

## CLAIM SUMMARY / DETERMINATION<sup>1</sup>

<b>Claim Number:</b>	UCGPA921024-URC001
<b>Claimant:</b>	Global Diving & Salvage, Inc.
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$7,000.00
<b>Action Taken:</b>	Denied

### **EXECUTIVE SUMMARY:**

On August 3, 2021, the National Response Center (NRC) notified United States Coast Guard (USCG) Sector San Francisco that the M/V JI-MI II<sup>2</sup> had run aground and was discharging diesel fuel and motor oil into the Pacific Ocean, a navigable waterway of the United States.<sup>3</sup>

In accordance with the Oil Pollution Act of 1990 (OPA),<sup>4</sup> Mr. (b) (6) the owner and operator of the M/V JI-MI II was identified as the responsible party (RP).<sup>5</sup> At the time of the incident, the RP was injured and required hospitalization. As such, the Federal On-Scene Coordinator's Representative (FOSCR) accessed the OSTLF to fund the immediate removal activities.<sup>6</sup> Later the RP indicated that he had insurance coverage through State Farm Insurance which lead the FOSCR to determine that the use of the OSLTF was no longer necessary.<sup>7</sup> The FOSCR issued a Notice of Federal Interest ("NOFI") and a Letter of Warning (LOW) in Lieu of Civil Penalty to the RP for the incident.<sup>8</sup>

Global Diving and Salvage ("Global") performed removal activities. On December 15, 2021, Global presented an invoice for its removal costs to State Farm in the amount of \$40,930.81.<sup>9</sup>

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<sup>1</sup> This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant's rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant's rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

<sup>2</sup> The vessel is referenced as both the "JI-MI-II" and "JI-ME II" throughout the administrative record. For purposes of consistency in this determination we refer to it as the "JI-MI-II".

<sup>3</sup> See, NRC Report Number 1312648 dated August 3, 2021. The operator was injured and was later hospitalized. As such, Sector San Francisco accessed the OSLTF via Federal Project Number A21024 to fund the immediate response activities.

<sup>4</sup> 33 U.S.C. § 2701(32).

<sup>5</sup> See, USCG Notice of Federal Interest (NOFI) dated August 3, 2021 and FOSCR Coordination letter dated August 17, 2022.

<sup>6</sup> Federal Project Number A21024.

<sup>7</sup> FOSCR Coordination letter dated August 17, 2022.

<sup>8</sup> See, USCG Notice of Federal Interest dated August 3, 2021 and USCG LOW for the discharge of oil into a United States navigable waterway dated August 30, 2021. The USCG LOW was issued verbally and via email according to Sector San Francisco.

<sup>9</sup> Global invoice # 114223 dated December 15, 2021.

Apparently, State Farm offered to pay the full amount. On April 5, 2022, Global executed a complete release with State Farm for “any and all claims, demands, and suits” related to this incident in exchange for the amount of \$40,930.81.<sup>10</sup> On or about April 11, 2022, in conjunction with receiving the complete release, State Farm issued a check to Global in the amount of \$33,930.81 for payment on its claim - which Global accepted.<sup>11</sup> Global presented a claim for \$7,000.00 to the National Pollution Funds Center (NPFC) on August 10, 2022 seeking, what it considered as, the remaining uncompensated removal costs.<sup>12</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that the claim must be denied.

## **I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

### ***Incident***

On August 3, 2021, the M/V JI-MI II ran aground following an equipment failure and discharged diesel fuel and motor oil into the Pacific Ocean and injuring the operator of the vessel.<sup>13</sup> Sector San Francisco, in its capacity as the Federal On Scene Coordinator (FOSC) for the incident, responded to the incident and accessed the OSLTF via Federal Project Number A21024 in order to initiate response actions due to the RP being hospitalized following the vessel’s grounding.<sup>14</sup> The FOSC contracted Global Diving and Salvage, Inc. to initiate removal actions in accordance with National Contingency Plan (NCP) utilizing the OSLTF.<sup>15</sup> Upon communication with the RP, he informed the FOSC that he was insured so the FOSCR closed the Fund as Global agreed to invoice the insurer, State Farm.<sup>16</sup>

### ***Responsible Party***

Both the owner and operator of a vessel that discharges oil is a Responsible Party as defined by OPA.<sup>17</sup> The FOSC identified Mr. (b) (6) the owner and operator of the M/V JI-MI II as the Responsible Party (RP) for the incident.<sup>18</sup> On August 16, 2022, the National Pollution Funds Center (NPFC) issued an RP Notification Letter to Mr. (b) (6) via certified mail.<sup>19</sup> An RP Notification letter notifies the owner/operator that a claim was presented to the NPFC seeking reimbursement of uncompensated removal costs incurred as a result of a discharge of oil to navigable waters of the United States. Additionally, on August 25, 2022, the NPFC sent the same letter to Mr. (b) (6) via email.<sup>20</sup> On September 7, 2022, the U.S. Postal Service returned the August 16<sup>th</sup> letter to the NPFC indicating the letter was undeliverable

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<sup>10</sup> See, Email from Global to NPFC dated September 1, 2022 with signed release to State Farm dated April 5, 2022 in exchange for payment of \$40,930.81.

<sup>11</sup> Global provided a receipt, a copy of the check, and lockbox data indicating a deposit of State Farm check on May 9, 2022.

<sup>12</sup> Global’s claim submission dated July 28, 2022 and received at the NPFC on August 10, 2022.

<sup>13</sup> United States Coast Guard POLREP Two and Final dated August 6, 2021.

<sup>14</sup> FOSCR Coordination letter dated August 17, 2022.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 33 U.S.C. § 2701(32).

<sup>18</sup> The FOSC identified Mr. (b) (6) as the RP via USCG POLREP Two and Final dated August 6, 2022.

<sup>19</sup> NPFC RP Notification Letter dated August 16, 2022 sent via email certified mail receipt # 7017 1450 0001 9565 2449.

<sup>20</sup> NPFC RP Notification dated August 25, 2022 sent via email to (b) (6)

and unable to be forwarded.<sup>21</sup> NPFC has not received a reply to the RP notification letter that was sent via email.

### ***Recovery Operations***

Global responded to the report of a 32' pleasure craft that had washed up on the beach near Tomales Bay, CA. Global provided personnel to conduct an initial survey and assessment on August 3, 2021 then provided personnel and assets on August 5, 2021 to remove fuels and any hazardous material found on the vessel.

The FOSCR confirmed that the response efforts lasted from August 3, 2021 until August 5, 2021 and that the response effort was performed in accordance with the National Contingency Plan (NCP) in an appropriate and timely manner.<sup>22</sup>

### **II. CLAIMANT AND RP:**

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>23</sup> require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.<sup>24</sup>

On December 15, 2021, Global presented an invoice for its removal costs to State Farm in the amount of \$40,930.81.<sup>25</sup> Apparently, State Farm offered to pay the full amount. On April 5, 2022, Global executed a complete release with State Farm for “any and all claims, demands, and suits” related to this incident in exchange for the amount of \$40,930.81.<sup>26</sup> The release continues in relevant part, “[u]ndersigned hereby declares the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims for payment, disputed or otherwise, on account of the payments earned by the undersigned as mentioned above, and for the express purpose of precluding forever any further or additional claims relating to payment for services provided by the undersigned arising out of the aforesaid accident.” On or about April 11, 2022, in conjunction with receiving the complete release, State Farm issued a check to Global in the amount of \$33,930.81 for full and final payment on its claim - which Global accepted and deposited.<sup>27</sup>

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<sup>21</sup> RP letter was returned by U.S. Postal Service as “return to Sender” and “Attempted – Not Known and Unable to Forward.”

<sup>22</sup> FOSCR Coordination letter dated August 17, 2022.

<sup>23</sup> 33 U.S.C. § 2701 *et seq.*

<sup>24</sup> 33 CFR 136.103.

<sup>25</sup> Global invoice # 114223 dated December 15, 2021.

<sup>26</sup> *See*, Email from Global to NPFC dated September 1, 2022 with signed release to State Farm dated April 5, 2022 in exchange for payment of \$40,930.81.

<sup>27</sup> Global provided a receipt, a copy of the check, and lockbox data indicating a deposit of State Farm check on May 9, 2022.

### **III. CLAIMANT AND NPFC:**

When an RP denies a claim or has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.<sup>28</sup> Having presented its claim to the RP, the claimant submitted a claim to the NPFC for the difference between what it expected to be paid from the RP and what it received from the RP – which was \$7,000.

### **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>29</sup> As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its decision. This determination is issued to satisfy that requirement.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.<sup>30</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>31</sup> If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and makes its determination based on the preponderance of the credible evidence.

### **V. DISCUSSION:**

An RP is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.<sup>32</sup> An RP's liability is strict, joint, and several.<sup>33</sup> When enacting OPA, Congress “explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills.”<sup>34</sup> OPA was intended to cure these deficiencies in the law.

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<sup>28</sup> 33 CFR 136.103. The NPFC notes that the claim appears to have been settled upon deposit of the check from State Farm. While not further discussed herein, this alone could make this claim void *ab initio*. While the NPFC preserves the right to discuss this issue in greater detail upon a request for reconsideration, this initial determination will focus on the issues implicated by 33 U.S.C. § 2712(f).

<sup>29</sup> 33 CFR Part 136.

<sup>30</sup> See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2011 WL 5187292, (E.D. La. 2011), “[T]he Fifth Circuit specifically recognized that an agency has discretion to credit one expert's report over another when experts express conflicting views.” (Citing, *Medina County v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010)).

<sup>31</sup> See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them).

<sup>32</sup> 33 U.S.C. § 2702(a).

<sup>33</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>34</sup> *Apex Oil Co., Inc. v. United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002) (citing S. Rep. No. 101-94 (1989), reprinted in 1990 U.S.C.C.A.N. 722).

OPA provides a mechanism for compensating parties who have incurred removal costs where the responsible party has failed to do so. Removal costs are defined as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident.”<sup>35</sup> The term “remove” or “removal” means “containment and removal of oil [...] from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”<sup>36</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>37</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>38</sup> The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.<sup>39</sup>

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.
- (d) That the removal costs were uncompensated and reasonable.<sup>40</sup>

Additionally, before reimbursement can be authorized, other pertinent provisions of OPA must be satisfied, to wit: “[p]ayment of any claim or obligation by the Fund under this Act *shall be subject to* the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.”<sup>41</sup> Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.”<sup>42</sup> Importantly as well, the OPA also provides parties with the right to have their disputes resolved by a federal court.<sup>43</sup>

The statute uses the phrase “all rights” without stating any temporal limitation. The word “all” is itself the quintessential word used to indicate an absence of limits. Because the statute

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<sup>35</sup> 33 U.S.C. § 2701(31).

<sup>36</sup> 33 U.S.C. § 2701(30).

<sup>37</sup> See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>38</sup> 33 CFR Part 136.

<sup>39</sup> 33 CFR 136.105.

<sup>40</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>41</sup> 33 U.S.C. § 2712(f). Emphasis added, noting this language imposes a threshold requirement that must be satisfied before the Oil Spill Liability Trust Fund can be used to pay a claim.

<sup>42</sup> 33 U.S.C. § 2715(a).

<sup>43</sup> 33 U.S.C. § 2717(b).

does not place any temporal limits on the phrase “all rights,” the Congressional intent for a claimant to preserve “all” of its subrogation rights against a responsible party is clear.

Should a claimant limit its rights in any way, the claimant cannot transfer “all rights” by subrogation to the Fund were it to compensate the claimant. In the claim at hand, the claimant executed a release that “hereby and forever discharges [the RP], his heirs, executors, administrators, agents, and assigns, and all other persons, firms, and corporations liable, or who may be claimed to be liable. . . from any and all claims, demands or suits related to payment for the services provided by the undersigned in connection with [the incident].”

If the OSLTF were to pay claims when the claimant has limited its options to recover against a responsible party, the deterrent purpose of OPA would be eliminated by turning the Fund into an insurance policy for both oil spillers and companies that make business-driven or ill-advised litigation (or pre-litigation) decisions to release, or otherwise agree to limited rights against, those oil spillers. “The Act provides limited compensation when the party responsible for an oil spill is unavailable. It does not function as a private insurance company.”<sup>44</sup> As the OSLTF’s trustee, the NPFC must be in a position to decide how to best vindicate its subrogation rights against a responsible party, not the claimant.

Importantly here, the OPA also provides parties with the right to have their disputes resolved by a federal court.<sup>45</sup> Congress intended that, subject to a very limited exception not implicated here,<sup>46</sup> “the United States district courts **shall have exclusive original jurisdiction** over all controversies arising under [OPA] and that venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides.... [T]he Fund shall reside in the District of Columbia.”<sup>47</sup>

The rights provided by 33 U.S.C. § 2717 are important. The ability to have a controversy resolved by a federal court is not a trivial right. Although Global had the absolute right to enter into release, Global may not, *inter alia*, waive its right to sue the responsible party in federal court and remain eligible for OSLTF reimbursement. If the NPFC paid Global’s claim, then under subrogation, the NPFC would be bound by the terms of the release as Global agreed to them.

The NPFC has long held, and courts have long agreed, the proper interpretation of the term “all rights” in OPA means “all rights”, not merely all rights the claimant might have at the time of the claim.<sup>48</sup> The plain language of 33 U.S.C. § 2712(f), and the history of OPA as a whole

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<sup>44</sup> *Gatlin Oil Co. v. United States*, 169 F.3d 207, 213 (4th Cir. 1999).

<sup>45</sup> 33 U.S.C. §2717(b).

<sup>46</sup> Those cases which involve state and federal claims for removal costs or damages can be brought together in a state forum rather than requiring plaintiffs to bring their OPA claims exclusively in federal court. *See*, 33 U.S.C. § 2717(c). *See, Tanguis v. M/V WESTCHESTER*, 153 F.Supp.2d 859 (E.D. La. 2001) for a more detailed discussion. *See also*, 33 U.S.C. § 2717(a)(also not implicated).

<sup>47</sup> 33 U.S.C. § 2717(b) (emphasis added).

<sup>48</sup> *Kenan Transp. Co. v. U.S. Coast Guard*, 2006 WL 1455658 at \*4, \*4 n.7 (N.D. Ga. 2006). That Congress required a claimant to preserve all rights... is clear in the legislative history.... Congress required broadly that the claimant assure all rights be acquired by the Government.... Reimbursement is allowed only if claims... are preserved so they may be asserted by the Government as subrogee of the claims. That Congress would condition the payment of a claim in return for the claimant broadly protecting the Government's right to assert a broad set of claims... makes practical and legal sense. *Affirmed, Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902,

establish that the Fund is available to pay claims only where a claimant has protected all of its rights to recover against the responsible party.

Because a claimant seeking compensation from the Fund under OPA must retain all rights of recovery against a responsible party permitting the NPFC to acquire them by subrogation, and the claimant has not demonstrated that it has done so, this claim cannot be reimbursed by the OSLTF and, as such, the claim must be denied.

**VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Global Diving and Salvage, Inc.'s request for uncompensated removal costs is denied.

Claim Supervisor:	(b) (6)	(b) (6)
Date of Supervisor's review:	<i>November 29, 2022</i>	
Supervisor Action:	<i>Denial approved</i>	

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904 (11th Cir. 2006); *Accord.*, *Rich Franklin Corp. v. U.S. Dep't of Homeland Security*, 2008 WL 337978 (D. Or. 2008).