR. §990.53(a)(2).[10] NOAA provided additional discussion associated with

[8] Plan, Section 4.6.2

[9] Determination, p. 24

[10] 15 C.F.R. §990.23 specifically mentions applicable consultation, permitting, or review requirements, including but not limited to: the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; the National Marine Sanctuaries Act, 16 U.S.C. 1431 *et seq.*; the National Historic Preservation Act, 12 U.S.C. 470 *et*

requirements for two regulatory compliance activities to support this assertion – securing a permit under Section 404 of the Clean Water Act (CWA) and consulting with the National Marine Fisheries Service (NMFS) under Section 7 of the Endangered Species Act (ESA). Thus, NOAA argues that the proposed monitoring is necessary not only to determine project success but to fulfill permitting and consultation requirements to other agencies.

CWA Section 404:

According to NOAA, the Trustees will be required to seek authorization from U.S. Army Corp of Engineers (USACE) pursuant to Section 404 of the Clean Water Act (CWA). Based on past experience, the Trustees anticipate that the primary restoration project will be required, at a minimum, to adhere to the monitoring period requirements at 40 CFR §230.96(b) which states, "The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs)..." Given that coral reefs are considered special aquatic sites, 40 CFR §230.44, and that coral exhibit slow development rates, the Trustees anticipate that the CWA permit will require monitoring in excess of the 5 year minimum established by 40 CFR. §230.96(b).

A permit is required from the USACE for any discharge of dredged or fill material into Waters of the United States.[11] According to the Plan, NOAA is placing and securing limestone boulders and discharging cementing agents to further stabilize rubble. NOAA does not provide specific evidence to support their assertion that post implementation monitoring will be a permit condition (such as copies of CWA 404 permit conditions for similar projects), but, as illustrated above, states their expectation that they would be required to, at minimum, adhere to the monitoring period requirements at 40 CFR §230.96.[12]

The NPFC acknowledges that the USACE District Engineer can impose permit conditions upon issuing any permit under CWA 404, but NOAA did not provide, nor did the NPFC find, compelling evidence that ten years of monitoring will be a likely permit requirement.

40 CFR §230.96 falls under Subpart J of the CWA - Compensatory Mitigation for Losses of Aquatic Resources associated with Disposal Sites for Dredged or Fill Material. The requirement to monitor activities under this section is specific to the

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seq.; the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*; and the Archaeological Resources Protection Act, 16 U.S.C. 470 *et seq.*

[11] EPA, Wetland Fact Sheet Series, Wetland Regulatory Authority. EPA843-F-04-001 Office of Water. https://www.epa.gov/sites/production/files/2015-03/documents/404_reg_authority_fact_sheet.pdf

[12] 40 C.F.R. §230.96 Monitoring. (b)*Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the District Engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required.

monitoring of compensatory mitigation projects required for the habitat losses associated with a permitted activity. The restoration activity proposed by NOAA is the permitted activity (not the required mitigation to compensate for the losses caused by the permitted activity). Therefore, NPFC disputes the use of 40 CFR §230.96 in this context.

Furthermore, the NPFC believes it unlikely that NOAA will be required to conduct mitigation that would require monitoring under 40 CFR §230.96. Given the purpose and nature of the construction activities, it is reasonable to expect that the activity may be authorized under Nationwide Permits (NWP) #27 for Aquatic Habitat Restoration, Enhancement, and Establishment Activities.[13] Under NWP #27, compensatory mitigation is not required since these activities result in net increases in aquatic resource functions and services. Even if the USACE does not authorize the activity under NWP #27, there is no evidence that NOAA anticipates a compensatory mitigation requirement as no description or budget has been included in the claim with regard to any anticipated mitigation associated with the proposed activities.

ESA Section 7:

NOAA argues that the project is also required to comply with the outcomes of an ESA Section 7 consultation with the National Marine Fisheries Service Protected Resources Division (NMFS PRD) since threatened species will be out-planted and their habitat will be altered. In its Request for Reconsideration, NOAA states that the informal consultation for this project has been approved by NMFS PRD, and that the consultation was based on the project as proposed in the Restoration Plan, including the 10-year monitoring plan. NOAA further asserts that any changes to the proposed plan would require the Trustees to reinitiate the ESA consultation and that it is also possible that the USACE will choose to request their own ESA Section 7 Consultation in conjunction with the CWA permitting process for the project. NOAA does not believe that NMFS PRD would approve a project with monitoring reduced to one year. NOAA maintains that, based on its experience and previous ESA consultations, projects that involve direct manipulation of ESA species and their habitat require a higher level of monitoring.

Section 7(a)(2) of the Endangered Species Act (16 U.S.C. §1531 *et seq.)* sets out the consultation process for Federal agencies under the Act, which is further implemented by regulation found in 50 CFR §402. The ESA consultation process provides for informal consultation if the project is found to have "no effect" or is "not likely to adversely affect" threatened and endangered species or their critical habitat (T&E species) and requires formal consultation if the project is "likely to adversely affect" T&E species. In the case of a "likely to adversely affect" determination (usually described in a Biological Assessment), the action agency can seek a Biological Opinion (BO) from NMFS with an associated Incidental Take Statement (if warranted) which typically include reasonable and prudent measures to minimize take along with terms and conditions that must be observed when implementing those measures. An Incidental Take Statement may require monitoring to determine the actual project effects on listed fish or wildlife species.[14]

[13] 2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions. 82 FR 1860. January 6, 2017

[14] Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and

The NPFC interprets NOAA's statement that, "the informal consultation for this project has been approved by NMFS PRD," to mean that NMFS provided a letter of concurrence of NOAA's determination that the project will have "no effect" or is "not likely to adversely affect" threatened and endangered species.[15] Given that NOAA (by this statement) did not have to enter into formal consultation, any changes to the monitoring regimen should be inconsequential to the determination and associated concurrence.

NOAA's reference to informal consultation in the Request for Reconsideration is slightly different than what is stated in the Plan with regard to ESA Section 7 consultation. According to the Plan, the NOAA Restoration Center, on July 2, 2014, requested concurrence from the NMFS PRD that the Preferred Alternative falls within the scope of the Restoration Center's 2011 Programmatic Biological Opinion (BO), and that NMFS PRD concurred on July 23, 2014.[16] The Programmatic BO is a formal opinion by NMFS regarding likely effects on T&E species by various types of activities conducted by the NOAA Restoration Center. Programmatic BOs and associated Incidental Take Statements typically include discretionary conservation measures to minimize impacts, or non-discretionary reasonable and prudent measures to minimize incidental take (depending on the specific project actions), and monitoring to determine the actual level of take if take is anticipated.[17] NOAA did not provide evidence of an Incidental Take Statement with an associated monitoring requirement.[18]

NOAA further asserts in the Request for Reconsideration that any change to the monitoring component of the Plan will require them to re-consult. This assertion is moot. In Section 5.2.1 of the Plan, NOAA's indicates their intent to reinitiate their programmatic consultation given the listing of five additional corals which will result in a new Programmatic BO. As such (and regardless of any changes to the Plan), NOAA will need to obtain an updated letter of concurrence for the *T/V Margara* restoration activities in light of the new listings and any associated changes in the Programmatic BO. Fortunately, none of the species are within the restoration impact area, nor has critical habitat for these corals been designated.[19] Thus, it is reasonable to conclude that the revised letter of concurrence and any associated terms and conditions of an Incidental Take Statement will be similar in nature under the new Programmatic BO.

The NPFC agrees with NOAA that any activities, including monitoring, required by another law or regulation in order to implement the activities for which the claim is paid are compensable costs. The NPFC further acknowledges that until such time as all of the permits are secured, it is not possible to know, precisely, what monitoring provisions will be included in the terms and conditions of the project specific permits. However,

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Conferences; USFWS and NMFS; March 1998

[15] Neither a copy of NOAA's determination nor NMFS PRD's concurrence are included with the Claim or Request

[16] Plan, Section 5.2.1 and Section 6

[17] Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences; USFWS and NMFS; March 1998

[18] Plan, Section 5.2.1, NOAA references the PBO as a NMFS, 2011 reference however no full citation is found in the bibliography. NOAA further indicates the letter of concurrence is in Appendix B, but Appendix B includes a NEPA concurrence letter, not an ESA concurrence letter

[19] Plan, Section 5.2.1

the evidence provided by NOAA to support ten years of monitoring as a likely permitting condition is not persuasive, as mitigation activities and adverse effects to threatened or endangered species are not anticipated. Should permits ultimately require monitoring beyond that afforded in the Determination, NOAA can submit a request for release of contingency funds per the terms of the NPFC Contingency Policy CN09 and as described in the Determination.

Ten Years of Monitoring to determine whether activities are implemented in accordance with the Plan

Performance Criteria:

NOAA argues that the proposed monitoring is required to determine whether the performance criteria for the Primary Restoration Project are met. The Plan specifies two performance criteria for Primary Restoration:[20]

i. Topographic complexity created by the non-live-coral substratum is returned to within 10% of agreed reference areas using the calculation for topographic complexity that is $C=1-d/l^9$.
ii. Structures are expected to remain stable and intact. Corrective action would be necessary if approximately 10% or more of the structures become loose; 10% or more of the reattached limestone is lost; or if dislodged and/or failing structures are likely to cause ancillary damage to the restored area or to adjacent reef.

The topographic complexity criteria is assessed immediately following construction (the 90-day baseline survey). This is supported by the *T/V Port Stewart* Monitoring Plan which indicates that topographic complexity data would only need to be collected once, during the initial baseline monitoring.[21]

The structures are specifically designed to withstand high wave and storm conditions.[22] A second monitoring event - to evaluate whether the placement and anchoring of the limestone modules and the rubble stabilization meet the stability criteria - is reasonable and appropriate following a full annual weather cycle.

The publically reviewed Plan does not identify any other performance criteria for Primary Restoration. Table 7 includes monitoring of "coral recruitment and colonization" and "coral reattachment success" as components of the monitoring, but no performance criteria are attached to either objective. As such, these additional monitoring objectives have no bearing with regard to "meeting the terms for documenting performance effectiveness."

Based on the above, the NPFC determines that two monitoring events - Baseline (90-days post construction) and Year One (one year after baseline) - are sufficient for determining whether performance criteria for the restoration activities are met, as stipulated in the Plan.

[20] Plan, Section 4.6.2
[21] Port Stewart Monitoring Plan: topographic complexity, NOAA, 2010. Submitted with the Request for Reconsideration
[22] Plan, Section 4.6.1

Corrective Measures:

NOAA clarifies that important minor corrective actions to support biological reestablishment will be completed in conjunction with monitoring events and that the time necessary to conduct these minor corrective actions was factored into the development of the yearly monitoring cost estimates (essentially arguing that the out-years monitoring supports necessary maintenance activities). However, the Plan only stipulates that "during the first 12 months, minor corrective actions may be needed to support the biological reestablishment."[23] Nowhere in the Plan is there any mention of the expectation, and plan for, minor corrective actions/maintenance later in the recovery period.

NOAA provided examples of monitoring plans for two similar restoration projects (*T/V Port Stewart* grounding[24] and the *LNG-C Matthew* grounding[25]), as well as the monitoring report for the *T/V Port Stewart* grounding to support their assertion that maintenance is built into the monitoring plan.[26] However, neither monitoring plan included any provision for conducting simultaneous corrective actions; although, the monitoring report for the emergency restoration conducted following the *T/V Port Stewart* grounding does indicate that invasive "weedy" sponges were observed and removed during the post-implementation monitoring period.

Information from both the *T/V Port Stewart* restoration and *T/V Margara* pilot project were available during the development of the *T/V Margara* monitoring plan, and NOAA cited both as supporting the high likelihood of success of the proposed actions. There is no evidence that implementing minor corrective actions was a component of the *T/V Margara* pilot project, and there was no reference in the Plan to the minor corrective actions of the *T/V Port Stewart* restoration as being an expected component of the *T/V Margara* restoration. Similarly, the detailed monitoring budget provides no evidence supporting the expected level of effort for corrective actions nor does the budget narrative include a discussion of corrective actions. If NOAA anticipated regular minor corrective actions as necessary throughout the ten-year reestablishment period, it was incumbent upon NOAA to include the information in the Plan and in support of the Claim.

The NPFC recognizes that minor corrective actions might be warranted in future years. However, the NPFC does not consider NOAA's clarification as amplifying information but rather a change to the activities presented in the Claim, which were not clearly presented to the public or to the RP.

Project Success:

With regard to project success and claims to the Fund it is important to consider that claims to the Fund are sum certain[27] and that the Trustees subrogate their rights upon

[23] Plan Section 4.6.2
[24] T/V Port Stewart Monitoring Plan, NOAA, 2010
[25] LNG-C Matthew Monitoring Plan, NOAA 2011
[26] Monitoring Report for Emergency Restoration Following the T/V Port Stewart Grounding in 2009, Flynn et al. 2016
[27] 33 C.F.R. §136.105(b)

acceptance of an offer.[28] There is no provision for submitting another claim for the same damages if the Trustees' Plan fails to realize the anticipated benefits, and the NPFC is not responsible for, and doesn't ensure, project success. As such, to determine the reasonableness and appropriateness of a claim, NPFC relies on evidence that the proposed activities have a high likelihood of achieving successful restoration – in this case, the NPFC considered the five other similar coral reef restoration projects in the Caribbean and coastal Florida referenced by NOAA along with the pilot project for the *T/V Margara* Plan.[29]

A Claimant presenting a claim to the Fund has the burden of providing all information to support the claim.

NOAA asserts that the NPFC incorrectly shifted the burden of proof to the Trustees, based on NPFC's conclusion in the Determination that NOAA provided insufficient evidence establishing that ten years is needed to ensure that implementation of the Plan is complete. NOAA reasons that because Congress gave NOAA the authority to promulgate regulations interpreting 33 U.S.C. §2706 and established that natural resource damages assessments completed in accordance with those regulations have the force and effect of a rebuttable presumption in administrative proceedings such as this, then the NPFC should defer to NOAA's expertise in interpreting its own regulations and in determining a reasonable monitoring plan to gauge the success of the coral restoration project.

The NPFC finds NOAA's assertion not persuasive. Claims to the Fund are subject to the OSLTF Claims Procedures Regulations, 33 CFR Part 136. The NPFC utilizes an informal process when adjudicating claims against the Fund.[30] It does not confer upon parties a right to a formal hearing, a right to present rebuttal evidence or argument or any procedural rights at all. Congress left it to the agency to develop the relevant procedural framework.[31]

The OSLTF Claims Regulations clearly state that the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.[32]The NPFC acts as the finder of fact. In this role the NPFC considers all relevant information and evidence obtained independently by the NPFC and weighs its probative value when determining the facts of the case and the reasonableness and appropriateness of a claim.

Importantly, OPA provides that the Trustees are authorized to present a claim to the Fund seeking their assessment costs under 33 U.S.C. §2712(a)(4) or (a)(2). Payment under section 1012(a)(4) requires the NPFC to adjudicate the claim to determine whether the amounts claimed should be compensated under OPA and the applicable Claims Regulations. Alternatively, the Trustees may opt to pursue reimbursement of its claimed amount through an appropriation from the Fund under section 1012(a)(2). In this case NOAA has opted to seek its costs under section 1012(a)(4); therefore, it must meet the requirements of the OSLTF Claims Regulations.

[28] 33 C.F.R. §136.115(a)
[29] Plan Section 4.6.1
[30] 5 U.S.C. §555(c)
[31] 33 U.S.C. §2713(e). Bean Dredging LLC v. United States of America, 773 F. Supp. 2d 63, 75 (D.C. D. Ct. 2011)
[32] 33 C.F.R. §136.105(a)

Finally, acceptance of any compensation from the Fund constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claim.[33] As such, if NOAA accepts the NPFC's offer to pay, it is the NPFC that inherits the force and effect of any rebuttable presumption in a subsequent administrative or judicial proceeding.

Cost of Monitoring Activities

The reasonableness and appropriateness of the monitoring costs was adjudicated in the Determination.[34] The Request includes new information relative to costs for monitoring. Specifically, NOAA states that, "the time necessary to conduct minor corrective actions was factored into the development of the yearly monitoring cost estimates." Though this would call into question the appropriateness of the out-year monitoring costs (given the Plan did not include a discussion of the time for corrective actions in out-years), the incorporation of corrective actions in the Baseline and Year One monitoring is reasonable and appropriate given the expectation that "during the first 12 months, minor corrective actions may be needed to support the biological reestablishment."[35]

Conclusion

The NPFC has considered NOAA's Request for Reconsideration of the monitoring portion of the Determination in the context of the additional information submitted and finds the grounds for the relief requested and the additional support for the claim were not persuasive. The NPFC confirms its determination that two monitoring events, Baseline and Year One, are necessary cost of restoration and that any additional monitoring events are not compensable.

In accordance with the NPFC's Determination and the above adjudication of the Request for Reconsideration, the NPFC reaffirms its offer of $4,403,590.98 in settlement and reaffirms the stipulation regarding availability of $794,183.46 in contingency funding under the terms and conditions of the NPFC Contingency Policy CN09 as described in the Determination.[36] NPFC reaffirms the denied $583,626.70 in claimed damages and the denied $150,978.88 in requested contingency.

This written decision is final. The Trustees should refer to the Determination regarding requirements associated with acceptance terms and conditions.[37]

[redacted]
Division Chief
[redacted]

[33] 33 C.F.R. §136.115(a)
[34] Determination p. 25
[35] Plan Section 4.6.2
[36] Determination p. 26
[37] Determination pp. 27-29

U.S. Department of Homeland Security
United States Coast Guard

Director
National Pollution Funds Center

CG National Pollution Funds Center
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave SE
Washington, DC 20593-7605
Staff Symbol: (CN)
Phone: [redacted]
Email: [redacted]

Claim Number: M06017-OC01	Claimant Name: National Oceanic and Atmospheric Administration

On October 11, 2017, the National Oceanic and Atmospheric Administration (NOAA) on behalf of itself and the Puerto Rico Department of Natural and Environmental Resources (PRDNER), presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the amount of $5,932,380.02 for costs to conduct primary restoration of natural resource damages resulting from the *T/V Margara* incident. The NPFC assigned Claim Number M06017-OC01 to this claim. The Trustees' claim totaled $4,987,217.68 to implement the primary restoration project and $945,162.34 in contingency funding.

The Federal and Puerto Rican trustees, through their authorized representatives, accept the NPFC's settlement offer of $4,403,590.98 as full, final and complete settlement and satisfaction for all primary restoration costs described in the February 8, 2019 determination (M06017-OC01) and reaffirmed in the May 30, 2019 reconsideration determination.

The NPFC approves $794,183.46 in contingency funding to support implementation of the primary restoration project and will authorize the payment of this contingency award if and when a permissible contingency occurs during the implementation of the approved restoration activities. To support a request for contingency payment, NOAA acknowledges that it must provide documentation and justification to support the request.

NOAA, as the Federal Lead Administrative Trustee, shall comply with 33 U.S.C. §2706(f) by depositing into its revolving trust account the $4,403,590.98 awarded in the February 8, 2019 determination and reaffirmed in the May 30, 2019 reconsideration determination, as well as any future contingency funds provided. NOAA shall disburse costs to PRDNER in the amounts described in the budgets submitted to support the claim.

NOAA and PRDNER hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that he or she may have against any party, person, firm or corporation that may be liable for the payment of the $4,403,590.98 paid, as well as contingency paid in the future, from the Fund for Claim Number M06017-OC01.

NOAA and PRDNER authorize the United States to bring suit, compromise or settle in the name of the Trustees and for the United States to be fully substituted for, and subrogated to all rights arising from, and associated with this amount paid by the Fund for which each Trustee is compensated under this settlement.

Each Trustee warrants that no legal action has been brought regarding this matter, and no settlement has been or will be made, by them or any person acting on their behalf with any other party for amounts which are the subject of this claim against the Fund.

Each Trustee warrants that no settlement will be made by any person on their behalf with any other party to recover the compensation paid by the Fund for the February 8, 2019 determination, and reaffirmed in the May 30, 2019 reconsideration determination, without consultation with the NPFC.

Upon acceptance of this offer the Trustees will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the Fund. Cooperation shall include, but not be limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, and providing any documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person.

NOAA and PRDNER certify that to the best of their knowledge and belief that the information contained in this claim represents all material facts and is true, and it understands that misrepresentation of facts is subject to prosecution under federal law including, but not limited to, 18 U.S.C. §§287 and 1001.

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

_____	_____
Title of NOAA Authorized Representative	Date of Signature
_____	_____
Name of NOAA Authorized Representative	Signature

FOR THE PUERTO RICO DEPARTMENT OF NATURAL AND ENVIRONMENTAL RESOURCES

_____	_____
Title of PRDNER Authorized Representative	Date of Signature
_____	_____
Name of PRDNER Authorized Representative	Signature