

An underwater scene with various fish and coral reefs, serving as a background for the text.

NATURAL RESOURCE DAMAGES

PLOWING YOUR WAY INTO ENVIRONMENTAL LIABILITIES IN SOUTH FLORIDA

PRESENTED BY:

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INSURANCE COMPANY

An underwater scene with a shark swimming in the upper left, a large fish in the center, and coral on the bottom left. The background is a light blue gradient.

OVERVIEW

- I. Environmental Context
 - A. Commercial
 - B. Recreational
- II. Legislative Context
- III. Restoration
- IV. Judicial Application
- V. Insurance Considerations

I^A. COMMERCIAL



Source: NOAA

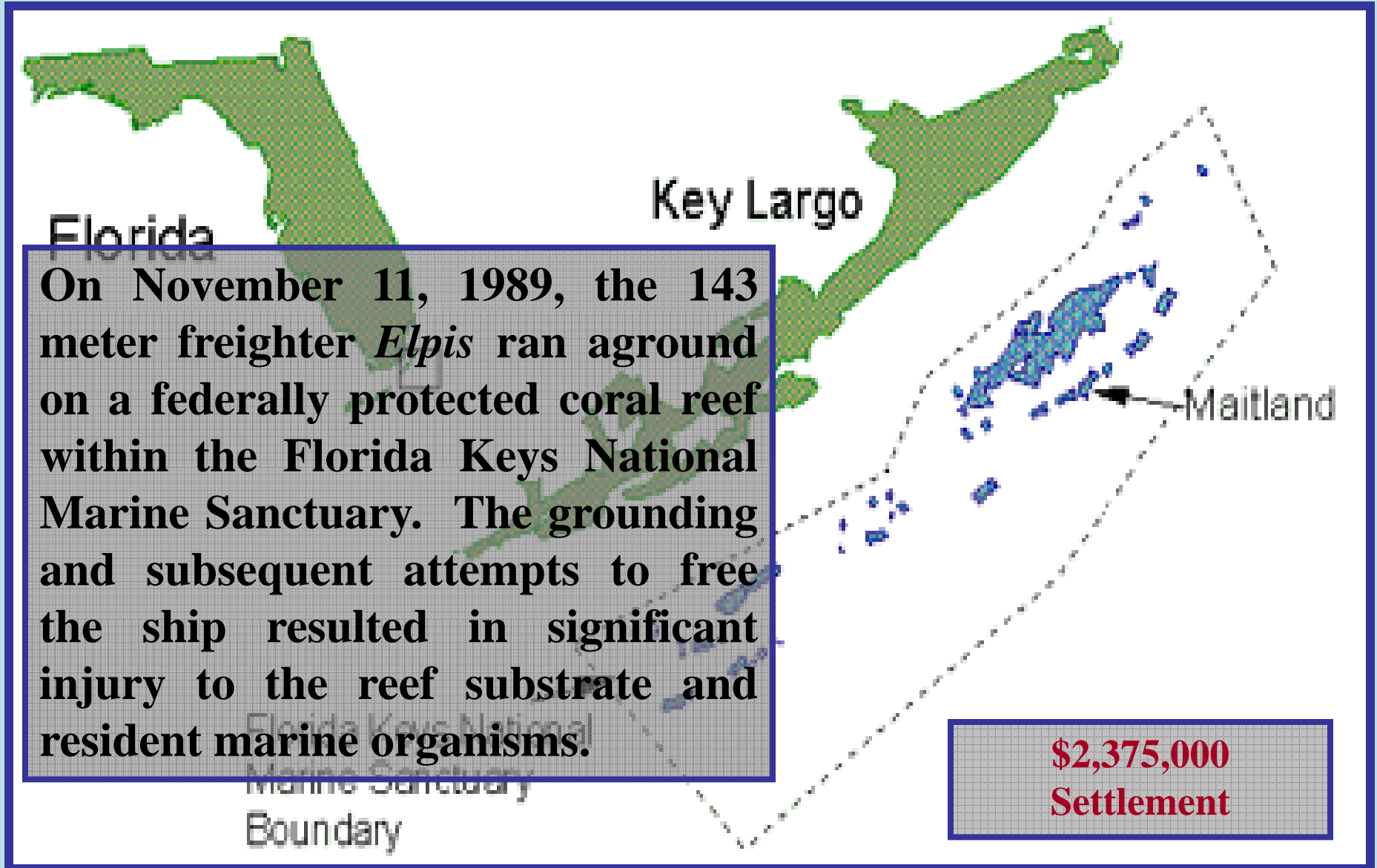
M/V ALEC OWEN MAITLAND

On October 25, 1989, the oil field supply vessel *Alec Owen Maitland* ran aground on a federally-protected coral reef within the Florida Keys National Marine Sanctuary. The incident resulted in significant injury to the reef substrate and resident marine organisms.

\$1,450,000 Settlement



M/V *ELPIS*



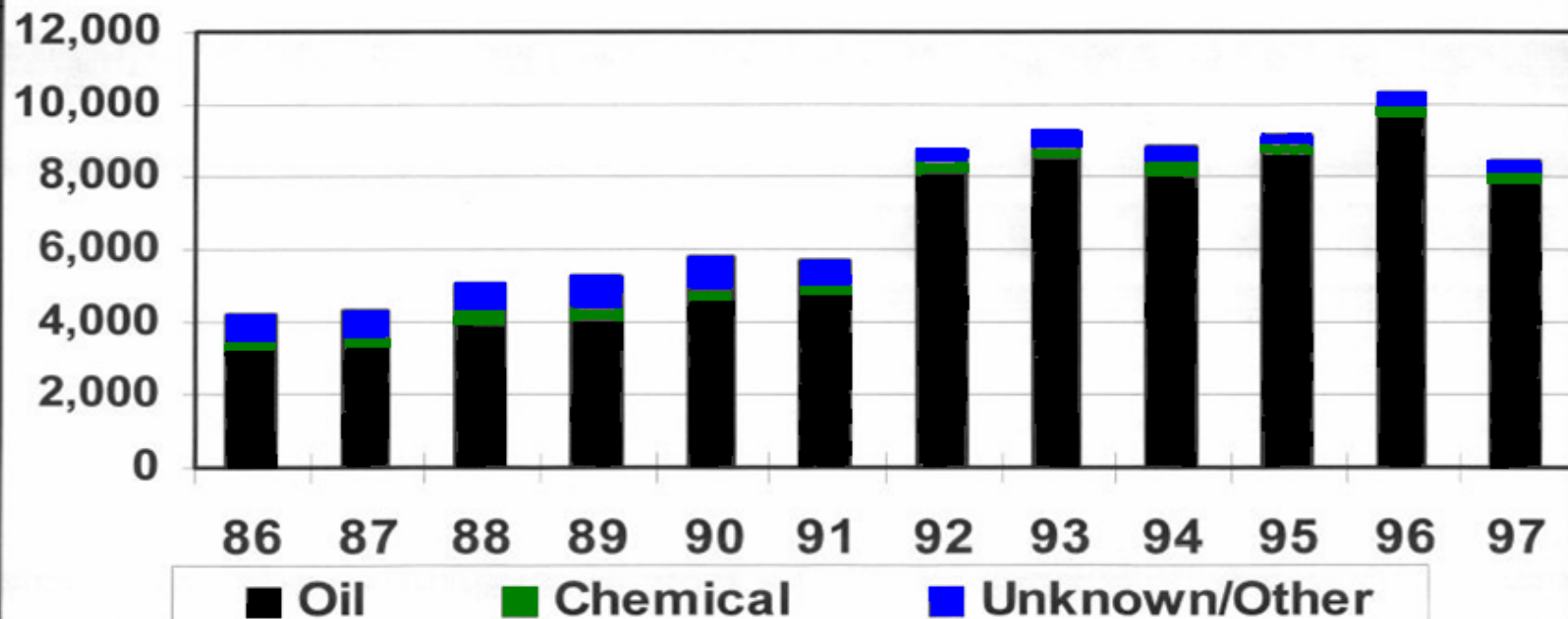
Source: NOAA

M/V *FORTUNA REEFER*

In July 1997, the 325-foot container ship *Fortuna Reefer* ran aground on the fringing coral reef surrounding Mona Island, Puerto Rico. The 6.8 acre grounding site was dominated by a well-established thick of Elkhorn coral.

\$1,250,000 Settlement

ANNUAL NUMBER OF SPILLS (OPA)

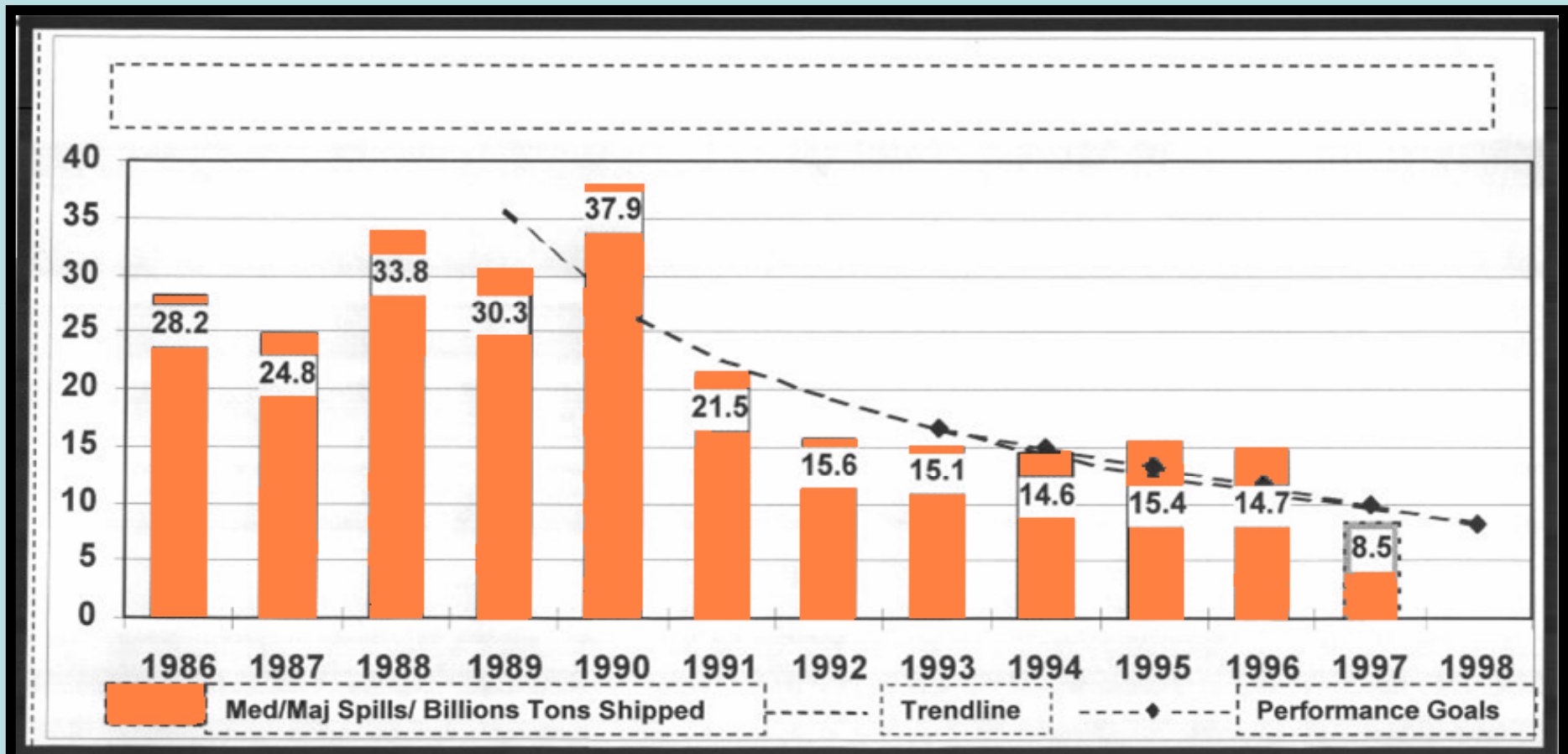


Includes: Spills reported under 100 gallons

Excludes: Chemicals, non-marine transport spills, USN ships, recreational vessels, and pipeline spills.

Source: United States Coast Guard

MAJOR & MEDIUM OIL SPILLS PER BILLION TONS OF OIL SHIPPED



Includes: Oil Spills of 10,000 gallons or more from regulated vessels and marine transportation -related facilities.

Excludes: Chemicals, non-marine transport spills, USN ships, recreational vessels, and pipeline spills.

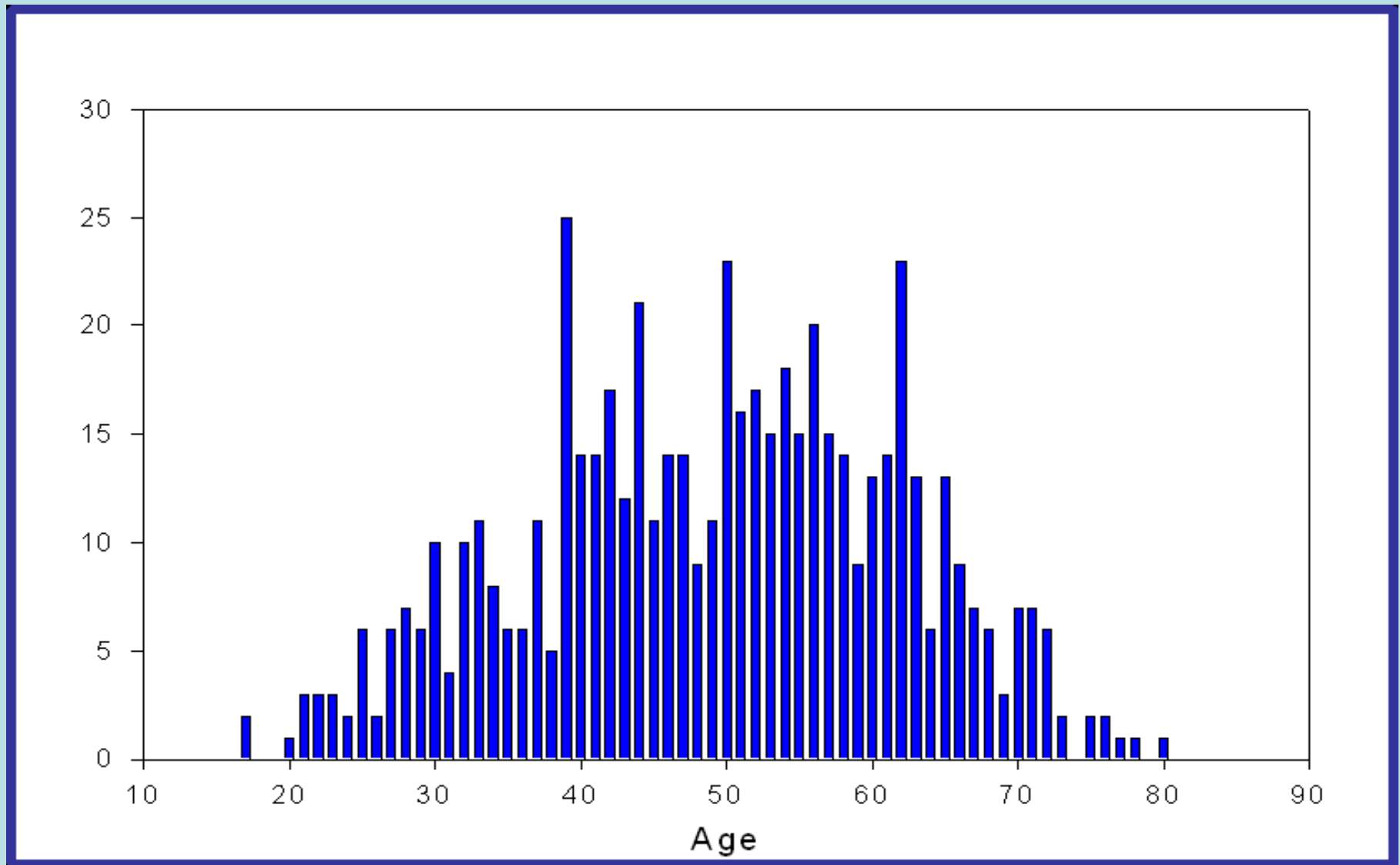
Source: United States Coast Guard

I^B. RECREATIONAL



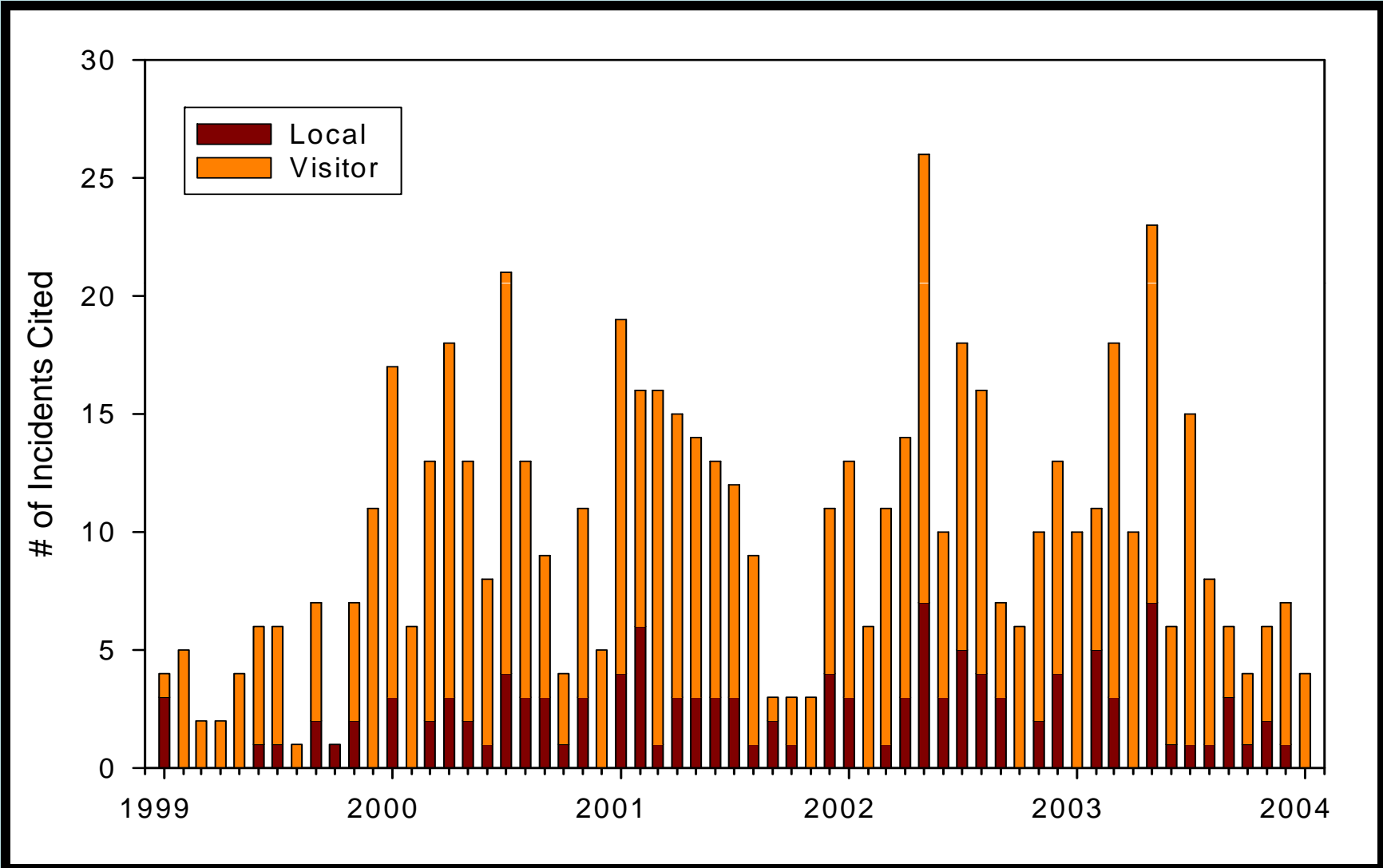
Source: NOAA

AGE OF OPERATOR



Source: NOAA

RESIDENTS vs. VISITORS



Source: NOAA

II. LEGISLATIVE CONTEXT

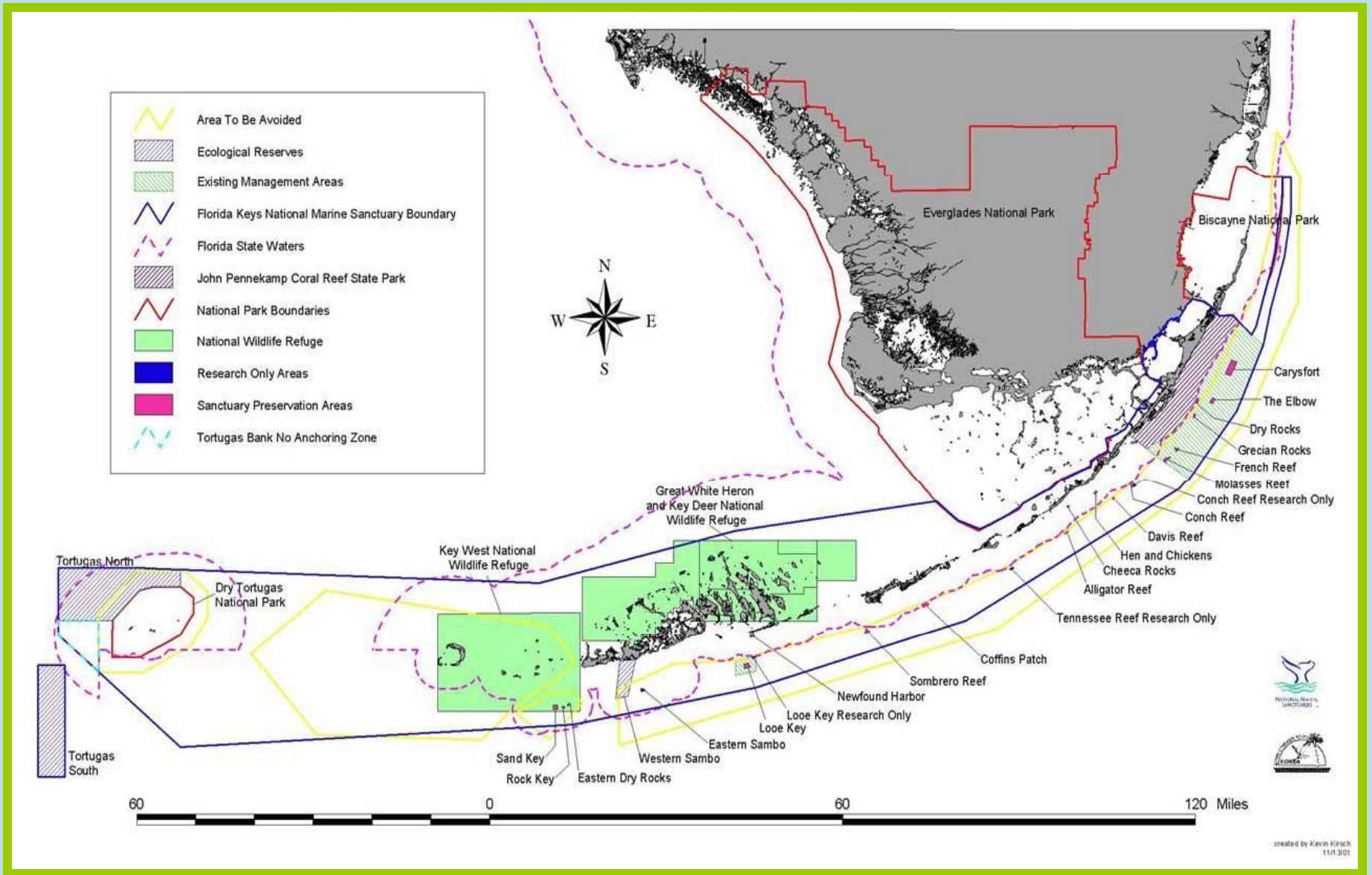


An underwater scene featuring a shark swimming in the upper left, a large fish in the middle left, and a coral reef in the lower left. The background is a deep blue ocean.

LEGISLATIVE AUTHORITIES FOR NATURAL RESOURCES DAMAGES ASSESSMENT (NRDA)

- Clean Water Act (CWA)
33 U.S.C. § 1321(f)(4) & (5)
- Comprehensive Environmental Response, Cleanup and Liability Act (CERCLA)
42 U.S.C. § 9607
- National Marine Sanctuaries Act (NMSA)
33 U.S.C. § 1443
- Oil Pollution Act (OPA)
33 U.S.C. § 2704(b)(2)(A)
- Park System Resources Protection Act (PSRPA)
16 U.S.C. § 19jj

SOUTH FLORIDA



Source: NOAA

An underwater scene featuring a shark swimming in the upper left, a large, rounded fish in the center, and a coral reef in the lower left. The background is a clear blue ocean.

POLICY OBJECTIVES

- Protect natural resources and educate the public regarding the marine environment as well as manage human uses of the area.
- Make the public whole for damages to natural resources by requiring responsible parties to pay for the losses they cause.

An underwater scene with a shark in the top left, a large fish in the center, and coral in the bottom left. The background is a light blue gradient.

LIFE BEFORE LEGISLATIVE AUTHORITIES

- Lack of Suitable Resources
- No Organization/Infrastructure
- Poor Incident Management
- No Contractual Response Capability
- No Legislative Guidelines

An underwater scene featuring a shark in the upper left, a large fish in the center, and a shark in the lower right. The background is a deep blue ocean with some coral visible at the bottom left.

LIFE TODAY (POST LEGISLATIVE AUTHORITIES)

- Strict Planning Guidelines
 - National OSROS
- Incident Command System
- Sufficient Response Resources
- Extensive Incident Management

An underwater scene featuring several fish and coral. In the foreground, a large, dark-colored fish with a prominent eye is swimming. To its left, a smaller, striped fish is visible. In the background, a large, light-colored fish is swimming. The bottom of the frame shows a coral reef structure. The overall background is a light blue color.

COMMONALITY OF PROVISION

- Liability
- Claim Components
 - Remedial
 - Defenses
- Judicial Application

312 VERSUS 307 (NMSA)

Section 312

- Larger Injuries
- Natural resource damage assessment and claim development.
- Present claim: settle or file suit in U.S. District Court.

Section 307

- Smaller Injuries
- No natural resource damage assessment.
- Submit notice of violation (NOVA): pay full amount, compromise or hearing before an Administrative Law Judge.

An underwater scene featuring a shark swimming in the upper left, a large fish in the center, and a coral reef in the lower left. The background is a deep blue ocean.

LIABILITY

§ 312 NMSA; 16 U.S.C. §1443(a)

- Liability for Natural Resource Damages:
 - Any person who destroys, causes the loss of or injures any sanctuary resource is liable to the United States for the following categories:
 - Response Costs
 - Damages Resulting from the Destruction of the Sanctuary Resources

An underwater scene with various fish and coral. A large, dark fish is in the foreground, and a smaller, lighter fish is in the background. The water is clear and blue.

CLAIM COMPONENTS

Under § 312 NMSA

- Damage Assessment Costs
 - Monitoring Costs
 - Enforcement Costs
- Primary Restoration Costs
- Compensatory Restoration Costs

An underwater scene featuring a shark swimming in the upper left and a large, dark fish swimming in the middle left. The background is a deep blue ocean with some coral visible at the bottom.

§ 307 CIVIL PENALTIES

(NMSA)

- Liability for Civil Penalties: “307 Penalty”
 - Any person who violates the provisions of the National Marine Sanctuaries Act, its regulations or its permits, shall be liable to the United States for a civil penalty of not more than \$100,000 for each violation.

16 U.S.C. §1437(d)

An underwater scene featuring a shark swimming in the upper left, a large fish in the center, and a coral reef in the lower left. The background is a clear blue ocean.

RANGE OF § 307 PENALTIES

(Traffic Ticket Approach)

- *Seagrass Damage*
 - \$100 for seagrass/hardbottom under 1 sq yd
 - \$75 for each add'l sq yd up to 10 sq yds
- *Living Coral Damage*
 - \$100 for living coral under 1 sq ft
 - \$75 for each add'l sq ft up to 10 sq ft
- NOVAs (Notice of Violations): Penalty schedule



Source: NOAA



Source: NOAA



Source: NOAA

III. RESTORATION



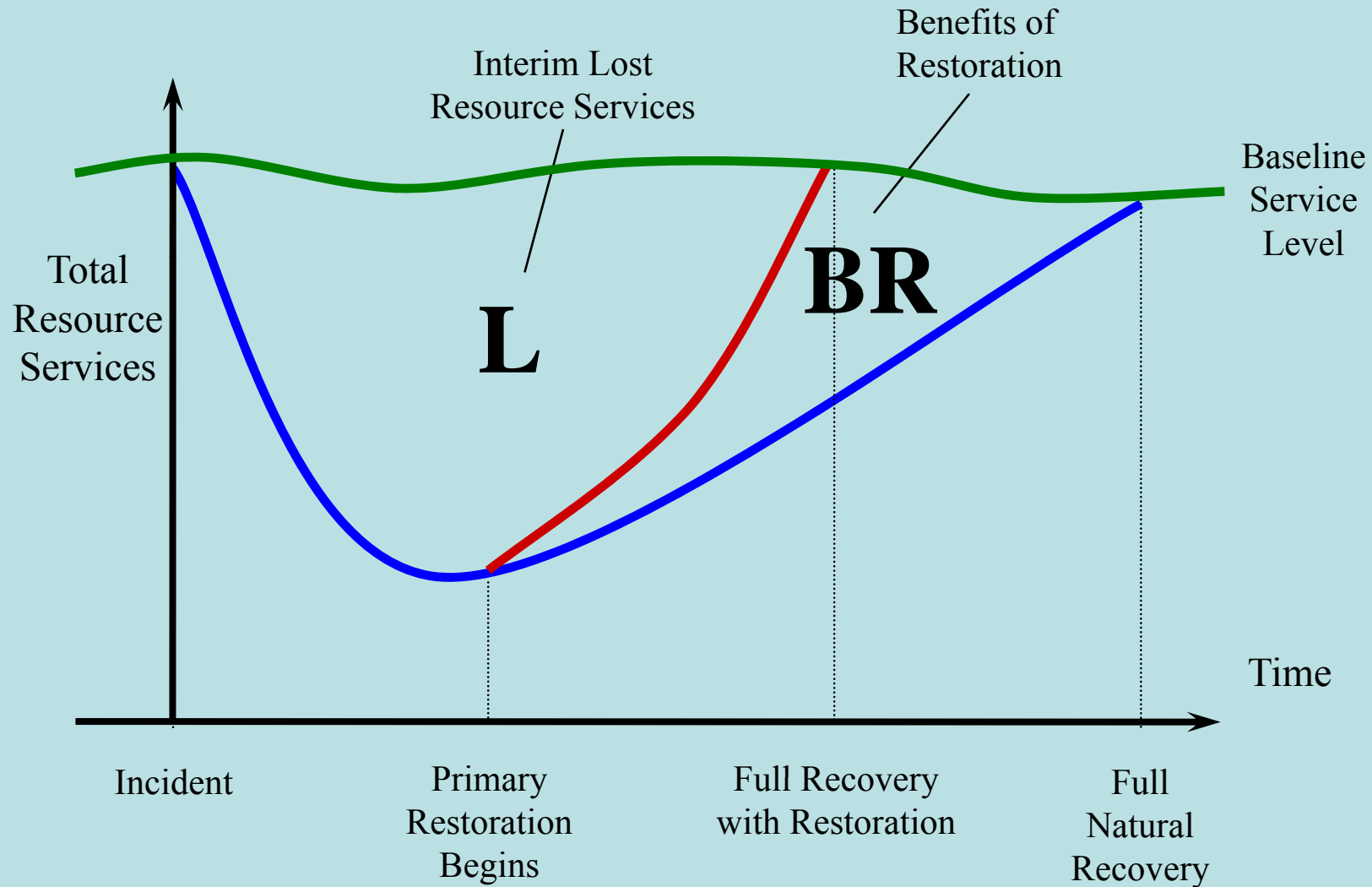
Source: NOAA

An underwater scene with a shark swimming in the upper left, a large fish in the center, and coral on the bottom left. The background is a light blue gradient.

RESTORATION

- Primary Restoration
 - Projects that restore the resources and their services to as close to their baseline condition as possible.
- Compensatory Restoration
 - Projects that compensate for interim losses of natural resources and services that occur from the date of the incident until recovery to baseline. Six Different Classes of Compensatory Damages.

WHY PRIMARY RESTORATION IS IMPORTANT



An underwater scene featuring a shark swimming in the upper left and a large, dark-colored fish swimming in the middle left. The background is a deep blue ocean with some coral visible at the bottom.

SIX CLASSES OF COMPENSATORY DAMAGES

1. **Natural Resources** – Damages, injury to loss of and loss of use of natural resources including reasonable costs of assessment (i.e. Fishing Grounds).
2. **Real or Personal Use** – Damages for injury to, or economic losses resulting from destruction of property.
3. **Subsistence** – Claimant who subsists on natural resources regardless of who owns or manages them (i.e. Fishermen, Indian Tribes).
4. **Revenues** – Federal, State, and Local Governments are entitled to receive damages equal to new loss of taxes, royalties, rents, fees, or net profit shares.
5. **Profits & Earnings Capacity** – Damages equal to loss of profits or impairment of earning capacity from destruction or loss of use of property or natural resources.
6. **Public Services** – Damages for net costs of providing increased or additional public services resulting from removal activities including fire, safety, and health protection.

An underwater scene featuring a large, flat, silver fish in the center, swimming towards the right. To its left, a smaller, dark fish with a yellow stripe is visible. In the background, there are coral reefs and other smaller fish. The overall lighting is blue and somewhat dim, typical of an underwater environment.

INTEREST ON CLAIMS

(Damages Cont.)

- Interest on unsettled claims begins 30 days after presentation of claim to responsible party.

An underwater scene with a shark in the upper left, a large fish in the center, and coral in the lower left. The background is a deep blue ocean.

§ 312 NOAA PROCESS

- Emergency Restoration, if warranted
- Technical Injury Determination
- Primary and Compensatory Restoration Plan
- Monitoring Plan
- Cost Out Components of Claim
- Present Demand to Responsible Party



Source: NOAA



Source: NOAA



Source: Marine Resources, Inc.

IV. JUDICIAL APPLICATION



An underwater scene featuring a shark swimming in the upper left, a large, rounded fish in the center, and a shark in the lower right. The background is a deep blue ocean with some coral visible at the bottom left.

JUDICIAL TEMPERAMENT

- Courts will **construe** the statutory provisions liberally to effect the remedial purpose
- Goal is **restoration** therefore provisions not punitive

An underwater scene featuring a shark swimming in the upper left, a large, rounded fish in the center, and a shark's tail in the lower right. The background is a blue, slightly hazy underwater environment with some coral visible at the bottom left.

DEFENSES TO LIABILITY

- Act of God
- Act of War
- Act or Omission by a 3rd Party
 - Entity claiming the defense acted with due care.
- Injury was Authorized by Federal or State law
- Injury was Negligible

An underwater scene featuring a shark swimming in the upper left and a large, dark fish swimming in the center. The background is a deep blue ocean with some coral visible at the bottom.

ARGUMENTS/INVESTIGATIONS

- Is there Jurisdiction to Present a Claim?
 - Did the Loss Occur within a Protected Area?
 - Was the Claim Presented within the Applicable Statute of Limitations?
- Was the Vessel Properly Identified?
- Was the Operator Properly Identified?
- Was the Loss Properly Identified?

An underwater scene featuring a shark swimming in the upper left, a large dark fish in the center, and a coral reef at the bottom. The background is a light blue gradient.

ARGUMENTS/INVESTIGATIONS (Continued)

- Was the Channel or Waterway Properly Marked? Potential 3rd Party Claim.
- Was the Resource Properly Marked?
- Was the Activity which caused the Loss Permitted or Authorized by the Government?
- Did the Loss Occur Due to an Act of God?
- Did the Loss Occur due to an Act of War?

An underwater scene featuring a shark swimming in the upper left, a large, dark-colored fish in the middle left, and a coral reef structure at the bottom left. The background is a clear blue ocean.


ARGUMENTS/INVESTIGATIONS (Continued)

- Was the Resource Already Injured or Destroyed?
- Was the Resource Injured or Destroyed by the Vessel in Conjunction with Another Vessel(s)?
- Is there Statutory Authority for the Government to Seek the Damages it Claims?
- Are the Damages Claimed Directly Related to Repairing the Loss or Compensating the Public for the Loss?
- Were the Techniques used to Formulate the Primary and Compensatory Restoration Plans “Generally Accepted” as Reliable in the Relevant Scientific Community?

An underwater scene featuring a shark swimming in the upper left, a large, dark fish in the center, and a coral reef in the lower left. The background is a clear blue ocean.

Defenses to Damages

- Was the Underlying Data Used to Formulate the Primary Restoration and Public Compensation Plans (HEA) Accurate?
- Does the Primary Restoration and Compensation Plans take into Consideration the Financial Resources of the Responsible Party?
- Is the Restoration Plan Beneficial to the Environment?
- Is the Restoration Plan Practical and Feasible from an Environmental and Engineering Standpoint?
- Has the Public Visited the Resource which has been Injured or Destroyed?

An underwater photograph showing a shark swimming in the upper left and a large, dark fish swimming in the middle left. The background is a deep blue ocean with some coral visible at the bottom.

Litigation Involving Habitat Equivalency Analysis (HEA)

- Two NOAA cases involving HEA

U.S. v. Mel Fisher, Kane Fisher, Salvors, Inc. et al. (“Salvors”)

- Creation of 600+ holes in FKNMS, destroying 1.63 acres of seagrass
- In *Salvors*, defendants challenged validity of HEA and its inputs...Court ruled HEA was appropriate.

U.S. v. Great Lakes Dredge and Dock (“GLD”)

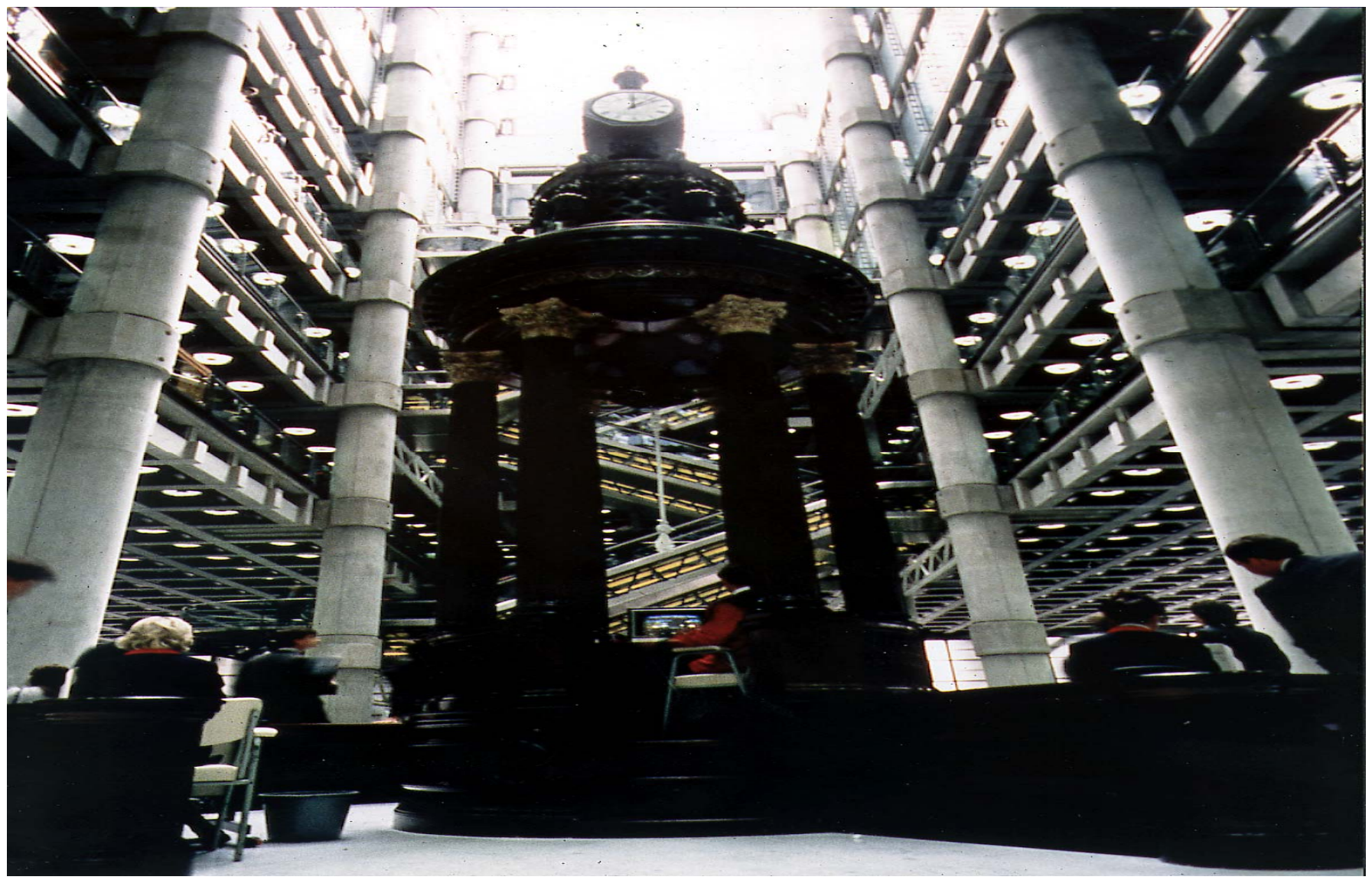
- Destruction of 6.4 acres of seagrass habitat in FKNMS
- In *GLD*, defendants challenged NOAA’s expert reports, focusing especially on HEA...Court ruled that HEA was admissible under *Daubert*.

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Rulings Pertaining to HEA

- In both the Salvors and GLD cases, the court concluded that HEA is appropriate to determine compensatory project scale when:
 - The primary category of lost on-site services pertains to the ecological/biological function of an area;
 - Feasible restoration projects are available that provide services of the same type, quality and comparable value to those that were lost; and
 - Sufficient data to perform the HEA is available, or cost-effective to collect.
- In both cases awarded full (>99%) compensatory claim based on HEA calculation.

V. INSURANCE CONSIDERATIONS



P&I COVERAGE

- Responsibilities Under:
 - OPA 90
 - CERCLA
- State Oil Pollution Liability
- State Toxic Waste Laws

An underwater scene featuring a shark swimming in the upper left, a large, dark fish in the center, and a coral reef at the bottom. The background is a deep blue-green color.

P&I COVERAGE

RESPONSIBILITIES UNDER OPA & CERCLA

- Removal Costs...
- Including the expenses of actions taken by virtually any agency of the Federal, State, or Local Government to avert or mitigate a spill.

An underwater scene featuring a shark swimming in the upper left and a large, dark fish swimming in the middle left. The background is a deep blue ocean with some coral visible at the bottom.

THE YACHT POLICY

Underwriters' Response

- Limit Coverage for Environmental Damage
 - “With respect to fines or other penalties that any government unit requires you to pay for damage to a coral reef...we will pay no more than \$25,000...”
 - “We cover damages a covered person is legally obligated to pay, up to \$50,000, for marine environmental damage...” “Marine environmental damage’ means the physical injury to or the alteration or destruction of costal or marine habitat through physical contact with your yacht...”
 - “We will pay up to \$100,000 for sums a covered person is legally obligated to pay for damages to a coral reef caused by your yacht from any one accident or occurrence or series of accidents or occurrences arising out of the same event.”

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Underwriters' Response (Continued)

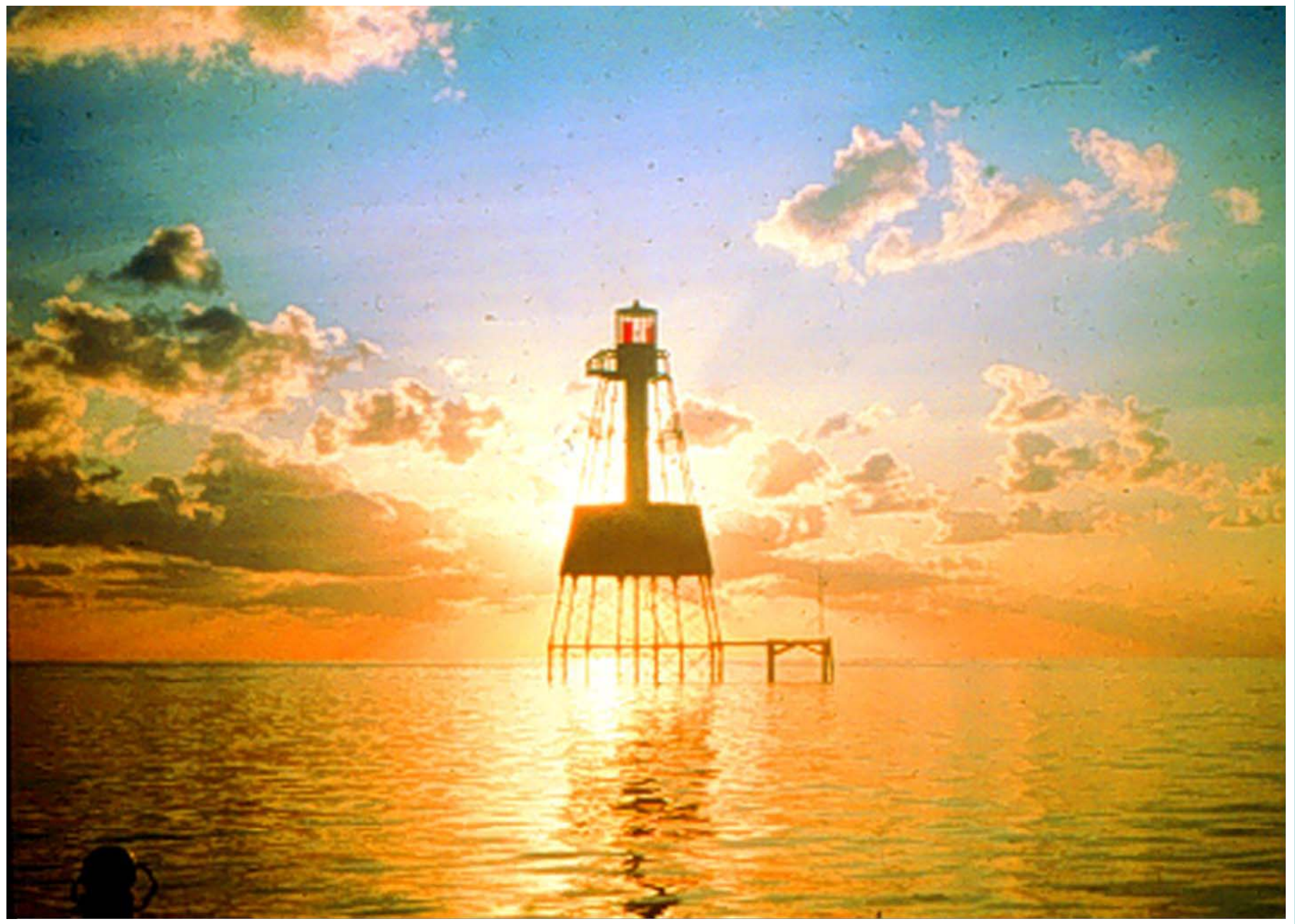
- Exclude Coverage for Environmental Damage
 - This policy excludes: Liability for damages to any marine sanctuary, artificial or natural reef, living or dead coral or other marine organisms, caused by the vessel or its operators or passengers.

An underwater scene featuring a shark swimming in the upper left, a large fish in the center, and a coral reef at the bottom. The background is a deep blue-green color.

THE YACHT POLICY

To Deny or Not Deny Coverage,
That is the Question

- Does the Policy Exclude or Limit an Environmental Damages?
- Did the Loss Occur Outside of the Policy's Navigation Restrictions?
- Was the Policy's Manning Requirements for the Vessel Complied with at the Time of the Loss?
- Was the Operator a Named Insured, Additional Insured or Authorized Operator Under the Policy?
- Did the Insured Fail to Avert or Minimize the Loss?
- Did the Insured Provide Proper Notice of the Loss?



Source: NOAA

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