

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	N12025-0001
<b>Claimant:</b>	Environmental Safety & Health Consulting Services, Inc.
<b>Type of Claimant:</b>	Corporate
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$525,290.84

### **FACTS:**

***Oil Spill Incident:*** On March 16, 2012, United States Coast Guard (USCG) Sector New Orleans was notified of a fire on a platform in Main Pass Block 35 in the Gulf of Mexico, a navigable waterway of the US. The initial report was received by the USCG at 1600, followed by a National Response Center (NRC) report # 1005961 at approximately 1618. The report indicated that a storage tank on the Poydras Energy platform ignited due to recent hot work. Port Authority and fire boats extinguished the fire at approximately 2033.

The fire resulted in the number 2 tank top becoming compromised, open to the environment, and a discharge of an unknown quantity of crude oil into the Gulf of Mexico and heavy sheening around the tank. During lightering operations of the number 2 tank, it was discovered that there was a free flow of oil between the individual tank walls due to additional damage.<sup>1</sup>

A Unified Command (UC) consisting of U.S. Coast Guard Sector New Orleans, Environmental Safety and Health Consulting Services, Inc (ES&H), and Poydras Energy / HLP Engineering was established.

***Responsible Party:*** Poydras Energy Partners, LLC., the Responsible Party (RP), owned the offshore oil storage facility at the time of the incident and is a responsible party under the Oil Pollution Act.

***Description of Removal Activities for this Claimant:*** On March 16, 2012, ES&H was contracted by the RP to mobilize an emergency response crew to the scene of the fire. Upon arrival, ES&H deployed 800 feet of 18 inch containment boom to contain the spilled crude oil. After it was discovered that the fire compromised tank number 2, a Lightering Plan was drafted which stated that there are four tanks all of which needed to be lightered. That plan was approved by the FOSC. Additionally, it is important to note that all response actions claimed exclude fire fighting activities. ES&H maintained emergency response activities through March 20, 2012.

The RP contracted ES&H to remove all of the remaining oil and oil sludge from the tanks and to render the tanks to a 'gas free' state as instructed by the FOSC. Mobilization of equipment and personnel started on March 24, 2012. Tank cleaning operations commenced on March 26, 2012.

On April 17, 2012, the UC determined that the cleanup was completed.<sup>2</sup> Demobilization of equipment and personnel was completed May 2, 2012.<sup>3</sup> ES&H had to store all the waste products at the Premier Industries Docks between May and September, 2012 due to the RP's failure to follow through with its agreement to identify a waste disposal facility. In September 2012, ES&H informed the RP that they were going to start the process to dispose of the waste because

<sup>1</sup> USCG POLREP One, CGMS DTG R180345Z MAR 12.

<sup>2</sup> Email from FOSCR to NPFC dated December 13, 2012.

<sup>3</sup> ES&H Invoice# 1-26641 and associated daily logs.

of their failures as long as the RP would sign the waste manifests.<sup>4</sup> All wash water generated during tank cleaning operations was transported to Oakmount Environmental and all sludge removed from tanks was transported to Newpark Environmental Services for disposal.

**The Claim:** On November 21, 2012, ES&H presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$625,290.84.<sup>5</sup>

On March 25, 2013, ES&H provided proof of a payment made by the RP in the amount of \$50,000<sup>6</sup>. On April 17, 2013, ES&H updated their claim sum certain to \$575,290.84.<sup>7</sup> On April 25, 2013, ES&H provided proof of an additional payment made by the RP in the amount of \$50,000<sup>8</sup>.

#### **APPLICABLE LAW:**

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. 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". 33 USC § 2701(31).

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party or guarantor. 33 USC § 2713(a).

If a claim is presented in accordance with subsection (a) of this section and the claim is not settled by any person by payment 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 guarantor or to present the claim to the Fund. 33 USC § 2713(c)(2).

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

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<sup>4</sup> Email from Ms. [REDACTED] providing explanation for extended waste storage to NPFC, dated March 11, 2013.

<sup>5</sup> NPFC Standard Claim Form dated November 19, 2012.

<sup>6</sup> Capital One Bank Money Transfer Report dated March 25, 2013.

<sup>7</sup> Letter from ES&H requesting new claim sum certain dated April 17, 2013.

<sup>8</sup> Letter from ES&H requesting new claim sum certain dated April 25, 2013.

33 U.S.C. §2713(d) provides that “If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.”

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.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, “a claimant must establish -

- (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 determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR 136.205 “the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan (NCP) or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC.” [Emphasis added].

### **DETERMINATION OF LOSS:**

#### ***A. Overview:***

1. Sector New Orleans, as the FOSC for this incident, determined that the actions undertaken by ES&H were directed by the FOSC and 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 to “navigable waters.”
3. The claim was properly presented to the responsible party before being presented to the Fund.
4. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed costs.
5. In accordance with 33 U.S.C. § 2712(h)(1), the claim was submitted within the six year period of limitations for removal costs.
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined what costs presented were for actions in accordance with the NCP and that the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

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

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all 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 that the majority of the costs incurred by the Claimant in this determination were reasonable and necessary to mitigate the effects of the incident. Upon review of the information provided by the Claimant, the NPFC has determined that the payable costs were billed in accordance with the rate schedule and/or contractual agreements in place at the time the services were rendered, unless otherwise indicated below, and were determined by the FOSC to be consistent with the NCP.

General Categories of denied costs:

1. Vendor invoice(s) do not show that a cost was incurred by ES&H;
2. ES&H billed more than the vendor rate plus contracted mark up or more than the supplied supporting documentation (daily log and/or job ticket) demonstrates;
3. ES&H incorrectly calculated mark-up or transferred wrong cost from vendor sales receipt to billing invoice(s);
4. ES&H charged daily tank cleaning rate but did not meet the agreement due to insufficient personnel utilized. The tank cleaning agreement states that ES&H will provide a certified crew (1 supervisor, 1 operator and 8 technicians); and
5. Repairs for damages to third party contractor equipment are not OPA compensable removal costs and are denied accordingly.

The NPFC will not itemize all the denied costs here in this Claim Summary Determination but rather will attach the spreadsheets created by the NPFC for each invoice where the Claimant can see each item billed, claimed, paid, denied and reason for denial. All denied costs fall within one of the five categories referenced above.

***OVERALL DENIED COSTS = \$47,544.96***

***C. Determined Amount:***

The NPFC hereby determines that the OSLTF will pay \$477,745.88 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #N12025-0001. 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 Claimants.

***AMOUNT: \$477,745.88***

Claim Supervisor:

Date of Supervisor's review: 4/30/13

Supervisor Action: *Approved*