

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: E10201-001
Claimant	: National Response Corporation (NRC)
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$6,053,787.38

**INCIDENT:**

On October 23, 2009, a fire/explosion occurred at the Gulf Caribbean Petroleum Refining L.P. facility located in Bayamon, Puerto Rico (hereinafter the CAPECO facility). The CAPECO facility, a major petroleum products supplier for Puerto Rico, imports, off loads, stores and distributes petroleum products. As a result of the explosion and fire that occurred, an unknown amount of oil was discharged from the some of the tanks at the facility. Product was found in the storm water channels, on-site streams and creeks, neighboring wetlands, and off-site waters leading to San Juan Bay. The federal onscene coordinator (FOOSC) determined that the deteriorating conditions of the remaining tanks posed a substantial threat of discharge to navigable waters. The responsible party (RP) for this incident is Gulf Caribbean Petroleum Refining LP.

**CLAIM AND CLAIMANT:**

The Claimant, the National Response Corporation (NRC), provided removal support to the RP for this incident. On or about January 7, 2010, Claimant presented its claim for removal costs in the amount of \$4,645,863.41 to the Responsible Party (RP). On February 16, 2010, National Response Corporation (NRC) presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of its uncompensated removal costs in the original amount of \$4,645,863.41. The NPFC sent the RP notification letter, dated February 19, 2010, to Mr. Domingo M. Perez of Caribbean Petroleum Refining, L.P. advising that Claimant presented a claim to the NPFC for certain uncompensated removal costs.<sup>1</sup> The RP acknowledged receipt of the invoices that are the subject of this claim by way of CAPECO's Financial Audit. (See Enclosure 1—RP Audit). The RP, through its insurer, reimbursed Claimant \$2,000,025.00 as partial payment for removal costs incurred by the Claimant.

On August 23, 2010, the Claimant revised its sum certain for the claim to \$6,053,787.38<sup>2</sup>. These claimed costs, plus the payments made by CAPECO and its insurers in the amount of \$2,000,025.00, are identified on the RP audit summary sheet which total \$8,053,812.38 in total response costs. (See Enclosure 1 – RP Audit).

The Claimant submitted the following documents in support of its claim: Cover letter and NPFC claim form, NRC invoices and supporting documentation for each, proof of payments, NRC time and material rates, NRC subcontractor contacts, contractor

<sup>1</sup> See, NPFC letter, to CAPECO, re: Claim No. E10201-001, dated February 19, 2010.

<sup>2</sup> See, email from [REDACTED] of NRC to [REDACTED] of NPFC dated August 23, 2010.

agreements and rates, remittance from RP, spreadsheet of summary invoices, third party invoices, and United States Environmental Protection (USEPA) pollution reports (POLREPs). The NPFC's review of the actual cost invoice and related documents focused on: (1) whether the actions taken were compensable removal actions under OPA and the claims regulations at 33 CFR 136 (e.g. whether the actions were taken to prevent, minimize, and mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken are determined to be consistent with the National Contingency Plan (NCP) or directed by the FOOSC; (4) whether the costs were adequately documented and reasonable.; and (5) whether the Claimant's submitted costs were uncompensated.

The NPFC adjudicated the claim on December 6, 2010 and made a partial offer to the Claimant in the amount of \$191,716.91. The NPFC denied \$5,862,070.47 of costs on the grounds that the Claimant had not paid its subcontractors in full. The NPFC determined that any costs not paid by the Claimant were not "uncompensated" removal costs as set forth in the governing claims regulations under 33 CFR §136.205 entitled "Compensation allowable."

#### **CAPECO (RP) BANKRUPTCY:**

On August 12, 2010, Caribbean Petroleum Refining L.P. and two affiliated companies, Caribbean Petroleum Corporation and Gulf Petroleum Refining (Puerto Rico) Corporation, filed with the United States Bankruptcy Court for the District of Delaware voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, Case No. 10-12553 (KG) (CAPECO bankruptcy proceedings).

In August 2010, Claimant notified the NPFC that it would file a proof of claim in the CAPECO bankruptcy proceeding. On October 12, 2010, NRC filed a proof of claim reflecting its debt of \$6,895,722.71 with the bankruptcy trustee. This amount included the removal costs before the NPFC and \$729,304.37 in interest due to the Claimant on its unpaid invoices.

#### **REQUEST FOR RECONSIDERATION:**

On January 6, 2011, the Claimant requested that the NPFC reconsider its claim. At this time the NPFC understood that the NRC claim included removal costs for two subcontractors, Clean Harbors and Caribbean Enviromarine Services (CEMS). The request for reconsideration included proof of payment for all invoices associated with Clean Harbors, which constituted full payment to this subcontractor. Claimant, still maintaining that the NPFC could adjudicate the CEMS invoices even though NRC had not paid CEMS, requested that the NPFC approve an escrow payment or subrogation agreement concept that would allow the NPFC to adjudicate the claim the CEMS invoices.

In order for the NPFC to adjudicate and pay the Claimant for removal costs that it had not paid to CEMS, the NPFC determined, and the Claimant agreed, that CEMS could execute a subrogation and assignment agreement with the Claimant providing that the Claimant would acquire all rights, claims and causes of action that CEMS had under any other law.

On January 31, 2011, CEMS and the NRC executed a Subrogation and Assignment of Rights Agreement whereby CEMS agreed to subrogate to the NRC its claim for uncompensated removal costs in connection with the CAPECO incident in the amount of \$3,876,782.52. The NPFC received this agreement on February 3, 2011.

The NPFC subsequently discovered that the CEMS invoices included removal costs for eight subcontractors to CEMS. Claimant had not paid these subcontractors' invoices. The Claimant subsequently executed Subrogation and Assignment of Rights Agreements with each of the subcontractors: (1) Industrial Hydrovac Services; (2) Indutech Environmental Services; (3) MI Construction, Inc.; (4) Jorge Lopez; (5) Joaquin Lezcano; (6) Oil Energy Systems; (7) Industrial Cleaning Solutions, and (8) RAC Enterprises.<sup>3</sup> The NPFC received the executed agreements on March 28, 2011.

In a letter dated June 8, 2011, Claimant provided a copy of the proof of claim filed by NRC in the CAPECO bankruptcy proceedings. OPA 90 provides that if a claim is presented to a responsible party and the claim is not settled within 90 days after the date on which the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 USC 2713(c)(2). It further provides that no claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim. 33 USC 2713(b)(2).

On June 21, 2011 the NPFC advised NRC that pursuant to 33 U.S.C. § 2713(b)(2) and because NRC filed a proof of claim in the CAPECO bankruptcy proceedings, the NPFC would hold the claim in abeyance until the bankruptcy court action has been resolved.

**NPFC DETERMINATION ON RECONSIDERATION:**

**NPFC payment of a claim that pends in a bankruptcy action**

OPA section 1013(c) provides that a claimant whose presented claim has been denied by a responsible party or not settled after 90 days may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 U.S.C. §2713(c)(2). Further if a claim is presented in accordance with section 1013 and full and adequate compensation is unavailable, a claim for uncompensated damages and removal costs may be presented to the Fund. 33 U.S.C. §2713(d). In light of both provisions NPFC has not interpreted the election provision to mean that if a claimant elects to commence an action in court the claimant is necessarily precluded from ever coming to the Fund if, after the court action is complete, the claim remains uncompensated. The legislative history of these provisions supports NPFC's view:

“Subsections (c) and (d) provide for a second means of obtaining compensation. Subsection (c) allows for claims against the Fund where attempts to reach a settlement with the responsible party or guarantor were unsuccessful....At this point, the claimant may elect to commence an action in court, but once having decided to pursue the claim in

<sup>3</sup> Claimant provided Subrogation and Assignment of Rights Agreements between NRC and CEMS and subrogation agreements between CEMS and: (1) Industrial Hydrovac Services; (2) Indutech Environmental Services; (3) MI Construction, Inc.; (4) Jorge Lopez; (5) Joaquin Lezcano; (6) Oil Energy Systems; (7) Industrial Cleaning Solutions, and (8) RAC Enterprises.

court, the claimant cannot come back and assert his claim against the Fund while the legal action is still pending.

Subsection (d) also permits a claim against the Fund in those instances where claimants are not adequately compensated by the responsible party or guarantor. Failure to receive full compensation could occur for a number of reasons. First, the responsible party...may have successfully invoked his limitation of liability...and the claim may exceed that limitation...For some other reason, such as insolvency, the responsible party or guarantor may not be able to satisfy all claims. Uncompensated claims could, therefore, be brought against the Fund which served as a backup for such situations."

House Report 101-242 Part 2, page 66, Committee on Merchant Marine and Fisheries (September 18, 1989):

Any claim brought against the Fund after a court action is completed would be payable from the Fund only to the extent the claim is for qualifying oil removal costs and damages under OPA, and meets other requirements as applicable including the provision at OPA section 1012(f). 33 U.S.C. §2712(f) provides that payment of any claim by the Fund is subject to the United States Government acquiring by subrogation all rights of the claimant to recover from the responsible party.

Claimant fails to provide any convincing support when it argues that filing a proof of claim in a bankruptcy proceeding is not an action in court. Plainly such a bankruptcy proceeding is before a properly constituted federal court. Such claims may be disputed by the bankrupt estate and if so the merits of the claim may be tried by the bankruptcy court, just as the merits of such claims are generally tried in a district court against a solvent responsible party. Accordingly the NPFC view has been that a claimant that files a proof of claim commences an action in court for purposes of OPA section 1013. Until the bankruptcy proceedings are resolved what rights that may be subrogable to the United State Government and what amounts may be "uncompensated" remain to be resolved. While OPA provides that a claimant may "elect" to commence an action in court, once a claimant does so, the NPFC will not approve or certify a claim for the same costs while the claimants claim pends in court. 33 U.S.C. §1013(b)(2).

NPFC view is that if a claimant commences an action in court, achieves a judgment against the responsible party for its claim, but is unable to collect on the judgment, the Fund is available to pay that claim if it is a qualifying OPA claim and the rights against the responsible party are subrogated to the United States Government. An accepted and undisputed claim in bankruptcy, where all that remains to be achieved is a share of the eventual distribution from the estate would similarly merit payment from the Fund if the accepted claim is a qualifying OPA claim and the rights against the responsible party are subrogated to the United State Government so that the pending distribution pends as a United States claim.

In this case the NPFC determines that a three-party agreement executed by the NRC, the NPFC and the bankruptcy Trustee will satisfy the OPA requirements in respect to pending court actions. The attached agreement provides that (1) the parties stipulate to a liquidated and accepted amount of \$6,013,003.44 in the bankruptcy action; (2) that the NPFC and NRC agree that NRC assigns all its rights in the bankruptcy action to the

NPFC; (3) that the Trustee agrees to the assignment of the Claimant's rights to the NPFC, and (4) that the Trustee approves the agreement. In the event that the agreement is so crafted and approved by all parties and accepted by the Trustee the NPFC will pay the claim in the amount of \$6,013, 003.44 as further addressed below. If such an agreement is not executed NPFC will defer any offer of payment until the claimant's claim is resolved in the bankruptcy action and NPFC can determine what amount of claimant's claim as adjudicated remains a qualified uncompensated claim payable under OPA.

#### **NPFC Removal Costs Determination on Reconsideration**

Under 33 CFR 136.105(a) and 136.105(e)(6), the Claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a 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). As noted above a claimant must establish the criteria provided in 33 CFR § 136.203 for removal cost claims.

The NPFC's analysis on reconsideration was a *de novo* review of the Claimant's entire claim submission.

#### **Determination of removal costs on reconsideration:**

##### **A. Findings of Fact:**

1. USEPA, as the FOSC for this incident, determined that the actions undertaken by the Claimant are deemed consistent with the NCP. 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. A Responsible Party was identified. 33 U.S.C. § 2701(32). The NPFC notified the RP that a claim was filed with the NPFC for the removal costs. The RP has not made full payment of costs to date;
4. The claim was submitted within the six-year period of limitations for claims. 33 U.S.C. § 2712(h)(2);
5. The NPFC Claims Manager reviewed all documentation submitted with the claim and determined which removal costs were incurred for removal actions in accordance with the NCP and whether the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205. The Claims Manager also identified denied costs and the grounds for denial, and
6. The subrogation and assignment agreement between NRC and CEMS and the subrogation agreements between CEMS and its eight subcontractors ensure that the United States is subrogated to all rights, claims, and causes of action that the claimants have under any other law.

##### **B. Analysis:**

NPFC CA reviewed the actual cost invoices and dailies to confirm that the Claimant had obtained all rights, claims and causes of actions with CEMS and the CEMS

subcontractors for the costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The NPFC has determined on reconsideration that the majority of costs incurred by the Claimant and its associated vendors were reasonable and necessary in order to mitigate the effects of the incident. Upon reconsideration and information provided by the Claimant, the NPFC has determined that the costs were billed in accordance with the rate schedules in place at the time the services were rendered, unless otherwise indicated below, and consistent with the NCP.

**Itemization of denied costs broken down by NRC Invoice #:**

NRC Invoice # 544832 – Amount Denied = \$5,648.50  
NRC Invoice # 545071 – Amount Denied = \$1,661.00  
NRC Invoice # 545316 – Amount Denied = \$3,454.00  
NRC Invoice # 546219 – Amount Denied = \$9,678.90  
NRC Invoice # 546251 – Amount Denied = \$3,489.75  
NRC Invoice # 547616 – Amount Denied = \$16,850.74

The above costs were denied on the grounds that there were unidentified differences between the amounts requested and the documentation.

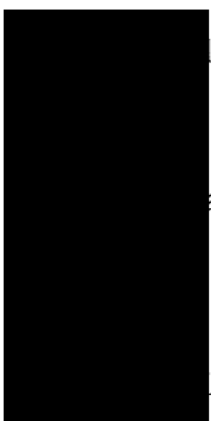
**Total amount denied = \$40,783.94<sup>4</sup>**

**Details of denied costs:**

**NRC Invoice # 544832:**

**CEMS Personnel and Materials denied:**

11/2/09



– Foreperson - \$1,025.00 – billed twice on the same day as a foreperson for the same period;  
Laborer - \$545.00 – billed twice on the same as a laborer for the same period;  
Laborer - \$545.00 – billed twice on the same day as a laborer for the same period;  
– Hoseperson – \$ 545.00 - billed twice in the same day; once as a laborer and once a Hoseperson for the same period. Denied the Hoseperson billing;  
Laborer – \$545.00 - billed twice on the same day as a laborer for the same period;

<sup>4</sup> See, Enclosure 2 – NPFC Summary of Costs spreadsheet

██████████ Equipment Operator - \$785.00 - billed twice on the same day; once as a laborer and once as an equipment operator during the period;

11/5/09

██████████ Laborer - \$605.00 – billed twice on the same day as a laborer for the same period;

**TOTAL personnel time denied = \$4,595.00**

The NPFC has denied \$540.00 on CEMS equipment as there is a miscalculation on the Claimant's invoice. The NPFC approved 100% of the billed costs identified on the invoicing. CEMS has the total equipment for this period as \$195,081.25 when the line items actually total \$194,541.25.

**TOTAL equipment costs denied = \$540.00**  
**TOTAL 10% markup on denied costs = \$513.50**  
**TOTAL denied this invoice = \$5,648.50**

**NRC Invoice # 545071:**

***Clean Harbors Personnel and Materials denied:***

11/9/09

██████████ \$170.00 – per diem charged twice for same person, same day;

11/11/09

██████████ \$170.00 – per diem charged twice for same person, same day;

**TOTAL personnel time denied = \$340.00**  
**TOTAL 10% markup on denied costs = \$34.00**  
**TOTAL denied for Clean Harbors on this invoice = \$374.00**

***CEMS Personnel and Materials denied:***

11/15/09

The Claimant has the total amount invoiced for personnel on 11/15/09 as \$85,775.00 although the actual daily documentation totals \$85,055.00 therefore the NPFC denied the difference of \$720.00 due to math error.

**TOTAL personnel costs denied = \$720.00**  
**TOTAL 10% markup on denied costs = \$72.00**  
**TOTAL denied this invoice = \$792.00**

11/13/09

The Claimant billed \$30,565.00 in equipment on this day based on invoice but all line items only total \$30,115.00 therefore the NPFC denied the difference of \$450.00 due to math error.

