

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N08075-001
Claimant	: Baby Oil Inc
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Claim Manager	: [REDACTED]
Amount Requested	: \$2,694,578.20

BACKGROUND

Claim History

Claimants, Baby Oil, Inc. and its insurers, St. Paul Surplus Lines Insurance Company/Travelers (the Claimants), presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) on April 1, 2009, arguing that Baby Oil, Inc. is entitled to a sole fault third party defense and reimbursement of its removal costs resulting from a discharge of oil from a Baby Oil well (No. 67/67D). Claimants assert that on September 17, 2008, an unidentified vessel struck the wellhead between 1400 and 1800, and the allision resulted in the discharge of oil from the well into Grand Bayou Blue, a tributary to Bayou Lafourche, a navigable water. Claimants authorized George Chalos, Chalos & Co, P.C., to act as their representative.

The NPFC, which administers the OSLTF, denied the claim on May 13, 2010 on the grounds that Claimants did not establish Baby Oil's entitlement to a third party defense because it did not establish by a preponderance of the evidence that it had exhibited due care with respect to the oil concerned in light of all relevant acts or omissions or taken precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.

Claimants timely sought reconsideration of the claim and requested additional time to provide additional documentation. The additional information included an expert report to support the request for reconsideration and an argument that Baby Oil had not violated any applicable regulations or statutes and therefore exhibited due care. They cited *Plantation Pipeline Co. v. Oil Spill Liability Trust Fund*¹ in support of their argument.

Facts

According to the Claimants the wellhead was located approximately 300 feet outside of a local, well-traveled navigational channel.² The channel was popular because it was the only available passage for large vessels transiting the area. There are numerous wells located in the area, both within and outside the navigational channel. The channel is located in Pointe au Chien State Wildlife Management Area.

The wellhead stood six feet above the water surface and was surrounded by an iron structure. The water was approximately eight feet deep. According to Mr. [REDACTED] the wellhead was not equipped with a subsurface valve or storm choke³ because it was a gas lift injection well. Nor was it equipped with a light to warn vessels of its presence in the area. On September 17, 2008 the wellhead was allegedly struck by an unidentified vessel,⁴ bending it at a 90 degree angle at mud level. This caused a blowout, with oil and gas initially released 8-10 feet into the air. Some well casings were broken; a well guard structure was

¹ *Plantation Pipeline Co. v. Oil Spill Liability Trust Fund*, 47 BNA 1598 (N.D. Ga. 1998)

² This fact may conflict with an October 3, 2008 Comprehensive Report to Travelers Insurance Company that states that the well was located approximately 100-125 feet away from a ship channel that was marked by pylons.

³ Subsurface valves and storm chokes are devices designed to prevent the discharge of oil under catastrophic events or accidents, such as damage to a wellhead.

⁴ The owner of the vessel has never been identified.

missing. Approximately 300-350 barrels of crude oil was discharged into Grand Bayou Blue, LA. On September 18, 2008, oil and gas were still discharging oil and gas one to two feet into the air.⁵

Baby Oil leased the area underlying the well from the Louisiana Department of Natural Resources (LA DNR). The Claimants provided certain documentation and well information to the NPFC. According to LA DNR well records well No. 67D was “shut in productive – no future utility” from March 1973 through December 1984. From January 1, 1985 through October 14, 2008 the well status “reverted to single completion.” The well, identified as 67/67D, was permitted to drill for minerals in August 2002.⁶ It is not known if the well produced oil or gas after the permit was issued. Claimants state that the well was shut in at the time of the blowout. LA DNR conducted a lease facility inspection that included well No. 67D on July 15, 2008, two months prior to the incident.⁷ The inspection report reflects that the facility successfully passed the inspection. Well Nos. 67 and 67D were plugged and abandoned in accordance with LA DNR regulations on October 15, 2008, several weeks after the incident.

The well is an onshore production well regulated by the LA DNR’s Office of Conservation, who is responsible for enforcing the state oil well regulations, which are found at Title 43, Part XIX, Subpart 1, Statewide Order No. 29-B. There are few requirements for onshore and off shore oil wells in Louisiana. For instance, a well is not required to install lighting or cribbing. Wells can be placed anywhere, including within a navigational channel.

While there are few requirements for oil wells, Statewide Order No. 29-B-a requires that all flowing wells with a surface pressure in excess of 100 pounds/square inch (psi) located in bodies of water being actively navigated require the use of storm chokes.⁸ According to Richard Hudson, LA DNR well inspector, well owners or operators are required to conduct surface pressure tests twice a year on their wells, including shut in wells, and submit the information to LA DNR.⁹ Claimants provided no surface pressure information for the well when it submitted its claim, although a review of the LA DNR well records¹⁰ reflect that the last reported surface pressure test for well No. 67, conducted in October 2005 and reported in November 2005, showed 110 psi for the well. There are no well pressure test records in the LA DNR SONRIS system for well No. 67D. Statewide Order also provides that where the use of a storm choke would unduly interfere with normal operations of a well, the Commissioner of Conservation may, upon submission of pertinent data in writing, waive the requirements of this order. Mr. Chalos, in response to questions sent by NPFC, states in a letter to the NPFC dated November 30, 2009, that the Baby Oil well did not require a storm choke because it was a gas lift injection well and that Baby Oil did not request a waiver for the subject well.¹¹

Claimants’ Submittals on Reconsideration

Most of the information submitted to support Claimants’ request for reconsideration was previously submitted with the original claim; however, an expert report and a legal argument, citing *Plantation Pipeline Co. v. Oil Spill Liability Trust Fund*, were provided. The expert report, Expert Witness Report and Opinion was authored by J.F. Moore II, President, J.F. Moore International, Inc. (Moore report).

In his report Mr. Moore argues that Baby Oil is entitled to the sole fault third party defense on several grounds. First, Baby Oil complied with all Louisiana state laws and regulations and added additional well head protection – six heavy steel pipes, driven into the seabed, were installed around the well along with support rings at the top of the structure and at the waterline. Therefore, it exhibited more than due diligence and more than the standard compliance compared to other such unprotected wells. Second, while the well head had no lighting the installation of such lighting would not have made a difference

⁵ Situation/Pollution Report No. 3, dated 21 September 2008; MISLE Report, Appendix 1 – Evidence, 3327171-19-CJ

⁶ According to LA DNR regulations, after July 1, 2000 an applicant for a permit to drill must provide financial security unless an operator meets certain requirements for exemption. Claimant provided no information on financial security or an exemption.

⁷ This includes an inspection of the well site, tank batteries, containment, bleeders, various valves and the structural integrity of storage tanks.

⁸ Subpart 4. Statewide Order No. 29-B-a, Chapter 11 (2005).

⁹ Teleconference with [REDACTED] on April 17, 2012.

¹⁰ LA DNR maintains voluminous well records for all wells regulated by the agency at dnr.louisiana.gov on its data site, SONRIS.

¹¹ Letter from [REDACTED] to [REDACTED] in response to a request for further supporting documentation, Question 7, page 2.

because the allision occurred between 1400 and 1800, during daylight hours. Third, the well had been in its location since 1955 with no previously known problems and there were numerous wells with similar physical characteristics well known to exist in the area. Finally, Mr. ██████ states that a vessel that veered out of the channel and struck the wellhead “would have to be grossly negligent and/or reckless in its navigation, making it solely liable for the occurrence, not the claimant.”¹²

Claimants also argue that Plantation Pipeline Co. v. Oil Spill Liability Trust Fund, 47 BNA 1598 (N.D. Ga. 1998) supports their argument that Baby Oil exhibited due care. In that case the Court determined that while the plaintiff, owner and operator of a pipeline that discharged oil, was not entitled to a sole fault third party defense, the NPFC was arbitrary and capricious when it determined that a failure to inspect the pipeline with a specific methodology was a failure to exhibit due care.

NPFC ANALYSIS ON RECONSIDERATION

A responsible party for a vessel or facility from which oil is discharged may present a claim for removal costs and damages if he demonstrates entitlement to a defense to liability. In order to be entitled to a third party defense a claimant must establish by a preponderance of the evidence that the discharge was caused solely by a third party, and that the responsible party (1) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances, and (2) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.

Mr. ██████ seems to assert that the unidentified vessel that veered out of the channel and allided with the well “was grossly negligent and/or reckless in its navigation.” This assertion is speculative because it is not known why, when or how the vessel left the channel. While it is likely that the well head was damaged by a vessel one can only speculate on this record why the vessel veered outside the channel. It could have had steering or engine problems; visibility could have been poor. There is conflicting evidence in the record as to how far outside the channel the well was located (300 feet versus 100 to 125 feet) and how clearly the channel was marked. His argument that the allision occurred during daylight hours is based on an uncorroborated alleged flyby at the wellsite at 1400, when nothing out of the ordinary was seen, and the time the incident was discovered at 1730. There are two reports to the National Response Center as to discovery of the oil spill. According to one NRC report a caller reported a sheen sighting at 1830; the report was taken at the NRC at 1947.¹³ An earlier NRC report, No. 884380, states that a wellhead ruptured at Baby Oil at 1936 and oil was released ten feet into the air.

Mr. ██████'s primary argument is that Baby Oil was in compliance with state laws and regulations; therefore, it exhibited due care. Compliance with statutes and regulations are not the only standard for determining due care or adequacy of precautions. While violation of a statutory duty may in certain circumstances constitute negligence per se, the inverse proposition that compliance with a statute precludes a finding of negligence is not the law. A statutory standard is no more than a minimum, and it does not necessarily preclude a finding that the actor did not exercise due care or take precautions. Tidewater Marine, Inc. v. Sanco Intern, Inc., 113 F. Supp. 2d 987, 998 (E.D. La. 2000) (A duty of care may be derived not only from statutory standards, but also from the dictates of reasonableness under the given circumstances in a case.)

Compliance with regulations alone does not establish entitlement to a sole fault defense. A responsible party must also establish that a third party was solely the cause of the incident and that the responsible party exhibited due care with respect to the oil concerned, taking into consideration characteristics of the oil and in light of all other facts and circumstances and took precautions against foreseeable act or omissions of any such third party and the foreseeable acts or omissions of that third party. While the well was outside the navigational channel it is not clear whether it was 300 feet or 100 to 125 feet outside the channel. Pictures provided by the Claimant do not depict clear delineation as to where one would be in or

¹² Moore report, page 4.

¹³ NRC Case No. 884383.

outside the channel. The channel was well traveled by large vessels and it is foreseeable that a vessel could leave the channel and allide with a well located at some point outside the channel.

While Claimants largely rely on their argument that Baby Oil met all state regulations for oil well operations, Claimants have not established that they were in fact in compliance with all regulations. Statewide Order No. 29-B-a requires storm chokes on wells where the surface pressure on the well is greater than 100 psi. Regulations also require that well owners or operators conduct surface pressure tests on all wells, including shut in wells, twice a year. While the Commissioner may issue a waiver to the storm choke requirement a well owner must request one in writing.

In this case Claimant argues that it was not required to have a storm choke because the well was a gas injection well. Claimant does not refer to any authority for the proposition that this type of well was not subject to the storm choke requirement. According to the regulation the only exemption from the storm choke requirement are wells with surface pressure less than 100 psi or receipt of a waiver by the Commissioner. According to the LA DNR SONRIS records the last test conducted on the well was in October 2005; the psi was 110. Mr. Chalos admits that Baby Oil did not seek a waiver. Baby Oil did not report surface pressure well test data since 2005 so it is not known if the surface pressure was 100 psi or less; therefore it is not known if the well was exempted from the storm choke requirement.

Importantly, the administrative record includes a valve and well report dated June 2008¹⁴, which states that the surface pressure on the well was 375 psi. This is much higher than the 100 psi that triggers a potential waiver of the storm choke requirement. The early Pollution Reports state that oil and gas were discharging 8 to 10 feet into the air after the well head was hit. The oil continued to discharge one to two feet into the air 12 hours after the wellhead was hit.¹⁵ If the well had been equipped with a storm choke the storm choke should have prevented the discharge of oil. Thus, Baby Oil cannot succeed in its argument that the incident was solely caused by a third party.

Mr. [REDACTED] also argues in his expert report that there are other facilities with similar physical characteristics existing throughout southern Louisiana. It is not clear what he is arguing when he states that other facilities have similar physical characteristics. Conformity to custom is not in itself the exercise of due care. Roberie v. Sinclair Refining Co., 252 So.2d 488, 493 (La. App. 1971) (While custom may be considered in determining whether sufficient care has been exercised, it is not conclusive or controlling of that determination since the customary manner of doing things may well involve negligence, and to allow custom to control the outcome could create a false standard of care.); Pennington v. Justiss-Mears Oil Co., 123 So. 2d 625, 632 (La. App. 1961) (By the great weight of modern American authority a custom (defined as "a fairly well defined and regular usage ... among a group of people such as a trade, calling or profession") either to take or omit a precaution is generally admissible as bearing on what is proper conduct under the circumstances, but is not conclusive.) Thus, even if it is custom in south Louisiana to comply only with LA DNR's regulations and not take further precautions, it is not conclusive evidence that the Claimant exhibited due care in this case.

Claimants also rely on the Court's opinion in Plantation Pipeline Co. v United States. However, the issue of due care in this claim can be distinguished from the facts in that case. The Court in Plantation Pipeline held that the NPFC was arbitrary and capricious when it determined that the pipeline company did not exhibit due care because it did not use a specific testing mechanism to determine if the pipeline was leaking. The pipeline owner stated that he used a different method that was used by others in the industry – measuring the volume of oil going into the pipeline and measuring the volume coming out. The Court stated that pipeline company met its burden of proving due care; nothing in the record indicated a lack of due care. The Court went to state that "[T]o require Plantation to prove a negative, that is, to require it to

¹⁴ This report was generated two – three months prior to the incident.

¹⁵ Even if LA DNR had granted a waiver the business decision not to install a storm choke and accept the risk of a discharge that might have been prevented by a storm choke would seem to weigh heavily against the responsible party's efforts to establish a complete defense to liability and to put the entire burden of costs and damages onto another party or, as in this case, the public's OSLTF.

show why its compliance with industry standards did not detect the leak is too much to require.”
Plantation Pipeline Co. v. OSLTE, 47 BNA at 1604-05.

It is not clear if Claimants are arguing that they exhibited due care because they complied with industry standards. If so, the NPFC determines that such compliance does not necessarily exhibit due care as discussed by the Louisiana Courts in Roberie v. Sinclair and Pennington v. Justiss-Mears Oil Co.

CONCLUSION

The NPFC denies the third party defense on the grounds that the Claimants did not meet their burden of demonstrating that Baby Oil was entitled to a third party defense to liability. The evidence in the administrative record does not establish by a preponderance of the evidence that the incident was caused solely by a third party and that Baby Oil exhibited due care or took precautions against the foreseeable acts or omissions of a third party.

Claim Supervisor:

Date of Supervisor's review: *5/10/12*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments: