

CLAIM SUMMARY / DETERMINATION

Claim Number:	E14431-0001
Claimant:	Environmental Remediation Consultants, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$305,466.53
Action Taken:	Denied

I. FACTS:

A. The Incident

At approximately 1515 hours on February 14, 2014, a representative from APAC-Atlantic, Inc. d/b/a Harrison Construction Company (APAC) contacted the National Response Center (NRC) to report a discharge of No. 2 fuel oil from a 20,000-gallon above ground storage tank (AST) located in Candler, North Carolina.¹ Approximately 5,000 gallons of diesel spilled onto the ground and some reached Hominy Creek.² Hominy Creek is a tributary to the French Broad River, a navigable water of the U.S. The U.S. Environmental Protection Agency Region IV was the Federal On-Scene Coordinator (FOSC).³

The record indicates that, at the time of the incident, APAC identified itself as the responsible party (RP) on the day of the spill, February 14, 2014.⁴ APAC owned and operated the AST⁵ and is the responsible party (RP) as defined by the Oil Pollution Act of 1990.⁶ According to its website, APAC operates the Enka Asphalt Plant at the site in Candler, North Carolina.⁷

APAC contracted with ERC to conduct removal actions. According to the documents submitted to the NPFC the Contract, executed on February 14, 2015, included ERC's Time and Materials Rate Schedule and a Reimbursement Terms and Conditions for Time and Materials Contract. Pursuant to the Contract ERC began invoicing APAC on April 23, 2014. The initial invoice sought \$140,530.31 for services provided.⁸ ERC continued invoicing the RP regularly through September 1, 2018, adding compound interest to each progressive invoice, finally totaling \$305,446.53 with \$164,936.22 being accrued interest.⁹ ERC presented the final total of its uncompensated removal costs to the RP on September 1, 2018.

¹ EPA POLREP #1

² EPA POLREP #1

³ EPA POLREP #1

⁴ EPA POLREP #1 and NRC report.

⁵ NC UST Form 62, 24-Hour Notification of Discharge Form p.2; and February 25, 2014 NCDENR Notice of Violation Letter to Harrison APAC-Atlantic, Inc.

⁶ 33 U.S.C. § 2701(32).

⁷ <https://harrisoncc.com/locations/>

⁸ Invoice #20140215

⁹ September 1, 2018, ERC letter with Invoice #20180901

B. Claim to the Fund

When APAC failed to pay the ERC invoices,¹⁰ ERC presented its uncompensated removal cost claim for \$305,466.53 to the Fund. The National Pollution Funds Center (NPFC) administers the Fund.¹¹ The ninety-day presentment period for the final invoice was satisfied on December 1, 2018.

According to NPFC procedures, the NPFC sent a letter to APAC, notifying it that the Fund received a claim from ERC. In a response letter dated February 16, 2019, [REDACTED], Environmental Compliance for Harrison,¹² acknowledged that it had contracted with ERC to conduct removal actions, but ERC failed to provide supporting documentation for the invoices.

NPFC initially reviewed the claim and via email and letter dated October 23, 2018, NPFC communicated to ERC that arbitration provisions in its Contract may affect its Claim to the Fund because the provisions of the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* (OPA) require that “all” of a claimant’s rights be subrogated to the U.S. Government. In a response letter dated November 16, 2018, ERC argued that OPA’s requirements that the U.S. Government acquire “all rights of the claimant” means all rights that the claimant has, but not all rights that a claimant could possibly have or rights he doesn’t have.¹³ Further, ERC argues that it did not waive its right to sue in its contract, simply agreeing that it has a right to arbitration. Thus, ERC argues that the NPFC is subrogated to ERC’s rights under the contract, including arbitration.

II. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁴ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant’s claim against the OSLTF.

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.¹⁵ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities. 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 finds facts and makes its determination based on the preponderance of the credible evidence.

III. DISCUSSION:

OPA provides that a responsible party 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

¹⁰ 33 CFR 136.103(c).

¹¹ ERC optional OSLTF claim form dated September 20, 2018 and received by the NPFC on October 4, 2018.

¹² See letter. Harrison is a Division of APAC-Atlantic.

¹³ ERC’s November 16, 2018 letter, p. 1

¹⁴ 33 CFR Part 136.

¹⁵ 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).

United States.¹⁶ A responsible party's liability is strict, joint, and several.¹⁷ In this case APAC admits that it is the responsible party for the discharge of oil from its facility and was liable for the removal costs incurred. It contracted with ERC to conduct the removal actions.

OPA provides that the Fund is available to pay uncompensated removal costs consistent with the National Contingency Plan (NCP) and uncompensated damages. 33 U.S.C. § 2712(a)(4). Thus, a party that incurred removal costs that were not paid by an RP may present a claim to the Fund if it meets the requirements of the OPA. In this case ERC presented a claim to the Fund for its uncompensated removal costs, \$140,530.31. Because the RP did not pay the invoice ERC included its interest charges in its claim for reimbursement, totaling \$305,466.53.

A specific requirement pertinent to this claim is that the Government must acquire by subrogation all rights of the claimant in order that it can recover from the responsible party. OPA provides that:

Payment 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.¹⁸ 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.¹⁹

Thus, if claimant has not reserved all its rights, the NPFC cannot adjudicate and pay the claim because payment of the claim is subject to the United States Government acquiring by subrogation all rights of the claimant to recover from the responsible party. Kenan Transp.Co. v. U.S. Coast Guard, 2006 WL 1455658 *4 (N.D. Ga.) (What the statute requires to be preserved is broad. Section 2712(f) requires a claimant to insure that the Government acquires all rights of the claimant to recover from the responsible party. Reimbursement is allowed only if claims are preserved so they may be asserted by the Government as subrogee of the claims.) Further, if the Fund pays compensation under OPA to any claimant it shall be subrogated to all rights, claims and causes of actions that the claimant has under any other law. Rich Franklin Corp. v. U.S. Department of Homeland Security, 2008 WL 337978 (D.Or.) (The plain language of Section 2712(f) uses the words "all rights" when describing what subrogation rights will be acquired by the government when a claimant is compensated by the Fund.)²⁰

Stated another way, if the Fund pays compensation under OPA to any claimant it shall be subrogated to all rights, claims, and causes of actions the claimant has under any other law.²¹ In

¹⁶ 33 U.S.C. § 2702(a).

¹⁷ See, H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

¹⁸ 33 U.S.C. § 2712(f).

¹⁹ 33 U.S.C. § 2715(a).

²⁰ Kenan Transp. Co. v. U.S. Coast Guard, 2006 WL 1455658 at *4 (N.D. Ga 2006). That Congress required a claimant to preserve all rights... is clear in the legislative history. The Senate bill had proposed that the Fund "acquire by subrogation the rights of claimants to which the Fund paid removal costs or damages and to recover those removal costs or damages from the responsible party." The House bill proposed that reimbursement be conditioned on the Government "acquiring by subrogation all rights of the claimant or State to recover from the responsible party." H.R. Court. Rep. No. 101-653, at 115-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 795. The conference rejected the Senate limitation to clean-up costs and damages and adopted, instead, the "all rights" version. *Id.* at *8 n.7.

²¹ 33 U.S.C. § 2715(a).

this case the issue is whether the claimant has retained all its rights in light of the arbitration clause in the contract.

Claimant's contract

ERC provided a copy of its Form 2013-1 Time and Materials Rate Schedule, which was signed on February 15, 2014, by [REDACTED], Environmental Health and Safety Manager at APAC. Included with the rate schedule is a Reimbursement Terms and Conditions for Time and Materials Contracts document. Provision 9 includes the following paragraphs:

“All claims, disputes, and other matters in question arising out of, or relating to, this Contract or any subcontract made or purchase order issued pursuant to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association that are in effect as of the time demand for arbitration is made.”

“Notice of demand for arbitration shall be filed in writing with the American Arbitration Association and upon all proposed parties to such proceeding, and shall be filed within a reasonable time after the claim, dispute, or other matter in question has arisen, but in no event shall be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter will be barred by the applicable statute of limitations. Any arbitration proceeding will be conducted in Sevierville, Sevier County, Tennessee. The arbitration hearings will begin within 180 days of the date the demand for arbitration is served and continue on successive business days until completed. The prevailing party shall be entitled to recover not only attorney fees, but also the costs of the arbitration proceedings, including the fee paid to the American Arbitration Association and the arbitrators, witness fees, and the cost of preparing demonstrative exhibits.”

Claimant argues that it has not waived its right to sue under the contract, including a right to arbitration. Thus, Claimant argues that if the Fund pays the claim the U.S. government acquires the rights to arbitrate.

The terms of the Contract are clear that arbitration will decide the differences between the parties. The provisions state that the differences of the parties shall be decided by arbitration. The prevailing party shall be entitled to recover not only attorney fees, but also the cost of the arbitration proceedings, including fees paid to the arbitrator, witness fees and the costs of demonstrative exhibits.²² Thus, it is clear that ERC cannot sue APAC in court, including a suit for liability under OPA, because the issues will be decided by arbitration. If ERC has no rights it can take to court, it appears that it has no rights to sue in court that it can subrogate to the United States. At best it is unclear that ERC has any subrogable rights under the terms of the Contract under OPA; therefore, it has not established that it has met the requirements of 33 U.S.C. § 2712(f).

²² ERC, Reimbursement Terms and Conditions for Time and Materials Contracts, Paragraph 9, Terms of Payment

The Federal Arbitration Act is applicable to the Contract between ERC and APAC.

Paragraph 9 of the Contract provides that differences between the parties shall be determined by arbitration. Claimant does not consider the requirements of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA) in its claim to the Fund.

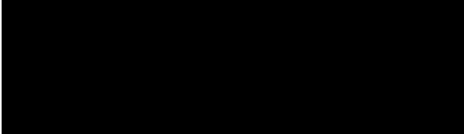

The FAA is applicable. Section 2 of the FAA provides that arbitration clauses are valid, irrevocable and enforceable, save upon any grounds as exist at law or in equity for the revocation of any contract. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987). (Absent a well-founded claim that an arbitration clause resulted from the sort of fraud or excessive economic power that would provide grounds for revocation of any contract, the Arbitration Act provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.) There is no evidence in the administrative record that the Contract was executed under fraud, duress or an unbalance of power. In fact the Claimant presented its own Contract, a standard form contract, to APAC for execution.

Despite addressing claims and dispute resolution in his own contract, Claimant argues only that the provisions of OPA govern this claim because it has a statutory right to reimbursement if the claim is not paid within 90 days. However, it has ignored the provisions in the Contract requiring arbitration if the parties have differences related to the Contract. Like a judge in a court action, an arbitrator in this case would effectively and efficiently resolve the differences between the parties and determine how much of the \$305,466.53 should be paid to the Claimant. Such resolution by an arbitrator would extinguish any subrogable rights of ERC that could be acquired by the U.S. Government.

Claimant also seeks \$164,936.22 in interest accrued over more than four years. OPA contains no provision that the Fund is available to pay interest on uncompensated claims for removal costs. Thus, even if the Claimant's removal costs were payable from the Fund, the \$164,936.22 in claimed, accrued interest would be denied.

IV. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, ERC's claim is denied.


Claim Supervisor: 
Date of Supervisor's review: <i>3/22/19</i>
Supervisor Action: <i>Denial Approved</i>