

National Pollution Funds Center (NPFC) Determination

Claim Number and Name:	J17008-OC02 – Tug Powhatan Oil Spill Natural Resource Damages (NRD) Assessment and Restoration Costs
Claimant:	National Oceanic and Atmospheric Administration
Amount Requested:	\$1,415,850.16
Offer Amount:	\$1,328,511.77
Denied Amount:	\$ 87,338.39
Determination Date:	March 17, 2023
NPFC Claims Manager:	[REDACTED]

This determination reconsiders the determination issued by the NPFC on November 7, 2022, for Claim J17008-OC02, Tug Powhatan Oil Spill NRD Assessment and Restoration Costs. This determination represents final agency action.

I. Summary of the Reconsideration Request

The NPFC issued its initial determination for this \$1,415,850.16 claim for Natural Resource Damages (NRD) on November 7, 2022. In the initial determination, the NPFC offered payment of \$1,193,510.46 and denied \$222,339.70. To the extent it is not inconsistent with this determination, the NPFC's initial determination is incorporated by reference. The facts of the incident are set forth in the initial determination.

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). The request must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier. Reconsideration may only be requested once for each claim denied. The claim determination was electronically mailed on November 7, 2022. The written request for reconsideration (the Request) was received on December 6, 2022, within the time limitation for a request for reconsideration.

NOAA requested reconsideration of \$135,001.31 of the \$222,339.70 in denied damages as relief for the unforeseeable historical inflation during the adjudication period and the resulting increase in cost to complete the approved compensatory restoration projects which were determined to make the public whole. NOAA argues that during the adjudication period unforeseeable historical inflation was experienced. Because of this, by the time the determination was issued, approved amounts would not provide sufficient funding to complete the approved projects which were determined to make the public whole.

II. Summary of Initial Claim and Adjudication

NOAA's NRD claim totaled \$1,415,850.16, which included \$309,578.72 for past assessment, \$31,598.44 for upfront restoration planning costs, \$827,046 to conduct a marine debris removal project, \$54,457 to provide funding for shellfish monitoring programs, and \$193,170 for case management.

NOAA's injury assessment focused on (1) Pacific herring mortality resulting from direct oil exposure and (2) the public's lost use of the shellfishery resulting from seafood safety warnings issued by public health officials. NOAA used a combination of response data, site specific resource data, and data from established literature to model the estimated magnitude of injury to both Pacific herring and the public's use of the shellfishery. In its initial adjudication, the NPFC determined that:

1. NOAA provided sufficient evidence to warrant proceeding with a natural resource damage assessment;
2. NOAA's determinations and quantifications of Pacific herring injuries and lost public use of the shellfishery were supported by a preponderance of the evidence; and
3. claimed assessment costs of \$341,177.16 were for appropriate assessment activities, were properly documented, and are compensable from the Oil Spill Liability Trust (OSLTF) under 33 U.S.C. §2706(d)(1)(C) as reasonable trustee assessment costs.

NOAA determined that a project to remove marine debris from shoreline areas adjacent to Pacific herring spawning habitat would improve hatching success sufficient to restore the herring injury. To restore injuries from lost public use of the shellfishery, NOAA would provide funding for an existing shellfish monitoring program aimed at increasing public confidence in the safety of shellfish consumption and thereby increasing public use. NOAA also claimed case management costs for trustee oversight, contract administration, and other administrative costs needed to collectively support both projects. The NPFC determined that:

1. the selected projects provide restoration for the type of injuries to herring and public use that resulted from the oil spill,
2. the methodologies selected to scale the restoration were appropriate for the NRDA;
3. the scope of case management was consistent with previous comparable NRDA activities, and the costs were developed using appropriate methodologies;
4. based on NOAA's approved methodologies for scaling the size and cost of the restoration projects, \$852,333.30¹ would provide equivalent restoration to the quantified injuries pursuant to 33 U.S.C. §2706(d)(1); and
5. \$222,339.70 of claimed costs for the projects and case management were for performance monitoring activities that are duplicative of other project activities and would represent a double recovery of damages, therefore they were denied.

¹ Marine Debris Removal (\$642,462), Shellfish Monitoring (\$36,914), and Case Management (\$172,957.30)

Table 1. Claimed History and Relief Requested

Activity	Claim			Reconsideration	
	Requested	Approved	Denied	Inflation Relief Requested	Total Reconsideration Request
1. Past Assessment Costs ²	\$309,578.72	\$309,578.72	\$0	\$0	\$309,578.72
2. Upfront Restoration Planning Costs ³	\$31,598.44	\$31,598.44	\$0	\$0	\$31,598.44
3. Marine Debris Removal ⁴	\$827,046.00	\$642,462.00	\$184,548.00	\$97,595.00	\$740,057.00
4. Shellfish Monitoring ⁵	\$54,457.00	\$36,914.00	\$17,543.00	\$6,274.00	\$43,188.00
5. Case Management ⁶	\$193,170.00	\$172,957.30	\$20,212.70	\$31,132.31	\$204,089.61
TOTAL	\$1,415,850.16	\$1,193,510.46	\$222,339.70	\$135,001.31	\$1,328,511.77

III. Additional Information Provided to Support NOAA’s Request

Pursuant to 33 C.F.R. §136.115(d) a request must include the factual or legal grounds for the relief requested to support the claim. Under 33 C.F.R. §136.211, the compensation allowed for natural resource damages is “the reasonable cost of assessing damages, and the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources.”

NOAA stated in its December 6, 2022 Request for Reconsideration, the \$852,333.30 approved for restoration¹ by the NPFC was insufficient to provide equivalent restoration for the amount of injury quantified by NOAA. NOAA asserts that, due to the impacts of historically large inflation rates across the country, the costs to implement the projects increased significantly from the original budgets developed to accomplish those projects. NOAA explains that this inflation largely occurred during the period the claim remained under adjudication with the NPFC and that these inflationary conditions could not have been reasonably anticipated by NOAA.

To support the \$135,001.31 Request, NOAA provided documentation of (1) generally accepted inflation rates adopted from the Consumer Price Index (CPI)⁷ that demonstrate the significant

² The NPFC did not deny any portion of past assessment costs claimed, and this amount is not included in the Request.

³ The NPFC did not deny any portion of upfront restoration planning costs claimed, and this amount is not included in the Request.

⁴ The NPFC denied \$184,584 in restoration monitoring costs associated with the marine debris removal project. The rationale for that denied portion is not refuted in the Request.

⁵ The NPFC denied a total of \$17,543 for shellfish monitoring which included \$9,460 to develop performance measures and \$8,083 to execute performance monitoring because these costs are duplicative and constitute double recovery. The rationale for these denied costs are not refuted in the Request.

⁶ Because the NPFC denied the monitoring costs associated with both the marine debris removal and the shellfish PSP monitoring project, the NPFC also denied the \$20,212.70 contract administration costs specific to the denied monitoring. The rationale for these denied costs are not refuted in the Request.

⁷ CPI can be summarized as a measure of the average change over time in the prices paid by urban consumers for a range of consumer goods and services. In the United States, CPI is reported by the BLS, and is generally considered a reliable indicator of nationwide inflation for retail goods.

cost increase of goods and services from their original budgets and (2) their calculations that demonstrate the direct impact of those inflationary rates on the costs to achieve equivalent restoration for the tug *Powhatan* oil spill. The inflation adjustments⁸ resulted in an overall cost increase for the marine debris removal project from \$642,462 to \$740,057 (15.19%),⁹ a cost increase for the shellfish monitoring project from \$36,914 to \$43,188 (17%), and cost increase for case management from \$172,957.30 to \$204,089.61 (18%).

IV. Reconsideration of Costs and Final Determination ,

In consideration of NOAA's request for relief to account for historic inflation, the NPFC first confirmed whether, in fact, historic inflationary conditions occurred during the NPFC's claim adjudication period. Next, the NPFC reviewed NOAA's originally submitted restoration project budgets and how those budgets accounted for inflation using CPI. Finally, the NPFC evaluated NOAA's updated application of CPI as applied individually to each of the three restoration budget components. In the evaluation of NOAA's Request, the NPFC independently researched additional guides and indexes that measure inflation to confirm that NOAA's Request is supported by a preponderance of the evidence and will ultimately provide restoration equivalent to the quantified injuries pursuant to 33 U.S.C. §2706(d)(1).

To confirm historically high inflation, the NPFC referred to publications from both inside and outside of the government. In July 2021, the White House issued analysis which acknowledged the current existence of historic inflation and compared it to five other historical periods of inflation that have occurred since World War II.¹⁰ Additionally, in July 2022, the United States Bureau of Labor Statistics (BLS) announced that during the 12-month period ending in June 2022, CPI experienced the largest increase in 40 years.¹¹ Numerous sources from the private sector echoed the government's statements and concerns. With particular relevance to the debris removal project, for which components and costs are relational to those values also found in traditional construction projects, The National Index for Construction Inflation 2022 report stated, "The construction data leading into 2022 is unlike anything we have ever seen,"¹² and then detailed the various industrial markets most seriously impacted, and the rippling effects observed on other parts of the economy. All information reviewed by the NPFC overwhelmingly supports NOAA's assertion that historically high inflation occurred during the NPFC's adjudication period between January 2021 and November 2022.

⁸ Excluding the performance monitoring costs. The overall amount claimed for restoration remains less than the original sum certain.

⁹ NOAA applied different CPI rates to various components of the project based on the time period of when each individual component was originally budgeted as identified in the table "Marine Debris Removal Project Implementation Cost Estimate (Activity 2)" from NOAA's December 6, 2022, reconsideration request letter.

¹⁰ Historical Parallels to Today's Inflationary Episode; Chair Cecilia Rouse, Jeffery Zhang, and Ernie Tedeschi, July 6, 2021

¹¹ Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Consumer prices up 9.1 percent over the year ended June 2022, largest increase in 40 years at <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm>

¹² NATIONAL CONSTRUCTION INFLATION REPORT 2022, Construction Inflation Analysis for NATIONAL DATA revised 5-8-2022; Edward R Zarenski, Construction Analytics

To validate the relief requested by NOAA, the NPFC compared NOAA's Request against the measured inflationary rate as expressed by the Producer Price Index (PPI) over the adjudication time period (January 2021 - November 2022). The PPI¹³ is an authoritative economics reference for evaluating price changes to the types of activities and costs¹⁴ included in NOAA's claim. The PPI is explicitly advertised by its publishing agency, the BLS, as a flexible tool useful for determining the impact of inflation on contracts and industrial pricing (in contrast with CPI which measures retail consumer price changes). Similar to CPI, the PPI allows for analysis of price changes according to specific categories. The PPI enables detailed and targeted analysis of price within contracts by classifying the type of buyer and stage of production. The NPFC selected a variety of purchase categories and buyer classifications¹⁵ appropriate for the type of direct costs, labor costs, and planning costs to implement the marine debris removal and shellfish monitoring projects.

The NPFC's analysis of NOAA's requested inflation relief follows for the three activities for which NOAA is seeking relief.

Marine Debris Removal

NOAA originally based the budget for the marine debris removal project on the costs to carry out a similar project in 2016. They then used CPI to update the costs of the 2016 project to the cost of implementing the project three years later in 2019 - the year NOAA originally developed the budgets for the claimed restoration project. Certain necessary costs for the claimed restoration project were not reflected in the actuals from the 2016 project.¹⁶ To account for those additional costs, NOAA incorporated original cost estimates based on cost information available in 2019.

In their Request, NOAA adjusted the project costs for inflation by returning to the original 2016 project actuals and applying CPI from 2016 through September 2022.¹⁷ This analysis resulted in an inflationary cost increase of 23%. For the additional necessary costs developed in 2019, NOAA applied CPI from 2019 through September 2022, which resulted in an inflationary cost increase of 16%. Collectively, the inflation impacts calculated by NOAA resulted in an overall cost increase for the claimed marine debris removal project¹⁸ from \$642,462 to \$740,057, a 15% increase over what NOAA presented in their Claim.

¹³ BLS emphasizes PPI's appropriateness for tracking and determining price and cost movements within the commercial and industrial realm and its ability to capture inflation for intermediate and final stages of production and services performed within those industries (including commercial, governmental, and construction projects). [Producer Price Index \(PPI\): U.S. Bureau of Labor Statistics \(bls.gov\)](https://www.bls.gov/press/2018/08/20180801.html)

¹⁴ BLS includes categories of pricing information that specifically capture both commercial and government contracted projects and services.

¹⁵ When a product or service is accurately reflected within a FD category, this is considered the more accurate valuation because ID combinations run the risk of double counting certain associated costs if the combination would reflect any overlap of steps. When projects have multiple unique steps, components, or cross between funder or producer types, ID may be a better solution for a customized valuation. Reviewing multiple categories and combinations to find a "best fit" can be helpful in some instances for these reasons, which was done here.

¹⁶ Specifically, donated vessel time, volunteer labor, and disposal of marine debris

¹⁷ Most recent cost information prior to submission of reconsideration request

¹⁸ Excluding the originally claimed performance monitoring costs

The NPFC confirmed the inflation time frames, CPI pricing information, and costs calculations submitted by NOAA. Separately, the NPFC analyzed the impacts of inflation on the marine debris removal project costs using PPI cost information published for January 2021 and November 2022 to specifically evaluate the effects of the historic inflation associated with the adjudication timeframe. The NPFC determined relevant inflation rates based on PPI for the types of associated costs range from 13.4-29.8%.¹⁹ NOAA’s request for 15% inflation relief falls conservatively within this range.

After reviewing NOAA’s calculations, and the supporting CPI and PPI inflation information data,²⁰ the NPFC finds that NOAA has proven, by a preponderance of the evidence, that \$97,595 beyond what was initially authorized is the actual cost of providing equivalent restoration as a result of historic inflation occurring during the claim adjudication time period. Accordingly, the NPFC determines that a grand total of \$740,057 for marine debris removal is the appropriate measure of damages under 33 U.S.C. §2706(d)(1).

Shellfish Monitoring

As described above, NOAA will provide funding to support shellfish safety monitoring efforts to achieve equivalent restoration for lost use of the public shellfishery. They originally determined the amount of funding needed for equivalent restoration through a cost-value approach. Essentially, NOAA quantified the monetary value of lost fishing trips using 2010 and 2017 economic studies and updated the respective trip amounts to the “present-day” monetary value in February 2019,²¹ using CPI, to account for inflation and other issues related to the declining value of a dollar.

In their Request, NOAA again adjusted the damages to account for inflation impacts not reflected in their initial calculations by applying CPI from the original end point in February 2019 through September 2022.²² NOAA requests an additional \$6,724 relief for the project based on CPI (17%), resulting in a total request of \$43,188 to provide the equivalent restoration.²³

The NPFC reviewed the inflation time frames, CPI pricing information, and costs calculations submitted by NOAA and validated their Request against the impacts of inflation using PPI cost information published for January 2021 and November 2022. The NPFC consulted various

¹⁹ Construction for Intermediate Demand, 18.7% cumulative increase for selected time period; Intermediate Distributive Services, 21.5% cumulative increase for selected time period; Materials and Components for Construction, 29.8% cumulative increase for selected time period; Transportation and Warehousing of Goods for Nonmanufacturing Industries, 18% cumulative increase for selected time period; Waste Collection and Remediation Services (partial), 13.4% cumulative increase for selected time period; Transportation Services, 25.3% cumulative increase for selected time period; Services Related to Transportation Activities, 19.1% cumulative increase for selected time period; Warehousing, Storage, and Related Activities, 14.5% cumulative increase for selected time period.

²⁰ Internal Powhatan Recon Inflation NPFC Analysis

²¹ The time period when the Plan was originally developed

²² Most recent cost information prior to submission of reconsideration request

²³ Excluding the originally claimed performance monitoring costs

relevant PPI indexes^{24,25} and determined that the resulting sample set²⁶ resulted in a mean cost increase (inflation) of 13.31%, or \$4,913. While this inflation rate, and associated monetary value increase, is less than the relief requested by NOAA, the relief requested is within one standard deviation of the PPI derived value and therefore falls well within an acceptable confidence interval.

Accordingly, after reviewing NOAA's calculations, and the supporting CPI and PPI inflation information data, the NPFC finds that NOAA has proven, by a preponderance of the evidence, that an additional \$6,724 is needed to provide equivalent restoration as a result of historic inflation occurring during the claim adjudication period.

Accordingly, the NPFC determines that a grand total of \$43,188 for the shellfish monitoring program is the appropriate measure of damages under 33 U.S.C. §2706(d)(1).

Case Management

NOAA used CPI to calculate cost increases for case management using a timeframe from January 2019 to September 2022. NOAA's justification was that although labor rate changes may lag behind CPI, using CPI as a metric to adjust for inflation accounts for likely rate increases in response to inflation and job market conditions, as well as changes in travel costs and potential inflation surcharges or overhead adjustments which are becoming commonplace for contractual services.

Using the January 2019 to September 2022 timeframe, NOAA used CPI to calculate an additional \$31,132.31 (18%) in relief necessary for case management, resulting in a total request of \$204,089.61 for case management.

Similar to above, the NPFC focused its analysis on the inflation specific to the adjudication time period to validate NOAA's Request. The NPFC verified case management dollar values in terms

²⁴ PPI FD categories considered: Finished Services, 12.4% cumulative increase for selected time period; Total Finished, 15.59% cumulative increase for selected time period; Government Purchased Services, 10.59% cumulative increase for selected time period; Government Purchased Services Less Trade, Transportation, and Warehousing, Cumulative increase of 4.5% for selected time period; and Final Demand Less Energy, 14.37% cumulative increase for selected time period.

²⁵ PPI NAICS Industries and Industry Group indexes considered: Automatic Environmental Control Manufacturing, Cumulative increase of 16.38% for selected time period; two classifications of Automatic Environmental Controls for Monitoring Residential, Commercial, and Appliance Use, Cumulative increases of 14.49% and 14.45% for selected time period.

²⁶ Mean of the sample set of { .045, .1059, .124, .1437, .1445, .1449, .1559, .1638, .17 } is .13307778, or 13.31%, with a sample standard deviation of .038389054, or 3.84%. The t-distribution (N-1 DF) is most appropriate when considering a small sample set such as this. One may be 99% confident the true value of inflation for this category is contained in the interval (.09014, .17601) as calculated: $.1330778 \pm 3.355 * (.038389054 / \sqrt{9})$, indicating NOAA's 17% calculation is reasonable and supported within the sample considered.

of being a component to the aforementioned restoration projects^{27,28} The NPFC determined that using this PPI sample set²⁹ as a measure of inflation resulted in a mean cost increase of 14.76%, or \$25,529, which is within one standard deviation of the claimed amount.

The NPFC finds that the evidence supports NOAA's Request that an inflationary increase of 18%, or \$31,132.31 above what was initially authorized for case management is necessary to achieve the equivalent restoration. Accordingly, the NPFC determines that a grand total of \$204,089.61 is the appropriate measure of damages under 33 U.S.C. §2706(d)(1).

Final Determination

- V. The NPFC finds that historically high inflation occurred during the adjudication time period of NOAA's claim for natural resource damages. Second, the NPFC finds that the restoration projects remain unchanged from those described in the publicly reviewed plan and approved by the NPFC in the initial determination as providing equivalent restoration pursuant to 33 U.S.C. §2706(d)(1). Third, the NPFC finds the cost amounts remain within the limits of the original sum certain request presented to the NPFC. Fourth, the NPFC finds that without the requested relief, NOAA will not be able to complete the restoration projects as reviewed and approved.³⁰ Finally, the NPFC finds NOAA's Request to be well supported, and appropriate in totality.

VI. Conclusion

The NPFC has considered NOAA's Request as it relates to inflation realized during the claim adjudication period and finds the grounds for the relief requested and support for the claim to be persuasive and in accordance with 33 CFR §136.115(d). Therefore, the NPFC offers payment of \$ 1,328,511.77 from the Fund for natural resource damages resulting from the 2017 tug *Powhatan* oil spill, as detailed below. This offer constitutes final agency action.

²⁷ Because both marine debris removal and shellfish monitoring are strongly supported by the above discussed FD PPI categories, case management costs would be included as components of those projects and subject to those same inflationary calculations. FD categories include all costs required to complete a product or service, such as labor and compensation, transportation and fuel, materials and supplies, travel, project and case management, containers, waste and reparations that comprise the project from beginning to end. As such, this valuation metric considers case management within those same categories.

²⁸ NPFC utilized Final Demand (FD) January 2021 and November 2022 PPI (not seasonally adjusted) considered for the restoration projects: Construction Services for Government, 27.9% cumulative increase for selected time period; Finished Services, 12.4% cumulative increase for selected time period; Total Finished, 15.59% cumulative increase for selected time period; Government Purchased Services, 10.59% cumulative increase for selected time period; Government Purchased Services Less Trade, Transportation, and Warehousing, Cumulative increase of 4.5% for selected time period; and Final Demand Less Energy, 14.37% cumulative increase for selected time period.

²⁹ The t-distribution (N-1 DF) is most appropriate when considering a small sample set such as this. The sample set { .045, .1059, .124, .1437, .1559, .18, .279 } has a mean of .14764286 or 14.76%, with a sample standard deviation of .072136927 or 7.21%. One may be 99% confident the true value of inflation for this category is contained in the interval (.04657, .24871) as calculated: $.14764286 \pm 3.707 * (.072136927 / \sqrt{7})$, indicating NOAA's 18% calculation is reasonable and supported for the sample considered.

³⁰ The NPFC does not currently offer any mechanism to support unforeseen cost fluctuations. Previously, contingency was a claim component Trustees could request for instances such as this. Without the relief, injury would not be restored to baseline as authorized with the dollar amount of funds previously authorized in this instance. Additionally, providing the appropriate relief supports claim submissions focused on presenting accurate budgets rather than inflated ones.

NOAA should refer to the November 7, 2022, Determination for requirements related to use of a revolving trust fund, return of unused funds to the OSLTF, cost documentation, progress reporting and final report.

NOAA has 60 days from the date of this determination to return the signed acceptance/release or the offer is void.

Table 2. Offer Summary

Activity	Claim			Reconsideration	
	Requested	Approved	Denied	Inflation Relief Requested	Final Offer
1. Past Assessment Costs	\$309,578.72	\$309,578.72	\$0	\$0	\$309,578.72
2. Upfront Restoration Planning Costs	\$31,598.44	\$31,598.44	\$0	\$0	\$31,598.44
3. Marine Debris Removal	\$827,046.00	\$642,462.00	\$184,548.00	\$97,595.00	\$740,057.00
4. Shellfish Monitoring	\$54,457.00	\$36,914.00	\$17,543.00	\$6,274.00	\$43,188.00
5. Case Management	\$193,170.00	\$172,957.30	\$20,212.70	\$31,132.31	\$204,089.61
TOTAL	\$1,415,850.16	\$1,193,510.46	\$222,339.70	\$135,001.31	\$1,328,511.77