**TOTAL equipment costs denied = \$450.00**  
**TOTAL 10% markup on denied costs = \$45.00**  
**TOTAL denied this invoice = \$495.00**  
**OVERALL TOTAL DENIED THIS INVOICE = \$1,661.00**

**NRC Invoice # 545316:**

***CEMS Personnel and Materials denied:***

11/19/09

██████████ – Laborer - \$785.00 – duplicate billing for same person, same position on the same day;  
██████████ – Laborer - \$785.00 - duplicate billing for same person, same position on the same day;

11/21/09

██████████ – Laborer - \$785.00 – duplicate billing for same person, same position on the same day;  
██████████ laborer - \$785.00 - duplicate billing for same person, same position on the same day;

**TOTAL personnel costs denied = \$3,140.00**  
**TOTAL 10% markup on denied costs = \$314.00**  
**OVERALL TOTAL DENIED THIS INVOICE = \$3,454.00**

**NRC Invoice # 546219:**

***CEMS Personnel and Materials denied:***

11/30/09

██████████ – Equipment Operator - \$515.00 - duplicate billing for same person, as an equipment operator when billed as a laborer on the same day;

**TOTAL personnel costs denied = \$515.00**  
**TOTAL 10% markup on denied costs = \$51.50**  
**TOTAL denied this invoice = \$566.50**

12/1/11

The Claimant requested \$23,567.50 for materials on 12/1/09 although the daily for this date only totals \$15,283.50 therefore the difference of \$8,284.00 is denied as undocumented and unsupported by the record.



**TOTAL material costs denied = \$8,284.00**  
**TOTAL 10% markup on denied costs = \$828.40**  
**TOTAL denied this invoice = \$9,112.40**  
**OVERALL TOTAL DENIED THIS INVOICE = \$9,678.90**

**NRC Invoice # 546251:**

***Clean Harbors Equipment denied:***

12/8/09

The Claimant did not provide an invoice or documents in support of equipment charges on 12/8/09 in the amount of \$3,172.50 therefore this amount is denied as undocumented and unsupported by the record.

**TOTAL equipment costs denied = \$3,172.50**  
**TOTAL 10% markup on denied costs = \$317.25**  
**OVERALL TOTAL DENIED THIS INVOICE = \$3,489.75**

**NRC Invoice # 547616:**

***Third Party Charges***

11/22/09 – Group I third party receipts - \$3,893.70 due to illegible receipts that could not be read;

11/24/09 – Group IIA third party receipts - \$565.42 due to illegible and/or missing receipts;

11/29/09 – Group IIB third party receipts - \$6,207.25 due to illegible and/or missing receipts;

11/29/09 – Group IIIA third party receipts - \$72.00 due to illegible and/or missing receipts;

12/10/09 – Group IVB third party receipts - \$4,580.49 due to illegible and/or missing receipts or documentation.

**TOTAL third party costs denied = \$15,318.86**  
**TOTAL 10% markup on denied costs = \$1,531.89**  
**OVERALL TOTAL DENIED THIS INVOICE = \$16,850.75**

**Unidentified differences denied between the amount requested and the amount documented = \$1.05**

**TOTAL DENIED: \$40,783.94**

*Overall Summary by category of denied costs*

*Personnel and associated markup = \$3,454.00*

*Equipment & Materials and associated markup = \$20,478.15*


*Third party receipts and associated markup = \$16,850.75*

*Misc. difference denied = \$1.05*

*Total = \$40,783.94*

The NPFC hereby determines that the NPFC offers, and the OSLTF is available to pay, **\$6,013,003.44** as full compensation for reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # E10201-001 upon execution of the three-party Settlement Agreement attached to this Claim Summary/Determination. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs payable by the OSLTF as presented by the Claimant.

In the event that the Settlement Agreement is not executed by all parties the offer is void and no further offer will be made until such time as Claimant's claim in the bankruptcy proceeding has been resolved and the Claimant provides any additional information needed to determine what amount of its qualifying oil removal costs remain uncompensated and payable from the Fund.

Claim Supervisor: 

Date of Supervisor's Review: *11/02/11*

Supervisor Action: *Determination on reconsideration approved*

Supervisor's Comments: