

CLAIM SUMMARY / DETERMINATION

Claim Number:	S11010-0001
Claimant:	Ballard Diving & Salvage
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$165,443.09

I. INCIDENT:

On January 19, 2011, the United States Coast Guard (USCGG) received a report of sheening on the Columbia River near Camas, Washington. USCG personnel were dispatched to the scene to investigate. Upon arrival at the scene, the investigators found a visible heavy rainbow sheen that appeared to be coming from the submerged section in the center of the DAVY CROCKETT, a 431-foot Liberty Class Navy vessel that had been modified into a barge. River debris had accumulated alongside the vessel, which shifted its position, and its stern was sticking out into the River. The spill was contained with hard boom that was surrounding the vessel.¹

The USCG identified the responsible party (RP) to be Principle Recovery Systems, LLC (PRS).² On January 21, 2011, the USCG federal onscene coordinator (FOSC) issued the RP an administrative order notifying it of federal interest into the pollution incident.³ Mr. [REDACTED], a principal of PRS, was ordered to secure the vessel and remove the observable oil. In an effort to comply with the order he hired Ballard Diving and Salvage (Ballard) to conduct cleanup of the pollutants onboard the vessel.⁴ Ballard provided removal actions from January 21, 2011 through January 27, 2011.

On January 27, 2011, the USCG was notified of another sheening on the Columbia River at Mile Marker 102.6.⁵ Testing reflected that the sheen was from the DAVY CROCKETT. On this date the FOSC ordered the RP to remove all remaining oil on the vessel. When the RP did not comply with the order, the USCG federalized the response and the removal costs associated with the incident were then funded from the Oil Spill Liability Trust Fund (OSLTF or the Fund). All subsequent removal actions and the destruction of the DAVY CROCKETT were funded from the Fund.

II. CLAIMANT and CLAIM

Ballard Diving & Salvage (Ballard) is the Claimant. The RP signed a U.S. Open Form Salvage Agreement with Ballard Diving & Salvage on January 22, 2011.⁶

¹ The CG investigator stated that the discharge was a result of the owner cutting and scrapping the vessel while it was in the water which diminished the integrity of the vessel's ability to stay afloat.

² The principals of PRS were: [REDACTED]

³ The USCG opened the Fund on January 20, 2011 and contracted with Global Diving and Salvage on January 21, 2011, to conduct pollution and safety assessments on the vessel and presented its findings to the USCG.

⁴ See, USCG POLREP One.

⁵ See, USCG POLREP Two.

⁶ See, Open Form Salvage Agreement dated January 22, 2011 and signed by [REDACTED] of PRS as owner.

After being hired by the RP, Ballard deployed containment boom to prevent the discharge of oil from going further down river. Ballard deployed divers to remove the leaking oil from the vessel and to patch breaks in the vessel. Ballard performed the clean-up duties and hired subcontractors NRC Environmental Services, Inc.; JT Marine Inc.; and Northwest Maritime Consultants for assistance with the removal actions.

Pursuant to OPA requirements Ballard presented its claim for its removal costs to the RP, through [REDACTED] on January 28, 2011 for services provided from January 21, 2011 through January 27, 2011.⁷ Mr. [REDACTED] replied to Ballard on February 08, 2011 stating ... “we do not have the ability to pay all or part of the work performed” and added that he could “not speak for the other partners.”⁸

On August 12, 2011, Ballard presented a claim to the National Pollution Funds Center (NPFC) in the amount of \$165,443.09. This included \$128,628.02 for removal costs, \$24,276.84 for loss of profits, and \$12,538.20 for government revenues. After review the NPFC claims manager determined that the total costs presented, \$165,443.09, were for reimbursement of uncompensated removal costs.⁹ The NPFC subsequently notified the RP that it received the claim in the amount of \$165,443.09.

The claim submission consisted of the following:

- (1) Two invoices that describe their work as “containment services as required by the US Coast Guard Administrative Order.” Invoice #441, dated, January 27, 2011, covers the costs from January 21, 2011 to January 24, 2011;
- (2) Invoice #442, dated January 28, 2011, covers the costs for January 27, 2011.
- (3) Invoices for outside services and vendors hired for the containment: American Barricade (\$73.60); NRC Environmental Services (NRC) (\$19,902.54); JT Marine Incorporated (JT Marine) (\$47,446.70); and Northwest Maritime Consultants, LLC (NMC) (\$16,117.83).

III. APPLICABLE LAW

Under OPA 90, at 33 USC § 2702(a), each responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters is liable for for removal costs and damages. 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”.

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,

⁷ Electronic Mail from [REDACTED] to [REDACTED] re Davy Crockett – Administrative Order Response, dated January 28, 2011.

⁸ Electronic Mail from [REDACTED] to [REDACTED] re Invoicing for Cleanup, dated February 8, 2011.

⁹ See Ballard claim submission form dated July 28, 2011.

the costs to prevent, minimize, or mitigate oil pollution from an incident”. 33 USC § 2701 (31).

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.

Except as provided in 33 USC § 2713(b), claims for removal costs and damages shall be presented first to the responsible party. 33 USC § 2713(a). If the claim is not settled by any person by payment within 90 days 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).

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].

No claim may be presented for recovery of removal costs for an incident unless the claim is presented within six years after the date of completion of all removal actions for that incident. 33 USC § 2712(h)(1).

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 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].

IV. DETERMINATION OF LOSS

A. Overview:

1. NPFC has determined that the actions undertaken by the claimant and approved by the FOOSC are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 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).
4. In accordance with 33 CFR§ 136.105(e)(12), the claimant has certified that no suit has been filed in court for the uncompensated removal costs.
5. The claim was submitted within the six year period of limitations for claims. 33 U.S.C. § 2712(h)(1) and was properly presented to the responsible party before presentment to the Fund.
6. 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.

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 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 FOOSC, to be consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented and reasonable.

The NPFC has determined that the majority of costs incurred by the Claimant in this claim 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 costs were billed in accordance with the rate schedules and/or contracts/charter agreements in place at the time the services were rendered or were consistent with the rates charged to the USCG once the incident was federalized, unless otherwise indicated below, and were determined to be consistent with the NCP.

It is important to note that for any items billed that were not on the rate schedule for the vendor were then compared against the CG Basic Ordering Agreement (BOA) contract that the USCG used when the oil response action was federalized. The NPFC used this contract vehicle as comparison in order to make a reasonableness determination based on documented personnel, materials and equipment. Following is an itemization of costs the NPFC denied:

Ballard Diving – Invoices #441&442

Personnel Costs

For work performed on **Friday, January 21, 2011**, the Claimant billed \$840.00 eight hours of overtime, at the rate of \$105.00 per hour, for work performed by [REDACTED] and [REDACTED] as pile bucks. However, in a June 27, 2012 e-mail response from Ballard to the NPFC, [REDACTED] confirmed that [REDACTED] both worked from 7:00 am to 11:00 am. In accordance with the Claimant's rate schedule, the hours worked were during the timeframe in which their work should have been billed at the standard rate of \$77.00 per hour. As such, the NPFC will reimburse the Claimant at the standard rate in the total amount of \$616.00 which is four hours for each. The NPFC denies **\$224.00** in excessive charges on this date based on the hourly rate billed.

Vehicles/Equipment

On **January 21, 2011**, the Claimant requested reimbursement of **\$135.00** for 30 gallons of fuel at \$4.50 per gallon. The Claimant did not provide a receipt for the fuel costs, nor was the calculation for fuel costs delineated in the rate schedule; therefore, this charge is denied. The same applies to the Claimant's request for reimbursement of **\$112.50** in fuel costs on Saturday, **January 22, 2011**; **\$157.50** for 35 gallons of fuel on Sunday, **January 23, 2011**; **\$157.50** for 35 gallons of fuel on Monday, **January 24, 2011**; and **\$225.00** for 50 gallons of equipment fuel on **January 27, 2011**. The NPFC therefore denies **\$787.50** in fuel costs not properly documented or supported by the record.

The Claimant requested reimbursement for the rental of "em boat" for sixteen hours on **January 22, 2011**, at a rate of \$65.00 per hour, for a total requested amount of **\$1,040.00**. The Claimant provided the NPFC with a copy of a Bare Boat Charter Party agreement with [REDACTED] at \$57.00 per hour which would also include a 15% markup. [REDACTED] signed the charter party on January 24, 2011.¹⁰ The reimbursement for the boat rental on January 22, 2012 in the amount of **\$1,040.00** is denied because the charges were incurred prior to the execution of a charter agreement. The NPFC also denies **\$1,170.00** for the boat rental on **January 23, 2011** those charges were prior to the executed charter as well. The NPFC denies a total of **\$2,210.00** for the boat rental that occurred prior to the execution of the charter agreement.

Materials

The Claimant requested reimbursement of \$10.00 for the daily use of a multi-gas detector on **January 22, 2011**. The item was not found on either of the two rate schedules provided by the Claimant nor did the Claimant provide other supporting documentation to demonstrate this item was in their inventory. As such, the NPFC denies the \$10.00 charge due to lack of supporting cost documentation. The NPFC also denies the same charge of **\$10.00** on Sunday, **January 23, 2011** due to the lack of supporting cost documentation. NPFC denies a total of **\$20.00** for the multi-gas detector.

The following materials charged on **Monday, January 24, 2011** were not found on the rate schedules provided by the Claimant nor was any supporting cost documentation

¹⁰ Bare Boat Charter Party between [REDACTED] and Ballard Diving & Salvage, dated January 24, 2011.

provided to support the charges; therefore, the following costs are denied as not supported by the record.

Two rolls of salvage bags were billed at \$109.25 per roll for a total of **\$218.50**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

Twelve rubber gloves were billed at \$8.61 each for a total of **\$103.32**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

Eighteen tyvek suits were billed at \$12.59 each for a total of **\$226.62**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

One 20'x4" nylon strap was billed at the rate of \$100.11 each for a total of **\$100.11**. This item is not listed on the rate schedule nor was supporting documentation provided and as such, this cost is denied.

Twenty super sacks were billed at the rate of \$25.30 each for a total of **\$506.00**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

Eight absorbent nappies were billed at the rate of \$45.64 each for a total of **\$365.12**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

Four 55-gallon plastic barrels were billed at the rate of \$56.67 per barrel for a total of **\$226.68**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

The Claimant requested reimbursement of the following materials used on **Thursday, January 27, 2011**:

Twenty absorbent nappies were billed at the rate of \$45.64 each for a total of **\$912.80**. These items were not listed on the rate schedule nor was supporting documentation provided and as such, these costs are denied.

One roll of salvage bags was billed at \$109.25 per roll for a total of **\$109.25**. This item is not listed on the rate schedule nor was supporting documentation provided and as such, this cost is denied.

Finally, the Claimant requested reimbursement of Clark County sales tax for both January 24, 2011 and January 27, 2011 in the amounts of \$8,527.52 (Invoice #441) and \$4,010.68 (Invoice #442), respectively. The NPFC denies the sales tax on the basis that the Claimant has failed to articulate what tax rate was used and on which items the tax applies. Additionally, the Claimant has not shown it paid the taxes after collection. The total sales tax denied by the NPFC is **\$12,538.20**.

Subcontractors to Ballard

Vendor: NRC Environmental Services

All costs approved as presented.

Vendor: JT Marine Incorporated

JT Marine charged for the use of their Whirley Crane with an operator for five hours on January 24, 2011. The crane was billed to the Claimant at the rate of \$185.00 per hour, for a total amount of **\$925.00**. However, JT Marine did not have this listed on the contemporaneous daily worksheet and as such, this item is denied. The NPFC also denies **\$138.75** associated with the 15% markup applied to the charge of this item.

Total amount denied is **\$1,063.75**.

Vendor: NW Maritime Consultants, LLC

The Claimant requests reimbursement for [REDACTED] to “mobilize to site” for one hour and for his accommodations on January 22, 2011. NW Maritime billed the Claimant \$500.00 for mobilization; \$750.00 for “ROV with 900 kHz sonar;” and also billed \$108.00 for Mr. [REDACTED]’s accommodations. The “mobilize to site” task is not specified on the vendor’s rate schedule and is therefore denied. The billing rate for Mr. [REDACTED]’s accommodations is not on the rate schedule and no receipts have been provided to support the charge and as such, accommodation charges are denied.

On June 7, 2012, the NPFC contacted the Claimant for specific rates on mobilization, demobilization, and accommodations for this vendor.¹¹ The Claimant responded on June 27, 2012 stating that they “no longer have a relationship” with the vendor and “do not feel that the vendor would be cooperative in assisting” them to provide the rate information.¹² Based on the foregoing, the NPFC denies reimbursement for \$500.00 associated with mobilization and \$750.00 as the sonar is not listed on the rate schedule nor supported by alternate documentation. The NPFC also denies \$108.00 for accommodations due to the rate not being on the rate schedule and the lack of supporting cost documentation. The NPFC has denied \$203.70 in 15% markup associated with costs not approved. The total amount denied by the NPFC for January 22, 2011 is **\$1,561.70**.

On January 23, 2011, [REDACTED] again performed the task of mobilizing to the site and again billed the Claimant \$500.00. As noted above, this charge is denied as not supported by record or the rate schedule. The Claimant was again billed for [REDACTED]’s task of having the ROV with 900 kHz Sonar on stand-by. The vendor charged \$250.00 for the stand by rate of one sonar on site. This item is not on the rate schedule and no supporting documentation has been provided to support the charge and is denied. The NPFC denied a total **\$862.50** on this date which includes denial of part of the 15% markup associated with the denied charges.

¹¹ Electronic Mail from [REDACTED] to [REDACTED] re NPFC Claim Number S11010-0001, dated June 7, 2012.

¹² Electronic Mail from [REDACTED] to [REDACTED] re NPFC Claim Number S11010-0001, dated June 27, 2012.

On January 24, 2011, the charge for [REDACTED]'s "decontaminate gear" in the amount of \$250.00 is denied because the charge was not on their rate schedule nor was alternative supporting documentation provided. The NPFC denies a total of **\$287.50** on this day which includes denial of part of the 15% markup associated with the denied costs.

On January 27, 2011, the charge for [REDACTED]'s tasks to "mobilize to site" and "demobilize from site" are denied as these charges are not on the rate schedule nor supported by alternative documentation. Each task was billed at \$500.00 each. The NPFC denied a total of **\$1,150.00** on this day which includes denial of part of the 15% markup associated with denied costs.

The NPFC has denied a total of **\$23,473.55** which includes the denial of \$.30 which is not supported by the invoicing based on the Claimant's sum certain.

C. SUMMARY

All costs determined payable included in this determination have been reviewed and determined to be compensable as presented and in accordance with 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136.203 and 136.205. The costs determined to be payable are for uncompensated removal costs that are determined to be consistent with the National Contingency Plan.

The NPFC hereby determines that the NPFC offers, and the OSLTF is available to pay, **\$141,969.54** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # S11010-0001.

AMOUNT: \$141,969.54

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *2/12/13*

Supervisor Action: *Approved*