

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA and the)	
COMMONWEALTH OF PUERTO RICO,)	
)	
Plaintiffs,)	
)	Civ. No. 3:17-cv-01742
v.)	
)	
PORT STEWART GmbH&Co. Kg)	
OF GERMANY,)	
)	
Defendant.)	

ASSENTED-TO MOTION OF THE UNITED STATES
TO THE ENTER CONSENT DECREE

On June 1, 2017, Plaintiffs United States of America, on behalf of the National Oceanic and Atmospheric Administration of the Department of Commerce (“NOAA”), and the Commonwealth of Puerto Rico, on behalf of the Puerto Rico Department of Natural and Environmental Resources (“DNER”), filed a Complaint against the Defendant, Port Stewart GmbH&Co. Kg of Germany. The Complaint seeks assessment costs and damages to natural resources under the Oil Pollution Act, 33 U.S.C. § 2701, et seq., as a result of grounding on a coral reef habitat of a vessel owned and operated by the Defendant near the entrance to the Yabucoa Channel. The proposed Consent Decree, filed contemporaneously with the Complaint, resolves those claims.

Notice of the lodging of the Consent Decree, and the opportunity to comment on it, was published in the Federal Register on June 7, 2017 (82 Fed. Reg. 26518). The public comment period has expired and no comments were received.

The United States believes that the Consent Decree is fair, reasonable and in the public interest, and, therefore, it respectfully requests that the Court sign the Consent Decree at page 18, and enter it as a final judgment. A memorandum in support of is filed with this Motion.¹

Counsel for Co-Plaintiff, Commonwealth of Puerto Rico, has indicated to undersigned counsel that she has no objection of this Motion. The Defendant, as evidenced by Paragraph 27 of the Consent Decree, agrees to entry of the proposed Consent Decree.

Respectfully submitted,

Respectfully submitted,

ELLEN MAHAN
Deputy Chief, Environmental Enforcement Section
Environment and Natural Resources Division

07/25/2017
Dated

/s/
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¹ Note that a Memorandum of Agreement ("MOA") between DNER and NOAA dated December 2016 was intended to be attached as Appendix A to the Consent Decree, but was inadvertently omitted. It is attached to the Memorandum in Support of this Motion, and the United States respectfully requests that, by approving the entry of the Consent Decree, the Court incorporate the MOA by reference as part of the Decree.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing ASSENTED-TO MOTION OF THE UNITED STATES TO ENTER THE CONSENT DECREE, were served by via ECF, email or first class mail, postage prepaid, this 25th day of July, 2017, upon counsel listed below:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA and the
COMMONWEALTH OF PUERTO RICO,

Plaintiffs,

v.

PORT STEWART GmbH&Co. Kg
OF GERMANY,

Defendant.

Civ. No. 3:17-cv-01742

MEMORANDUM IN SUPPORT OF THE
ASSENTED-TO MOTION OF THE UNITED STATES
TO ENTER THE CONSENT DECREE

On June 1, 2017, Plaintiffs United States of America, on behalf of the National Oceanic and Atmospheric Administration of the Department of Commerce ("NOAA"), and the Commonwealth of Puerto Rico, on behalf of the Puerto Rico Department of Natural and Environmental Resources, filed a Complaint (Docket Entry #1) against the Defendant, Port Stewart GmbH&Co. Kg of Germany, for damages to coral reef habitat caused by the grounding of the tanker vessel (T/V) *T/V Port Stewart* near the entrance to the Yabucoa Channel. The Plaintiffs' claim is based on the natural resource damage ("NRD") provisions of the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2701, *et seq.* The Plaintiffs contemporaneously lodged a proposed Consent Decree (Docket # 2, Attachment #4) resolving the matter.

As required by 28 C.F.R. § 50.7, the Consent Decree was published in the Federal Register, which began a 30-day public comment period. 82 Fed. Reg. 26518 (June 7, 2017). The public comment period has now expired, and no comments objecting to the Consent Decree

were received. The Defendant has already consented to the entry of this Consent Decree under Paragraph 27 of the Consent Decree, and counsel for Co-Plaintiff, Commonwealth of Puerto Rico, has indicated to undersigned counsel that she has no objection to this Motion. As more fully explained below, the United States believes that the Consent Decree is fair, reasonable, and in the public interest, and therefore, respectfully requests that the Court sign the Consent Decree and enter it as a final judgment.

BACKGROUND

A. Factual Background

On October 27, 2009, the 176 meter *T/V Port Stewart*, carrying 7 million gallons of oil, ran aground near the entrance to the Yabucoa Channel on the southeast coast of Puerto Rico, causing damage to coral reef habitat in the area. Complaint, ¶¶ 15-16; Exhibit A, Declaration of Sean Patrick Griffin (“Griffin Declaration”), ¶¶ 6, 8. At the time, the vessel was owned and operated by the Defendant. Complaint, ¶ 21. Due to the fear of a threat of release of the oil cargo, the tanker was freed with the assistance of local tug boats. Complaint, ¶ 17; Griffin Declaration, ¶ 9. Those actions caused further damage to the habitat. *Id.* The damaged habitat supported a diverse assemblage of sponges and soft and hard coral. Complaint, ¶ 18; Griffin Declaration, ¶ 8. Although there was no release of oil, the incident caused either a total loss of biota in some areas or intense damage in others. Complaint, ¶ 18; Griffin Declaration, ¶ 8. The Plaintiffs estimate that the lost or injured habitat and biota covered an area of over 500 square meters. Complaint, ¶ 18. The Defendant performed emergency restoration activities under the Plaintiffs' oversight in order to save as many corals as feasible that were damaged in the incident. Griffin Declaration, ¶¶ 10-11. The Plaintiffs thereafter assessed the injury to the coral habitat in

order to estimate the amount of money necessary to restore the habitat. Griffin Declaration, ¶¶ 12-24. And, in doing so, the Plaintiffs incurred assessment costs. Griffin Declaration, ¶ 31.

The proposed Consent Decree provides for \$550,000 to compensate the Plaintiffs for their assessment costs in assessing the injuries to natural resources caused by the grounding and to resolve the Plaintiff's claims for injuries to the coral habitat.

B. Statutory and Regulatory Background

OPA provides that the owner or operator of a vessel from which oil is discharged, or from which there is a substantial threat of discharge of oil, into or upon navigable waters or adjoining shorelines is liable for damages for injury to or destruction, loss, or loss of use of natural resources caused by such discharge, including the reasonable costs of assessing the damage. 33 U.S.C. §§ 2701(5), (7), (32), and 2702(a) and (b)(2). Under Section 1006 of OPA, 33 U.S.C. § 2706, NOAA and DNER are designated as trustees for recovery under OPA for injuries to natural resources of the type relevant to this action.

Under the OPA implementing regulations, 15 C.F.R. Part 990, natural resource trustees perform an evaluation process when damage occurs due to an oil spill or threat of one. This is known as a natural resource damage assessment. The trustees employ various scientific and economic methods to assess the extent of such injuries. See, generally, Griffin Declaration, ¶¶ 12-29.

As provided in the regulations, the results of the injury assessment are scaled to determine the level of restoration actions needed to make the environment and public whole. This frequently involves developing potential types of restoration projects, which, based on their experience, the trustees believe can be implemented to restore the injured resources or the services they provide to the levels expected but for the injury. In this way, the trustees are able

to develop an estimate of the cost needed to perform the restoration – essentially reducing the injury into a monetary value. The complexity of the scaling process carries with it a level of uncertainty about the monetary amount needed for restoration. *Id.*, at ¶¶ 15, 30.

In association with the monetary recovery for restoration projects, the trustees must go through a public process during which they prepare one or more restoration plans intended to restore the injured resources. These assessments are presented to the public for review and comment. Those procedures were followed in this case. *Id.*, ¶¶ 20-25.

THE CONSENT DECREE

The terms of the proposed Consent Decree are typical of many other decrees entered by federal courts throughout the country in settling natural resource damage cases. In particular, the Decree here provides that of the total amount of the \$550,000 settlement, of which \$412,000 will be placed in a special restoration account (the “Port Stewart Grounding NRD Account”), Consent Decree ¶¶ 4.c. and 9. The money in the Account will be used by the Plaintiffs to pay for a coral propagation project to restore lost coral habitat in the area of the grounding.¹ Griffin Declaration, ¶ 24. In addition, NOAA will receive \$128,000, and DNER \$10,000, for reimbursement of their respective assessment costs. In return, the Plaintiffs provide the Defendant with a covenant not to sue, Proposed Consent Decree § VIII, but with a specified reservation for claims based on new information or unknown conditions. Proposed Consent Decree ¶ 13. The Decree also includes standard clauses for stipulated penalties and covenants by the Defendants. Proposed Consent Decree §§ VI and IX.

¹ Note that the procedures for use of the money in the Account are delineated in a Memorandum of Agreement (“MOA”) between DNER and NOAA dated December 2016. The MOA was intended to be attached as Appendix A to the Consent Decree, but was inadvertently omitted. It is attached to this Memorandum, and the United States respectfully requests that, by approving the entry of the Consent Decree, the Court incorporate the MOA by reference as part of the Decree.

ARGUMENT

A. Standard of Review

In general, public policy strongly favors settlements of disputes without litigation. Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985); Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976); Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982). Nonetheless, a district court reviews a consent decree to ensure that it is both procedurally and substantively fair, reasonable, and consistent with the underlying statute. City of Bangor v. Citizens Communications Co., 532 F.3d 70, 93-94 (1st Cir. 2008). While the approval of a settlement is a judicial act that is committed to the informed discretion of the court, id., see also Donovan v. Robbins, 752 F.2d 1170, 1176-1177 (7th Cir. 1985), the court's role is a limited one. Harris v. Pernsley, 654 F. Supp. 1042, 1049 (E.D. Pa.) (“[t]he court may either approve or disapprove the settlement; it may not rewrite it.”), aff'd, 820 F.2d 592 (3rd Cir. 1987). Accordingly, the relevant standard for the court's determination “is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.” United States v. Kramer, 19 F. Supp.2d 273, 280 (D.N.J. 1988) (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 2001). The policy encouraging settlements has “particular force where, as here, a government actor committed to the protection of the public interest has [engaged in the construction of the] proposed settlement,” Cannons Eng'g Corp. 899 F.2d at 84, and where that government actor is “specially trained and oriented in the field.” United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000).

Judicial review of a settlement agreement negotiated by the government does not involve de novo evaluation of the settlement's merits or “second-guessing” the executive branch's

decision to enter into a proposed settlement. See id.; see generally Sam Fox Pub. Co. v. United States, 366 U.S. 683, 689 (1961). Rather, in reviewing a settlement involving a governmental agency, the court “must exercise some deference to the agency’s determination that settlement is appropriate.” Conservation Law Found. v. Franklin, 989 F.2d 54, 58 (1st Cir. 1990) (quoting Federal Trade Comm’n v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987)). This deference for governmental actions reflects the “strong public policy in favor of settlements, particularly in very complex and technical regulatory contexts,” United States v. Davis, 261 F.3d 1, 26 (1st Cir. 2001) (quoting Comunidades Unidas, 204 F.3d at 280), where the government actor is “committed to the protection of the public interest.” Cannons Eng’g Corp., 899 F.2d at 84. These principles, in turn, are reinforced by the fact that a consent decree is a “highly useful tool for government agencies [because] it maximizes the effectiveness of limited . . . resources” by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975). Thus, “in the absence of any claim of bad faith or malfeasance on the part of the Government so acting, a court should decline . . . to assess the wisdom of the Government’s judgment in negotiating and accepting [a] . . . consent decree.” Sam Fox Publishing Co., Inc. v. United States, supra.

B. Discussion

The United States urges the Court to approve the proposed Consent Decree because it is fair, reasonable, and furthers the goals of OPA.

1. The Consent Decree is Procedurally Fair.

Procedural fairness demands that the parties negotiated at arm’s length and in good faith. Davis, 261 F.3d at 23; United States v. CUCCo v. PREPA, 204 F.3d 275, 281 (1st Cir. 2000). Courts gauging procedural fairness look to the adversarial vigor, candor, openness, and

bargaining balance of the negotiation process. City of Bangor, 532 F.3d at 96. In this case, the proposed Consent Decree was entered into by the parties after lengthy, arms-length negotiations among experienced counsel. Further, there is no hint of bad faith with respect to the negotiations or the amount of the settlement in this case.

2. The Consent Decree is Substantively Fair.

Substantive fairness deals with the concepts of corrective justice and accountability; in other words, how much or how little should a settling party be expected to pay in order to correct environmental wrongs. CUCCo, 204 F.3d at 281. Because these concepts are not easily quantified in environmental cases, the Plaintiffs' expertise and conclusions must receive "the benefit of the doubt when weighing substantive fairness." Cannons Eng'g Corp., 899 F.2d at 88; City of Bangor, 532 F.3d at 97 ("Usually, there is deference to [an agency's] judgment on fairness, and no independent court inquiry.") (Bracketed material supplied.) Here, NOAA and DNER are specially trained in the area of natural resource damages, and therefore, deference is due to their determination regarding the benefits and fairness of entering into this settlement.

In particular, the Trustees followed the meticulous, multi-step process required by the regulations. They performed a field assessment; determined the degree and extent of injury to each habitat and type of resource injured by the grounding; identified the type and extent of restoration actions that will lead to recovery of the injured resources using a standard economic model called a "Resource Equivalency Analysis" ("REA"); and determined the cost of those actions. Griffin Declaration, ¶¶ 12-30. In addition, the Trustees went through a public process, seeking comments on the results of the assessment and their plan to restore the injured resources. Id., ¶¶ 20, 25; and see, Final Restoration Plan and Environmental Assessment, https://casedocuments.darrp.noaa.gov/southeast/port_stewart/admin.html. Notably, the Trustees

did not receive any negative public comments on their proposed plan. Griffin Declaration, ¶ 25.

As part of the economic evaluation using the REA, the Trustees determined that a coral propagation project would allow for the planting of 2,000 corals which, over time, would correct the damage caused by the grounding. The coral propagation project will focus on growing various coral species in nurseries and then out-planted onto reefs. This will assist in the recovery of the corals destroyed or injured due to the grounding. *Id.*, ¶ 27. But in doing so, the Trustees needed to keep in mind the inherent limitations of using an economic model such as a REA, which admittedly includes assumptions over which experts could differ were this case proceed to trial. On that basis, the Trustees determined that a payment of approximately \$400,000 was appropriate for the damage caused by the Defendant. *Id.*, ¶¶ 15, 30. And the Defendant is also required as part of the settlement to reimburse the Trustees their assessment costs, which total \$138,000. *Id.*, ¶ 31.

3. The Consent Decree is Reasonable.

The reasonableness of a proposed consent decree depends on how well the relief is “tailored” to redress the injuries alleged in the complaint. *CUCCo*, 204 F.3d at 281. Courts need not examine the reasonableness of proposed consent decrees for “mathematical precision,” but should defer to the Plaintiffs’ judgment on whether the decree is reasonable. *See Davis*, 261 F.3d at 26. For the same reasons as described above, the settlement in this case furthers statutory goals by requiring payment of restoration of the damaged natural resources caused by the grounding of the Defendant's tanker, which the Plaintiffs will then use to restore those resources. At the same time, the proposed Consent Decree ensures that the Plaintiffs will recoup the money they expended to assess the damages.

4. The Consent Decree Furthers the Goals of the Underlying Statute.

In deciding whether a consent decree advances the objectives of an environmental statute, there is a strong presumption in favor of entering Consent Decrees advanced by government agencies that are “committed to the protection of the public interest and specially trained and oriented in the field.” CUCCo, 204 F.3d at 280 (internal quotations omitted). Passed by Congress in the wake of the 1989 Valdez tanker disaster, OPA created a “comprehensive compensation and liability scheme for oil spill pollution.” Metlife Capital Corp. v. M/V Emily S., 132 F.3d 818, 820 (1st Cir. 1997). The statute imposes liability for, among other things, injuries to natural resources related to such spills -- or the threat of such spills, the monetary recompense for which is to be used to restore the injured resources. 33 U.S.C. § 2702(a).

This settlement furthers the goals of OPA. It provides money to pay for a coral propagation project to reestablish the natural resources damaged by groundings. And at the same time, the agreement will save the resources of the Court, the settling parties, and the taxpayers because the settlement will preclude the necessity of complex and prolonged litigation.

5. The Court Should Enter the Proposed Decree as a Final Judgment.

The Trustees ask that the proposed Decree be signed by the Court and entered as a final judgment pursuant to Fed. R. Civ. P. 54(b) and 58, and that the inadvertently-omitted MOA be incorporated by reference into the Consent Decree. There are three requirements for entry of a final judgment pursuant to Rule 54. First, the court must determine that the matter is a final judgment within the meaning of 28 U.S.C. § 1291. Next the court must determine that there is no “just reason” for delay. Fed.R.Civ.P. 54(b). Finally, the Court must identify the factors it relied on to make its decision. See, e.g., Consolidated Rail Corp. v. Fore River R.R., 861 F.2d

322, 325 (1st Cir. 1988).

The Rule 54 standards have been met in this case. First, the proposed Consent Decree is a judgment because it resolves the specific claims against the Defendant alleged in the Complaint, to wit, injuries to natural resources caused by the grounding. Second, there is no reason for delay, because it is in the public interest to secure the recovery of damages for the resolved claim so that work to restore and/or replace the injured natural resources underlying the claim can begin now instead of at some unknown point in the future. In addition, a final judgment “will advance the interests of judicial administration and public policy” and promote the goal of providing the parties with finality as to the claims alleged. Consolidated Rail, 861 F.2d at 325. Accordingly, since Rule 54(b)’s standards for entry of a final judgment have been met, the Court should not only approve the Consent Decree, but also should enter it as a final judgment in accordance with Fed. R. Civ. P. 54 and 58. This action by the Court is contemplated by the Parties in Paragraph 26 of the proposed Consent Decree.

Respectfully submitted,

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Dated

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EXHIBIT A
(Declaration of Sean Patrick Griffin)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	3:17-cv-01742
PORT STEWART GmbH&Co. Kg)	
OF GERMANY,)	
)	
Defendant.)	

DECLARATION OF
Sean Patrick Griffin

I, Sean Patrick Griffin, do hereby declare as follows:

1. I submit this Declaration in support of the Assented-To Motion of the United States to Enter the Consent Decree. I have personal knowledge of the matters set forth in this Declaration.
2. The following sections generally describe my professional background, my experience with this matter, my duties and responsibilities on this matter, and my general observations regarding the injury to natural resources while in the field.
3. I am a Marine Habitat Resource Specialist at the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS), of the United States Department of Commerce. I work in the Office of Habitat Conservation's Restoration Center at the Aguadilla, Puerto Rico office.
4. I have worked at NOAA/NMFS as a Marine Habitat Resource Specialist for approximately nine years. Prior to that, I worked for Lighthouse Technical Consultants providing consultation on damage assessments and restoration following ship groundings

and oil spills in Puerto Rico for NOAA and PR DNER. I received a graduate degree of Doctor of Philosophy in biological oceanography from the University of Puerto Rico in 2005.

5. Currently, my primary responsibilities at NOAA include: planning, developing, and reviewing materials for and assisting in the implementation of restoration projects that benefit and restore NOAA trust resources, including those associated with oil spill and hazardous substance release cases under NOAA's Damage Assessment, Remediation and Restoration Program (DARRP). Specific to my work under the Oil Pollution Act, 33 U.S.C. § 2701, et seq. (OPA), I have been trained in Habitat Equivalency Analysis (HEA) and Resource Equivalency Analysis (REA) to assess and scale injuries associated with oil spills, a key component of Natural Resource Damage Assessments (NRDAs). I participate in assessments of natural resource injuries, and resulting damages, to aquatic and shoreline habitats and resources caused by the grounding of ships into a coral reef habitat. I have conducted or participated in over 30 cases involving vessel groundings and coral reef damage. I am familiar with the NRDA process as it relates to injury and damage assessments; the public review process, which involves providing the public with an opportunity to review and comment on restoration plans; and the funding, implementation, and performance monitoring of projects designed to restore, rehabilitate, replace or acquire the equivalent of the natural resources injured by an oil spill or hazardous substance release.

6. I have been involved in the NRDA for the October 27, 2009, tanker-vessel (T/V) Port Stewart grounding on the coral reef habitat (the "Site") near the Yabucoa Channel, Puerto Rico since the grounding (the "Incident"). My duties in the case have included performing initial site assessment, emergency restoration planning, oversight, monitoring, mapping, injury assessment, scaling and restoration planning.
7. The Trustees in this case are NOAA and the Puerto Rico Department of Natural and Environmental Resources (DNER). By agreement with DNER, NOAA is the lead natural resource Trustee. As Trustees for the Incident, NOAA and DNER have a fiduciary duty to assess and evaluate damages caused by the Incident to its trust resources. Also, as publicly funded agencies, the Trustees are beholden to the public trust to spend its funds wisely. Accordingly, the Trustees have to ensure that these assessments are both informative and cost-effective.
8. I was in in the field for this case where I observed the aftermath of the Incident. I observed thousands of dislodged and pulverized corals damaged by the grounding. I also observed in the area of the Incident that a complex coral reef system was rendered almost completely flat in some areas (the 'parking-lot effect'). For illustrative purposes, I have included several photos of the impacted area in Appendix A , which are part of the Final Restoration Plan and Environmental Assessment available at https://casedocuments.darrp.noaa.gov/southeast/port_stewart/admin.html .
9. In this Incident, no oil was spilled, but because of a significant threat of a release of oil, response measures were taken to quickly remove the grounded T/V Port Stewart before

oil could be spilled. Although it was removed the same day as the grounding, those emergency measures resulted in additional injuries to the coral reef habitats at and near the Site.

10. In light of the significant and immediate damage to the coral reef system caused by the Incident, the Parties' most urgent priority, after removing the grounded vessel, was to perform emergency restoration. "Emergency Restoration," a form of "Primary Restoration," is comprised of actions needed to expeditiously stabilize damage to natural resources -- in this case, impacted corals -- in an effort to save the existing biota.
11. The Parties' emergency restoration efforts were able to save roughly 1,000 corals, although many were destroyed beyond repair. The Parties also stabilized rubble and restored topographic complexity using limestone in some areas to assist natural recovery of the Site.
12. A claim for NRD under OPA follows the regulations in 15 C.F.R. Part 990 and can be broken down into a multi-step process that includes: field assessment; determining the degree and extent of injury to each habitat/resource type; identifying the type and extent of restoration action(s) that facilitate recovery of the injured resources and compensate for the interim loss of services occurring prior to full recovery; determining the costs for the restoration activities identified to compensate for the injuries, which may include the conversion of the injury into monetary damages based on the estimated cost to replace or undertake projects to restore injured resources; recovering damages from the party

responsible for the damage (Responsible Party); and implementing one or more projects to restore injured natural resources.

13. Natural resource injuries are determined by collecting and analyzing information to evaluate the nature and extent of injuries resulting from an incident. This information is then used to identify restoration actions to bring injured natural resources and services back to baseline (that is, conditions that would have existed had the spill not occurred) and make the environment and public whole for interim losses. Restoration consists of both (i) "primary restoration" which in this case was performed as "emergency restoration," which are actions that attempt to return injured natural resources and services to baseline, and (ii) "compensatory restoration" which are actions to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery.
14. To quantify the appropriate restoration required to compensate the Trustees for the injuries to their trust resources, the Trustees used a Resource Equivalency Analysis (REA) specifically designed to account for injuries to a coral reef system. The REA model used by the Trustees in this case and other coral reef cases equates the losses from the incident and gains from the restoration occurring at different times, and then discounts them to a present value.
15. It is important to note that the REA is a model, and while informative, it is not necessarily definitive and could be subject to contrary conclusions based on the assumptions used in developing the model. The REA used here is designed to allow the

Trustees to quantify and aggregate losses across coral species, taking into account the different species injured, the sizes and ages of corals lost, anticipated recovery rates and, similarly, to identify the scale of the proposed restoration required to restore or replace coral species comparable to those lost over time. In the context of a coral reef environment, this approach sorts and groups different coral species based on similarities in life history traits and services provided to the ecosystem.

16. Using the REA, the metric of injury becomes a coral colony year (CCY) wherein a CCY is not the coral's age, but a proxy for the services provided during a one-year period of time for a particular size and type of coral.
17. Utilizing the REA in this manner allows for a total number of coral colony years lost (CCYLs) to be calculated for compensatory restoration purposes, while still attempting to account for the original diversity of corals that were impacted, and the unique services they provided. For example, some corals provide shelter for associated biota, while others do not. It also ensures that rare corals that were lost are not exchanged for common corals; or that larger or more valuable corals are not exchanged for smaller or less beneficial corals.
18. The Trustees also account for the time lapse between injury and recovery to establish a present-day value through a process called "discounting." Discounting accounts for the fact that while the injury was suffered in 2009, compensatory restoration will not begin until at least 2018, and a full recovery at the site may take decades.

19. Based upon these factors included in the REA, the Trustees were able to determine the extent of their injuries. These injuries then need to be addressed through the compensatory restoration planning process.
20. The Trustees begin the process to evaluate and select compensatory restoration options in accordance with the NRDA regulations in 33 CFR Part 990. The first step is the issuance of a notice of intent to conduct restoration planning, which informs the public of its opportunity to participate in the process, in accordance with 15 C.F.R 990.42 and .44. The Trustees issued the notice of intent to conduct restoration planning on June 13, 2013 on DNER's website, and in *Primera Hora*, a newspaper of general circulation, on June 27, 2013.
21. The Trustees announced their preferred compensatory restoration options in a Draft Restoration Plan and Environmental Assessment (RPEA). The Draft RPEA was released for public review and comment for 30 days beginning on January 6, 2017 until February 10, 2017. The Draft RPEA examined seven restoration project alternatives, including a 'no-action' alternative as required by 40 CFR 1502.14(d) and 1508.25(b)(1). The action alternatives examined in the Draft RPEA included:
 - a. Enhancement of corals and coral reef ecosystems;
 - b. Restoration of existing and future impacts to coral reefs;
 - c. Prevention of future physical impacts to coral reefs;
 - d. Elimination and reduction of external reef stressors;
 - e. Restoration of associated habitats; and

f. Construction of artificial reefs.

22. Consistent with the NRDA regulations, the restoration project alternatives were then evaluated by six criteria:

- a. The extent to which each alternative is expected to meet the restoration goals and objectives;
- b. The cost to carry out each alternative;
- c. The likelihood of success of each restoration alternative;
- d. The extent to which each alternative will avoid collateral injury to natural resources as a result of implementing the alternative;
- e. The extent to which each alternative benefits more than one natural resource or service; and
- f. The effect of each alternative on public health and safety.

23. The restoration alternatives were then evaluated by their nexus to the injured resources affected by the Incident. The alternatives with attenuated or no nexus to the resources injured were removed from further consideration by the Trustees.

24. The remaining alternatives after this analysis by the Trustees were (i) the enhancement of corals and coral reef ecosystems through coral propagation and (ii) restoration of existing and future impacts to coral reefs caused by vessel groundings with no viable responsible party or reef damage from storm events. While the second could have provided an acceptable compensatory restoration alternative for this Incident, coral propagation provided quicker mitigation given the scale of compensatory restoration required in this

case. Further, the proximate location of this Incident to the newly designated (2015) Habitat Focus Area off the east coast of Puerto Rico, where coral propagation work is designated as a high priority, made the nexus to coral propagation even stronger.

25. After receiving no negative public comments on the Draft RPEA, the Trustees released a Final RPEA for this case in March 2017, finalizing the proposed actions that will comprise compensatory restoration: active coral propagation by cultivating corals in nurseries and then outplanting them to reefs that have suffered physical impacts, disease or bleaching.
26. Once the type of compensatory restoration has been selected, the metric for determining the amount of credit for compensatory restoration are coral colony years gained (CCYG). CCYG are estimated based on the number of corals, species, and size classes that will be provided through restoration. CCYG are estimated using the same REA factors used to calculate CCYL, but rather than estimating the losses, it is measuring the compensatory gains to be realized per unit of restoration. CCYG is also discounted annually for each year after the incident until when the projects are expected to be implemented. The CCYL's are then balanced against the CCYG's per unit of restoration to determine the amount of restoration required to offset the injury.
27. The proposed propagation will focus on species that can be easily produced in coral nurseries and out-planted onto reefs. The proposed restoration project funded by this settlement consists of growing corals in nurseries and out planting them onto reefs to help coral populations recover after disease or bleaching events, physical impacts, or to help

restore genetic connectivity to assist in coral reef recovery. Several Caribbean coral species will be propagated and out planted during this project, including some listed as “Threatened” under the Endangered Species Act.

28. To estimate credit for restoration credit for the coral propagation work, the Trustees evaluated a credit scenario based on experience with the success of previous propagation projects. The REA is used to model the number of CCYG’s added to the restoration sites based on the number of out-plants, species, size of the out-plants, mortality and year of out-planting.
29. Based on years of experience planning and funding coral propagation projects (through grants, contracts and cooperative agreements), the Trustees estimated cost range for this proposed settlement will allow the propagation and out-planting of at least 2,000 corals. These corals will be out-planted over a three to four year period and will produce the CCYGs necessary to compensate the public.
30. The Trustees’ current estimate of the project’s cost is approximately \$400,000, which takes into account the litigation risk inherent in the REA model, as outlined in Paragraph 15. The cost estimate will cover contract support for vessel and dive operations during propagation, outplanting, restoration and monitoring activities as well as Trustee oversight.
31. The \$550,000 settlement also includes funds to reimburse the Trustees’ past costs, future oversight, and anticipated monitoring. The Trustees will oversee the implementation of

the projects described above and will use the monitoring results to inform any necessary corrective actions needed to ensure that project goals are achieved.

32. As a result, I believe that the settlement is fair, reasonable and in the public interest insofar as it enables this project to be completed, which would make the environment and the public whole.

* * * * *

I swear under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of July, 2017.



Sean Patrick Griffin
Marine Habitat Resource Specialist
NOAA Restoration Center

Appendix A

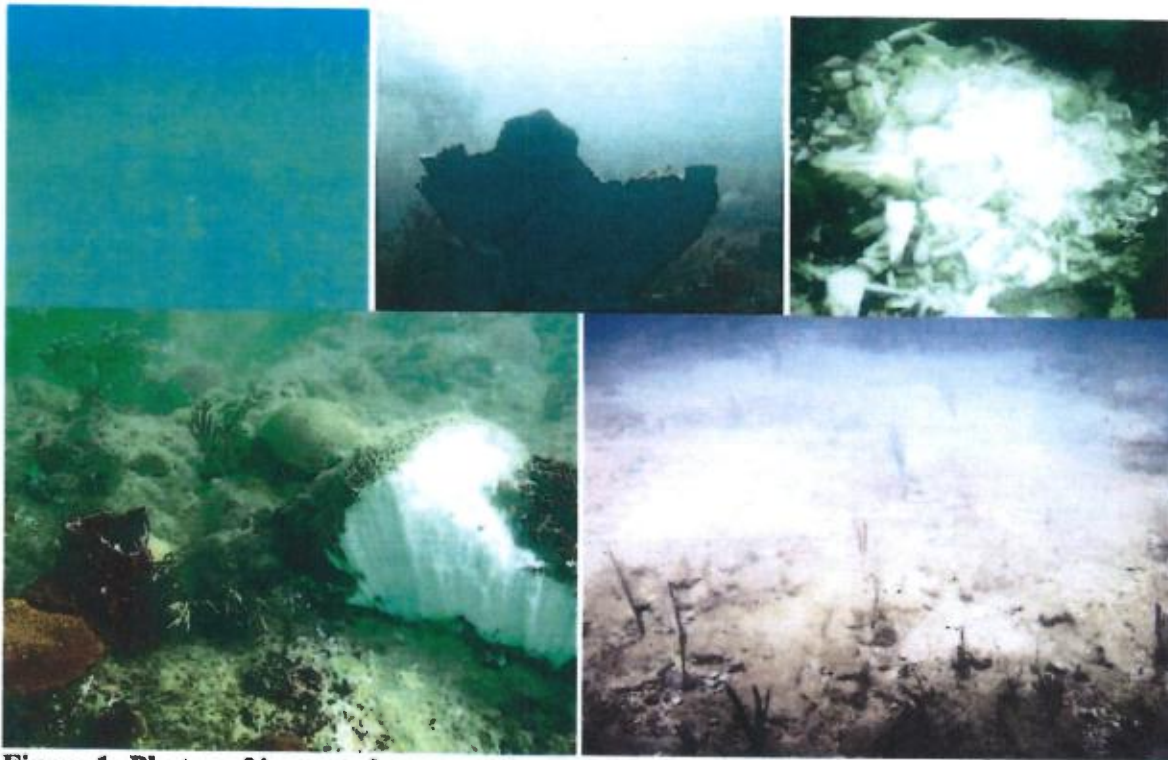


Figure 1: Photos of impacted areas at the T/V PORT STEWART site. Photos taken by NOAA Restoration Center in 2009-10.



Figure2: Photos of un-impacted reef adjacent to the T/V PORT STEWART site. Photos by NOAA Restoration Center, December, 2009.

APPENDIX A to CONSENT DECREE
(Memorandum of Agreement)

MEMORANDUM OF AGREEMENT

BETWEEN

THE COMMONWEALTH OF PUERTO RICO, DEPARTMENT OF NATURAL AND ENVIRONMENTAL
RESOURCES

AND

THE U.S. DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION

REGARDING

NATURAL RESOURCE DAMAGE ASSESSMENT, RESTORATION AND OTHER NATURAL RESOURCE
TRUSTEE ACTIVITIES

ARISING FROM

April, 2006 T/V Margara Grounding

October, 2009 M/V Port Stewart Grounding

December, 2009 LNG/C Matthew Grounding

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[Handwritten signature]

I. INTRODUCTION

This Memorandum of Agreement (MOA) by and between the Commonwealth of Puerto Rico, Department of Natural and Environmental Resources ("PRDNER") and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA") (collectively hereinafter "Trustees") is entered into in recognition of the common interests of the Trustees in the restoration of natural resources and associated services which have been injured, destroyed or lost as a result of the T/V Margara, M/V Port Stewart, and LNG/C Matthew groundings (Groundings) which occurred between 2006 and 2009, and resulted in injury and loss of coral reef resources in coastal and offshore areas in Puerto Rico territorial waters.

Since the Margara grounding in 2006, the Trustees have cooperatively worked together to implement a natural resource damage assessment (NRDA) to identify the nature, degree and extent of natural resource injuries resulting from this incident, with cooperative work continuing on the subsequent two Groundings starting in 2009. The NRDAs were funded, in part, by the Responsible Parties involved in each incident. Natural resource damage settlement funds, as they become available, shall be used to implement projects designed to restore injuries documented during the NRDAs. These restoration projects will be identified and described in a publicly-reviewed restoration plan that is compliant with all applicable Federal and Commonwealth statutes and regulations. This MOA serves as an operating agreement for the Trustees: 1) development of a restoration plans; and 2) implementation of the promulgated restoration plans to restore natural resources injured by the Groundings.

II. AUTHORITY

- A. The natural resource Trustees enter into this MOA in accordance with the natural resource trustee authorities provided for each Trustee under Section 1006 (a)-(g) of the Oil Pollution Act (OPA) of 1990, 33 U.S.C. § 2706(a)-(g); Section 311 (f) of the Clean Water Act (CWA), 33 U.S.C. §1321 (f), Executive Order 12777, 56 Fed. Reg. 54757 (Oct. 22, 1991) and other applicable Federal law and Commonwealth statutory and common law; and authority including, but not limited to, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), as amended, 40 C.F.R. Part 300, Subpart G and the Oil Pollution Act Natural Resource Damage Assessment Regulations, 15 C.F.R. Part 990, and the Puerto Rico Coral Reef Act. Law No. 147 of July 15, 1999, and Puerto Rico New Wildlife Act, Law No. 241 of August 15, 1999.
- B. In accord with Section 1006(b) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2706 (b) and Subpart G of the NCP, 40 CFR § 300.600 through 300.615, and pursuant to internal delegations and practice within the Department of Commerce and NOAA, the following officials or their designees shall act on behalf of the public as Federal and Commonwealth Trustees for natural resources under this MOA:


1. The Secretary of PRDNER for the Commonwealth of Puerto Rico; and

PRDNER/NOAA MOA
Vessel groundings
December, 2016

2. The Director of the NOAA Office of Habitat Conservation.

III. DEFINITIONS

For purposes of this Agreement, the following definitions shall apply:

- 
- A. "Commonwealth Trustee" means the Secretary of the PRDNER for the Commonwealth of Puerto Rico, or the Secretary's authorized designee.
 - B. "Federal Trustee" means the National Oceanic and Atmospheric Administration.
 - C. "Joint use" means use of natural resource damage recoveries by the Federal and/or Commonwealth Trustees whether individually or collectively, as is agreed upon by the Trustees in accordance with the terms of this MOA.
 - D. "Lead Administrative Trustee" or "LAT" means the Trustee agency that has been selected by the participating Trustees to coordinate natural resource damage assessment and restoration implementation activities and other activities as authorized by the Trustee Council as defined in Section III (L) of this document.
 - E. "Natural resources" shall have the same meaning as set forth in Section 1001 (20) of OPA, 33 U.S.C. §2701(20).
 - F. "Natural resource damage(s) assessment and restoration recovery(ies)" means any award, judgment, settlement or other payment to the Federal or Commonwealth Trustees, which is received or controlled by any of the Trustees, individually or collectively, for, or as a result of, claims for natural resource damages related to the Groundings.
 - G. "Oversight expenses" means any costs associated with individual Trustee participation in the damage assessment, restoration planning and implementation process, Trustee Council administrative proceedings, costs associated with the retention of consultants, coordinators, or any other technical or administrative services associated with the development and implementation of the restoration plans, or any other costs reasonably related to the implementation of this MOA , including the physical implementation of the final restoration plans approved by the Trustee Council.
 - H. "Responsible Party or Parties", "RP(s)" includes the owner, operator, or demise charterer of a vessel, or the owner or operator of a facility, or any other party who is or might be liable under the Oil Pollution Act of 1990 for natural resource damages.

- I. "Restore" and "Restoration" means any action undertaken by the Trustees pursuant to OPA Section 2706 (c), (d) and (f), and other applicable laws or regulations, including planning, implementation, monitoring, administration and oversight, which serve to restore, rehabilitate, replace, or acquire the equivalent of natural resources or natural resource services injured, destroyed or lost as a result of the Groundings.
- J. "Groundings" means the incidents between 2006 and 2009 in Puerto Rico involving the vessels T/V Margara, M/V Port Stewart and LNG/C Matthew together with any and all impacts to natural resources arising therefrom.
- K. "Trustees" means the Federal and Commonwealth Trustees.
- L. "Trustee Council" refers to the Vessel Groundings Trustee Council, consisting of the two (2) Trustee Representatives, PRDNER (as designated by the Commonwealth of Puerto Rico) and NOAA to oversee coordination of natural resource damage assessment and restoration activities arising from or related to the Groundings.
- M. "Trustees' Representatives" means the two (2) authorized designees appointed by the Trustees: PRDNER (as designated by the Commonwealth of Puerto Rico) and NOAA.
- N. "Trustee Resolution" refers to a document prepared by the Trustee Council in which disbursements of natural resource damage recoveries or other actions are explained, justified and agreed upon.

IV. SCOPE


This MOA is intended to cover natural resources belonging to or managed by, controlled by, or appertaining to the Trustees under OPA, CWA and the NCP and other applicable Federal and Commonwealth law, which have been or may be affected by the Groundings, the assessment of damages thereto and restoration thereof.

V. PURPOSE

The purpose of this MOA is to provide a framework for coordination and cooperation among the Trustees to: (i) ensure timely and efficient implementation of a natural resource damage assessment to address resource injuries, including service losses, caused by the Groundings, consistent with the procedures and guidance for the conduct of such assessments at 15 C.F.R. 990 and other applicable laws and regulations; (ii) avoid duplication of assessment costs and otherwise ensure costs are reasonable; (iii) seek compensation for such resource injuries or losses, including reimbursement of assessment costs; and (iv) provide for appropriate restoration, rehabilitation, replacement or acquisition of natural resources and/or services injured or lost.

VI. OBJECTIVES

The Trustees shall coordinate their efforts to meet their respective natural resource trustee responsibilities under OPA and other applicable Federal law and Commonwealth statutory and common law. In pursuing these objectives, the Trustees shall remain cognizant of all relevant law, policy, principles and concerns, including without limitation, the goals of OPA, the nature and extent of each Trustee's resource concerns and general principles of equity. The Trustees' objectives include, but are not limited to, the following:

- 
- A. Coordinating the efforts of the Trustees in implementing the natural resource damage assessment process consistent with the guidance and procedures provided at 15 C.F.R. Part 990.
 - B. Developing a plan(s) for the restoration of natural resources and services injured, destroyed or lost due to the Groundings, if necessary.
 - C. Pursuing funding and implementation of the plan(s) and reimbursement of assessment costs, by RPs or the National Pollution Funds Center (NPFC), United States Coast Guard.
 - D. Achieving settlement of all Trustee natural resource damages claims, including the costs of assessment, in a manner consistent with 15 C.F.R. Section 990.25.
 - E. Coordinating efforts of the Trustees in litigation, if necessary.
 - F. Implementing the restorations pursuant to Final Damage Assessment and Restoration Plans that have undergone public review.
 - G. Oversight of all restoration implementation actions in compliance with applicable Federal and Commonwealth statutes and regulations.

VII. FUNDING

- A. Funding. To the extent provided by law, each Trustee agrees to cooperate in the administration of any funding source or sources that may become available to the Trustees from RP's, the NPFC or others related to the Groundings. Such funds shall be administered through the Trustee Council in accord with the terms established pursuant to this MOA.
- B. Use of NOAA's Damage Assessment and Restoration Revolving Fund (DARRF). Funds received from the RP or NPFC shall be deposited in NOAA's Damage Assessment and Restoration Revolving Fund (DARRF) for use in the Groundings, restoration planning, implementation and monitoring actions.


- C. Disbursements. Disbursements of funds for restoration implementation, planning, monitoring, and oversight will be authorized by the Trustee Council through Trustee Resolutions, as deemed necessary. Each Trustee receiving such funds shall maintain accepted cost documentation procedures.

VIII. VESSEL GROUNDINGS TRUSTEE COUNCIL

- A. Composition. Within twenty (20) days of the execution of this MOA, each Trustee, as specified under Section III, shall designate a Primary Trustee Representative to the Vessel Groundings Trustee Council ("Trustee Council") who shall be authorized to vote on behalf of that Trustee. Each Trustee shall also designate an Alternate Trustee Representative who shall be authorized to act, and vote, in the absence of the Primary Trustee Representative. Each Trustee may, by written notification to all other Trustees, change the Primary and Alternate Trustee Representative designees. In-house counsel for each of the Trustees may each appoint one attorney who may attend all meetings of, or organized by, the Trustee Council in a legal/consultative role but who shall not be a member of the Trustee Council.
- B. Communications. To the extent not designated herein, within twenty (20) days of the execution of this MOA each Trustee shall notify all of the Trustees of the name(s), address(es), phone number(s) facsimile number(s) and email address(es) of their designated Primary and Alternate Trustee Representatives who shall receive, and shall be responsible for, all correspondence and communications on behalf of such Trustee.
- C. Decision making
1. The two (2) members of the Trustee Council shall have equal voting power, and all decisions under this MOA shall be by unanimous agreement of both Trustee Council members, except where a Trustee has notified the Trustee Council as described in C.2 below.
 2. The Trustees understand and acknowledge that each Trustee's duties and interests, although overlapping, may be sufficiently different that a Trustee may wish to bound or limit its involvement in certain aspects of the NRDA process. In recognition thereof, to avoid delaying the work of the Trustee Council as a whole, and to maximize the efficiency of Trustee assessment efforts, a Trustee may limit its involvement in the NRDA process by notifying the Trustee Council in writing, and in a timely manner, of those NRDA activities for which the Trustee would like to limit or end its participation.
- D. Dispute Resolution. In the event of a dispute involving any decisions under this MOA, the Trustee Council shall initially attempt to resolve the dispute through good faith

discussions directed toward obtaining unanimity among the Trustees involved in the dispute and consensus by the Trustee Council as a whole. If unanimous consent cannot be reached, the matter shall be elevated to the named Trustees identified in Section II (B) above who may expressly delegate their decision making authority to a senior supervisory level designee for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved. In the event of irreconcilable disputes, the disposition of funds recovered from the RPs or the NPFC shall be governed by Section XII (F) (3) of this MOA.

E. Duties and Authority

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1. The Trustee Council shall coordinate all Trustee activities and matters under this MOA directed towards the assessment and restoration of natural resource damages and resolution of natural resource damages claims arising from the Groundings.
 2. The Trustee Council shall be responsible for all natural resource damage assessment and restoration activities, including but not limited to assessment, restoration planning, restoration implementation and oversight both prior to and subsequent to final settlement or judgment covering all Trustee natural resource damages claims arising from the Groundings. Such activities may include but are not limited to the payment of any reasonable and appropriate costs of assessment or restoration.
 3. The Trustee Council may enter into contracts through its individual agencies, for the benefit of the Trustee Council, and after consultation with the Trustee Council, with consultants to provide such technical and administrative services as the Trustee Council determines are necessary and as permissible under applicable Commonwealth or Federal law.
 4. The Trustee Council may request and receive relevant materials and/or information from Trustee's staffs and/or the public.
 5. The Trustee Council shall have final authority to disburse any funding received pursuant to Section VII of this MOA, to implement restoration using funds recovered from RPs or the NPFC and to make all necessary decisions for the management, oversight and administration of projects for which such funding may be used. This shall include, but is not limited to, the payment of administrative costs to Trustees' Agencies that the Trustee Council determines are reasonable and necessary.
 6. The Trustee Council may request reimbursement and/or upfront payment of reasonable Trustee oversight and assessment expenses from funds recovered from the RPs, or the NPFC.

7. The Trustee Council may, to the extent permitted by applicable law, collectively or through individual Trustees, receive grants and or donations to be applied to the restoration of natural resources related to injuries arising from the Groundings.
8. The Trustee Council reserves the right to take such further actions as may be necessary to further the purposes and achieve the objectives of this MOA.
9. Records. All records created by the Trustee Council in support of this MOA (e.g., meeting agendas, meetings minutes, resolutions, etc.) shall be considered "Draft" unless and until voted on and approved as a "Final" record by the Trustee Council, or their designated representatives, and marked as such.
10. Public Review and Comment. The Trustee Council shall determine which records are appropriate, or legally required, to be made available for public review and comment, in compliance with applicable laws and regulations. For each record to be released upon such a determination, the Trustee Council shall determine the media or format and the procedures to be followed, including the dates and length of any public comment period, in accordance with applicable laws and regulations. Nothing in this paragraph shall apply to a Trustee's response to request for designated privileged documents from parties and non-parties as described in Section XI of this MOA.
11. Community Involvement. The Trustee Council shall provide the community affected by the Groundings with meaningful involvement in any natural resource damage assessment studies conducted concerning these Groundings, as well as in the restoration planning process.
- F. Lead Administrative Trustee. The Trustees designate NOAA as Lead Administrative Trustee (LAT) under this MOA for the purpose of directing and coordinating Trustee activities, including, but not limited to, assessment, restoration plan development, restoration implementation and oversight, resolution of claims arising from the Groundings and other Trustee activities as authorized by the Trustee Council. The LAT shall fully coordinate its activities with and only act under the direction of the Trustee Council. Other duties of the LAT and/or the other Trustee entities shall be determined by resolution of the Trustee Council.
- G. Meetings. Either member of the Trustee Council may, upon reasonable notice through the LAT, call a meeting of the Trustee Council to be conducted either in person or by telephone conference call or by webinar. Such meetings shall generally be held in conjunction with other set meetings among the Trustees to this MOA. Members of the Trustee Council may invite their respective staff members, contractors or attorneys to attend. Members of the Trustee Council also may invite representatives of public, private or non-profit entities, representatives of other agencies or

members of the public to its meetings unless the Trustee Council determines, in compliance with applicable law, that the subject of the meeting is privileged or that public disclosure of the Trustee Council's work would prejudice the effectiveness of the Trustee Council and the Trustees' responsibilities under applicable law.

- H. Trustee Council Termination. The Trustee Council created pursuant to this Section shall terminate upon the termination of this MOA pursuant to Section XI (F) of this MOA.

IX. DAMAGE ASSESSMENT, RESTORATION PLANNING AND IMPLEMENTATION


- NGW*
- A. Joint Purpose and Overlapping Authorities. Commonwealth and Federal Trusteeships. The Trustees recognize that each of them has trusteeship under OPA and other applicable Federal and Commonwealth law, over natural resources affected by the Groundings, and that the scopes and responsibilities of their respective trusteeships overlap.
- B. Joint Use of Natural Resource Damage Recoveries. The Trustees agree that any natural resource damage recoveries, as defined in Section III (F) of this MOA, except those recoveries for reimbursement of each Trustee's past, unreimbursed damage assessment costs, obtained or received by the Trustees, individually or collectively, and any interest earned thereon, shall be jointly used to assess and restore, including supporting technical and administrative services therein, natural resources which have been injured, destroyed or lost as a result of the Groundings, unless the Trustee Council agrees otherwise. Disbursements shall be agreed to in writing by the Trustees through Trustee Resolutions.

X. COORDINATION AND CONFIDENTIALITY

- A. Coordination. The Trustees recognize and agree that their interests in the recovery of claims for natural resource damage assessment and natural resource damages associated with the Groundings are related and agree to coordinate negotiation and, if necessary, litigation of their claims and damages that arise out of the Groundings.
- B. Confidentiality. The Trustees recognize that in order to effectively and efficiently negotiate and litigate their claims, their counsel, employees and consultants may, at each Trustee's discretion, exchange documents and information including draft reports, analyses, opinions, conclusions and advice that is prepared in anticipation of litigation, or for confidential settlement purposes, or which is protected by the attorney work product or attorney-client privilege, or other forms of privilege. Therefore, subject to paragraph X (E) below, the Trustees hereby agree as follows:

1. The Trustees shall treat each "designated privileged document," and any "designated privileged communication" by, between or among the Trustees as privileged and shall protect such document or communication from disclosure to the maximum extent possible under applicable Federal and Commonwealth law, unless the Trustee Council agrees otherwise.
2. A "designated privileged document" is one identified on its cover page or elsewhere as subject to one or more privileges or forms of immunity. It is the obligation of each Trustee to properly label as privileged each document for which a Trustee or Trustees asserts such privilege. A label for privileged materials shall be placed as a header, in boldface type, on the first page of each such document to read as follows:


NOT FOR PUBLIC RELEASE - FOIA EXEMPT



In addition, all pre-decisional drafts of studies, reports or analyses shall be labeled prominently on the first page as "DRAFT", and are deemed confidential, unless and until the Parties agree to the release of any such document. A Trustee's failure to identify or label a privileged document shall not, as such, constitute a waiver of any applicable privilege.

3. A "designated privileged communication" is one which occurs with an expectation of confidentiality and includes, but is not limited to, communications between the Commonwealth and Federal government's attorneys or their staffs, agents, consultants and/or experts in anticipation of litigation, in the seeking or giving of legal advice and/or in the context of pre-decisional government deliberations.
4. The transmittal of a privileged document, or a privileged communication between or among any of the Trustees (and their counsel, representatives, contractors and consultants) does not waive, or imply any waiver, of any privilege or right which the transmitting government may assert with respect to that document or communication.
5. Designated privileged documents shall be maintained in such a manner as to ensure that no intentional or unintentional disclosure is made which would compromise any asserted privilege, including segregating "designated privileged documents" in files that are identified as containing privileged documents that are not to be disclosed publicly or in response to a discovery request in this or any other case.
6. Unless otherwise specifically provided, the Trustees shall each be entitled to assert any applicable privilege with respect to any document or communication jointly transmitted, prepared, or funded by the Trustees. Each Trustee shall be entitled to

assert an applicable privilege with respect to any document or communication transmitted, prepared, or funded solely by that Trustee.

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7. If a subpoena, discovery request, or other request in any form, for a privileged document or information is received by any Trustee, a copy of the subpoena or request will be immediately forwarded to counsel for the Trustee or Trustees to which the privilege applies and to the government representative(s) who originally generated the document or communication requested. The Trustee who receives such a request shall also provide a draft of the Trustee's intended response to such request to the other Trustee not less than ten (10) working days prior to the date that the Trustee intends to issue its response. To the extent that applicable law may require a response more promptly than is consistent with the above temporal requirement, the Trustees agree to act in good faith to meet any such requirements.
 8. Only by specific written agreement (email is sufficient) among the Trustees or pursuant to a Court Order shall a privileged document or communication be made public or disclosed to a Trustee-opponent or non-Trustee. Such agreement shall not be construed as a waiver of privilege or confidentiality regarding any other documents or communications.
 9. In the event that any Trustee determines, for any reason, that any privileged communication, information, or document received from the other Trustee pursuant to this agreement should be released to a third party voluntarily, in response to a request, or pursuant to any statute or regulation, the Trustee planning to release such communication, information, or document shall first consult with the other Trustee. If the Trustees do not reach an agreement regarding release, then they shall each present the matter to supervisory and/or management personnel with their respective governments for resolution. Unless the supervisory and/or management personnel agree that the communication, information, or document may be released, the Trustee seeking to release the communication, information, or document may do so only if such Trustee has determined that it may or must release the communication, information, or document pursuant to Section X (E) of this MOA.
 10. Subject to the terms of this Section X, nothing herein in any way affects or limits the authority of any Trustee to waive any privilege and release any documents, information, analysis, opinion, conclusion, or advice that are subject to privileges held exclusively by that Trustee.
 11. At the request and option of any Trustee, designated privileged documents shall be returned to the originating Trustee or destroyed, to the extent permitted by Federal and/or Commonwealth law.

12. The obligations of the Parties under this MOA shall apply to all of their counsel, employees, consultants, agents, contractors and representatives.
- C. Sharing Information with the Public. The Trustees agree that, to the extent consistent with the effective and efficient negotiation and litigation of their claims, public dissemination of final data and studies related to injuries arising from the Groundings is in the best interests of the public and the Trustees. Such final data and studies shall be made available to the public upon request to the extent consistent with the foregoing confidentiality provisions. In addition, the Trustees shall open and maintain a publicly available administrative record consistent with the requirements of the Federal Natural Resource Damage Regulations that the Trustees select for use in connection with the Groundings, the National Environmental Policy Act and any other applicable Federal or Commonwealth law.
- D. Compliance with Federal and Commonwealth Law. In the event that any provision of Section XI of this MOA conflicts with Federal or Commonwealth law, including the Freedom of Information Act or similar Commonwealth law, the Federal or Commonwealth law will control, and the Trustees will comply with the applicable law.
- E. Reservation of Rights to Release Information. Notwithstanding any other provision of this MOA, each Trustee reserves the right to provide information or document related to the Groundings and the natural resource damage assessment process to the public if such Trustee determines that such information or document: (1) is already lawfully in the public domain; (2) requires disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552, or similar Puerto Rico public records law; or (3) should be disclosed in order to protect public health, welfare, or the environment.

XI. GENERAL PROVISIONS

- A. Reservations. Neither execution of this MOA nor performance of any activities pursuant to this MOA shall constitute an admission by any Trustee named herein (or any government) of (nor be construed as precedent for) any legal responsibility under Federal law or Commonwealth statutory and common law to protect, restore, or enhance any natural resources affected by the Groundings over which any other Trustee asserts trusteeship. Furthermore, neither execution of this MOA nor performance of any activities pursuant to this MOA shall constitute an admission by any Trustee named herein (or any government) of (nor be construed as precedent for) any liability for damage or injury to any natural resources affected by the Groundings over which any other Trustee asserts trusteeship.
- B. Limitation of Authority. No Trustee is authorized to enter into settlements on behalf of the other Trustees and no Trustee represents another Trustee in any litigation that may be commenced by the PRP or any other Trustee.

C. Third Parties. This MOA is not intended to, nor shall it, vest rights in persons who do not represent the parties to this MOA or who are not parties to this MOA.

D. Effective Date. This MOA shall become effective when executed by all of the Trustees, that is, the date on which the last signature is obtained. This MOA can be executed in one or more counterparts, each of which will be considered an original document.


E. Amendment

1. This MOA may be amended by agreement of the Trustees if it is determined that an amendment is necessary to accomplish the objectives of this MOA, or is necessary to modify the objectives of this MOA consistent with the requirements of OPA and any amendments thereto, or other applicable Federal law or Commonwealth common or statutory law.
2. Any amendment of this MOA shall be effective only if it is in writing and executed by all parties to this MOA.

F. Termination

1. This MOA shall be in effect from the day of execution until the Trustee Council determines that the restoration plan or plans implemented under this MOA have been completed, except that this MOA may be extended by written agreement, as provided in Section XII of this MOA.
2. Withdrawal from the MOA
 - a. Due to Dispute. Any Trustee may withdraw from this MOA, but only after efforts have been made to resolve any dispute in accordance with paragraph D of Section VIII of this MOA, if applicable. Such withdrawal shall only be effective upon thirty (30) days written notice upon all Parties to this MOA.
 - b. Due to Differing Duties and Interests. The Trustees understand and acknowledge that at some point a Trustee may determine that it is no longer necessary to participate in the Trustee Council in order to fulfill their duty and that, perhaps, continuing to participate will not further the Trustees' interests. In that event, a Trustee may withdraw from the MOA by notifying the Trustee Council, in writing, and in a timely manner, that the Trustee no longer will be participating in the Trustee Council.
3. In the event that this MOA is terminated or one of the Trustees withdraws, the Trustees expressly agree that they will continue to coordinate to the greatest extent practicable their activities to assess injury to and restore the natural

resources affected by the Groundings, and that they will be guided by the objectives set forth in Section VI of this MOA. The disposition of any unobligated funds recovered from RPs as natural resource damages, and any interest earned thereon, shall be determined by further agreement of the Trustees. If an agreement cannot be reached, the Trustees may take whatever legal action they deems necessary, consistent with the requirement that such funds shall be expended solely to develop and implement a plan to restore injured natural resources under their trusteeship, as mandated by Section 1006 of the Oil Pollution Act (OPA), 33 U.S.C. § 2706.

- 
4. The withdrawal of any Trustee from this MOA for whatever reason, shall not affect the subsequent validity of the Trustee Council or this MOA by the other Trustee. A Trustee that has withdrawn from this MOA shall have no further obligations under this MOA except for the obligations under Section XI (F)(3), above, to continue to coordinate activities to the greatest extent practicable, to maintain confidentiality as agreed in Section X and to expend unobligated funds recovered for natural resource damages solely to develop and implement a plan to restore injured natural resources under their trusteeship, as mandated by Section 1006 of the OPA, 33 U.S.C. § 2706.

G. Federal Natural Resource Damages Regulations. It is the intention of the Trustees to follow the NOAA natural resource damage assessment regulations, 15 C.F.R. Part 990 in matters relating to the Groundings.

H. Anti-deficiency. Nothing in this MOA shall be construed as obligating the United States or Puerto Rico, their officers, agents or employees, to expend any funds in excess of appropriations or other amounts authorized by law. The GOVERNMENTS, through their designated representatives, have signed this MOA on the day and year appearing opposite their signatures.

Memorandum of Agreement Concerning Natural Resource Damages in the Matter of the Vessel Groundings, PUERTO RICO

FOR THE COMMONWEALTH OF PUERTO RICO:



Nelson J. Santiago Marrero

Secretary

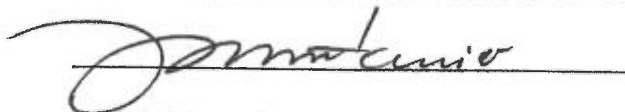
Puerto Rico Department of Natural and
Environmental Resources

Commonwealth Trustee for Natural Resources

Dec., 23 2016

Date

FOR THE UNITED STATES DEPARTMENT OF COMMERCE:



Patricia Montanio
Director, Office of Habitat Conservation
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Federal Trustee for Natural Resources

12/27/2016

Date

FOR THE UNITED STATES DEPARTMENT OF COMMERCE:



12/27/16

Date

David Westerholm
Director, Office of Response and Restoration
National Ocean Service
National Oceanic and Atmospheric Administration
Federal Trustee for Natural Resources

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM IN SUPPORT OF THE ASSENTED-TO MOTION OF THE UNITED STATES TO ENTER THE CONSENT DECREE, and MEMORANDUM IN SUPPORT, was served by via ECF, email or first class mail, postage prepaid, this 25th day of July, 2017, upon counsel listed below:

EUGENE O'CONNOR
Montgomery McCracken Walker & Rhoads LLP
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YADHIRA RAMIREZ TORO
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/s/ _____
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