

CLAIM SUMMARY / DETERMINATION

Claim Number:	913086-0002
Claimant:	American Pollution Control Corp
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$227,224.00

FACTS:

Oil Spill Incident:

The incident occurred on or about 3 January 2013.¹ On January 9, 2013, the National Response Center (NRC) received a report of a spill of material coming from a ruptured hose and the material appeared to be crude oil.² The incident location was reported to be the north end of the Bayou Sorrell oil field near ORB Exploration.

On January 9, 2013, Marine Safety Unit Baton Rouge received the initial report of pollution via the NRC. Upon investigation, a discharge of an unknown amount of crude oil from a ruptured marine transportation related buried pipeline owned by ORB Exploration was discovered in Bayou Sorrel, a navigable waterway of the US, causing a sheen on the seasonal flood waters.³

The USCG determined that ORB Exploration was the Responsible Party (RP) for this incident. On January 14, 2013, MSU Baton Rouge issued a Notice of Federal Interest (NOFI) to ORB/RP.⁴ On October 23, 2013, Captain [REDACTED] issued an Administrative Order that stated that the discharge was coming from a transfer line at the ORB Exploration Frog Lake Oil Field CF-1 production barge to the low water load out facility. The Order advised the RP that the facility posed an imminent and substantial threat to the environment and for those reasons, the RP was ordered to cease all over the water oil transfer activities until the following actions are completed:

- (1) Hydrostatically test the low water load out transfer line using a third party contractor and the RP must contact MSU Baton Rouge 4 hours prior to beginning the test and provide the name of the third party company;
- (2) Perform full decontamination of the CF-1 production barge with final inspection by Coast Guard personnel;
- (3) Make amendments to the facility's Operations Manual that details a process for clearing all cargo from the transfer line between the CF-1 production barge to the low water load out facility each time the line is used to handle, load, or unload oil or hazardous material.⁵

¹ See email dated September 18, 2013 between USCG and NPFC Claims Division.

² See NRC Report # 1035166.

³ See USCG MISLE Case # 624873; Activity # 4516339.

⁴ Notice of Federal Interest dated January 14, 2013.

⁵ Administrative Order Number 14-001

The Claim & Claimant:

The Claimant is American Pollution Control Corporation (AMPOL), the initial oil spill response organization for this incident (OSRO). This claim was presented to the Oil Spill Liability Trust Fund (OSLTF) via the National Pollution Funds Center (NPFC) on January 10, 2014 in the initial amount of \$290,350.00 for uncompensated removal costs.⁶ On February 3, 2014, the NPFC contacted the Claimant via email advising that after a review of the invoices and daily supporting documentation, it appeared that the sum certain was incorrect. The Claimant reviewed documentation provided by the NPFC and on February 7, 2014, the Claimant amended their sum certain to \$222,124.00. The Claimant made a final amendment to their sum certain on April 2, 2014 to \$227,224.00.

The Responsible Party and response to NPFC notification of claim:

As noted above ORB Exploration has been identified as the Responsible Party for the incident as the owner/operator of the Frog Lake Oil Field.⁷ The NPFC sent ORB Exploration an RP Notification letter dated January 14, 2014, advising them that a claim had been presented to the NPFC from AMPOL in the amount of \$290,350.00.

The RP responded to the NPFC's notification via a letter dated January 23, 2014. The RP acknowledged the NPFC claim history associated with this incident and a previous claim that had been submitted to the NPFC by AMPOL and identified as claim # 913086-0001 in the amount of \$1,567,398.09. That claim consisted of AMPOL invoice numbers 14029, 14074, and 14114. The RP further acknowledged that the first claim filed by AMPOL was for services performed in conjunction with the cleanup of crude oil that had discharged from a flow line connecting a production facility, owned by ORB, to a low water barge.

The RP further states that on October 14, 2013, they made payment to AMPOL on that first claim via check #7304 in the amount of \$1,567,398.09 and AMPOL withdrew that claim from the Fund because it had been settled in full and the claim was closed. The RP states that on January 14, 2014, it received an email from the NPFC notifying it of the second claim submission in the amount of \$290,350.00 which consisted of AMPOL invoice # 14226.

The RP states it disputes this second claim submission for two reasons. First, it disputes the portion of the invoice described as "Balance of 18" Containment Boom without the 30 day rental for the duration of job in the amount of \$234,700.00." The RP asserts that daily reports conducted by Clean Harbors, the Oil Spill Response Organization (OSRO) that was on scene and who replaced AMPOL as the primary cleanup contractor for this incident, revealed that AMPOL's containment boom was removed from the incident location over the course of several weeks beginning on March 1, 2013 and was completed on March 19, 2013. A written statement from Clean Harbors to ORB (undated) was provided at ORB's request for confirmation of the timeframe AMPOL containment boom was removed from the site.

⁶ See NPFC Optional OSLTF Claim Form dated December 26, 2013.

⁷ See Notice of Federal Interest dated January 14, 2013.

Second, the RP disputes the “Balance of sorbent pads without Discount for duration of job - \$55,650.00.” The RP states it reviewed all of the AMPOL invoices and has confirmed that a total of 967 bales of pads were invoiced to ORB from January 16, 2013 through February 26, 2013. The RP states that the total amount of the pads invoiced was \$46,416.00 and that amount was paid to AMPOL as part of the \$1,567,398.09 check paid on October 14, 2013. The RP believes the costs claimed constitute ‘double billing’ for a service provided only once and that its costs have been paid in full.

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 removal costs and damages 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).

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].

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].

DETERMINATION OF LOSS:

A. Overview:

1. The NPFC determines that the removal actions undertaken by the claimant 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 a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23) to navigable waters;
3. The claim was presented to the responsible party before being presented to the Fund. 33 USC § 2713(a); 33 CFR 136.103(a);
4. In accordance with 33 USC § 2713(b)(2) and 33 CFR 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed costs. The claimant filed a suit for \$1,857,748.00;⁸ the suit was dismissed without prejudice on August 30, 2013;
5. The claim was submitted within the six year period of limitations for claims. 33 U.S.C. § 2712(h)(1);
6. The NPFC claims manager has thoroughly reviewed all documentation submitted with the claim and determined what costs presented were for actions in accordance with the NCP and the costs for these actions were reasonable and allowable under OPA and 33 CFR 136.205.

B. Analysis:

1. Background

Prior to adjudicating the removal costs, the claims manager reviewed the entire administrative record, which included the correspondence between AMPOL and ORB representatives, the litigation case file, the January 23, 2014 letter from the RP’s attorney, and AMPOL’s first claim to the NPFC in 2013 (913086-0001) in the amount of

⁸ American Pollution Control Corporation v. ORB Exploration, LLC, 15th Judicial District Court, Lafayette Parish, LA,, Docket Number 20132631-F

\$1,567,398.09. As explained above this claim was withdrawn by AMPOL when the RP paid the claim on October 14, 2013.

AMPOL was hired by ORB under the terms of a previously executed Master Service Agreement (MSA) in March 2012.⁹ The AMPOL rate schedule was part of that agreement. The MSA was pro-actively initiated by ORB and on January 15, 2013, AMPOL was hired to respond to the incident.¹⁰ AMPOL responded with personnel, materials and equipment.

During the early removal actions conducted by AMPOL but before AMPOL forwarded its first invoice to the RP, Delray Lemaire (ORB operations manager) asked [REDACTED] (AMPOL account manager) if AMPOL would discount certain pricing on removal costs.¹¹ [REDACTED], President and CEO of AMPOL, agreed that if ORB paid its invoices within 30 days, he would discount the daily rates on boom and sorbent pads. AMPOL agreed to charge ORB \$48 per sorbent pad (vice the \$ 70 provided in the rate schedule) and later agreed to charge the boom at the rate schedule price of \$1.50 per foot but applied an adjustment to the amount of boom charged in the month of February. Invoices #14074, 14114, 13978 and 14029 reflected the discounted rates.

When ORB did not pay the invoices within the 30-day agreed upon time frame, Mr. [REDACTED] met with Mr. [REDACTED] to discuss payment.¹² At that time Mr. [REDACTED] declined AMPOL's offer of rate reduction and requested that AMPOL use ORB's suggested pricing (which, according to Mr. [REDACTED], was AMPOL's cost). Mr. [REDACTED] did not accept Mr. [REDACTED] offer and rescinded the agreement for the discounted rate.¹³ When AMPOL concluded its removal actions ORB made an additional offer, which was declined by AMPOL.¹⁴

On May 21, 2013, when ORB had not paid AMPOL's invoices within the 45-day provision in the MSA, AMPOL filed suit against ORB seeking \$1,857,748.00¹⁵, in removal costs.¹⁶ This amount reflected the rates provided in the MSA, rather than the discounted rates agreed upon during the first days of the response. On August 30, 2013, the case was dismissed without prejudice; on October 14, 2013, ORB paid AMPOL \$1,567,398.09. The unpaid amount, \$290,350.00, was submitted to the Fund for reimbursement.

2. Claim Number 913086-0002

As noted above, AMPOL filed a claim against the Fund for \$290,350.00 for uncompensated removal costs associated with the incident (Invoice #14226). This included \$141,750 for containment boom rates for March 2013 and the difference between the discounted sorbent pads and containment boom footage and the rates charged in the MSA for invoices #14074, 14114, 13978, and 14029. The claims manager noted several mathematical errors and AMPOL reduced its sum certain to \$227,224.00.

⁹ See MSA dated March 2, 2012 and signed by ORB Exploration on March 20, 2013.

¹⁰ See Letter from AMPOL to NPFC dated September 4, 2013 for claim # 913086-0001.

¹¹ See Affidavit executed by [REDACTED] dated April 22, 2014.

¹² Id.

¹³ See [REDACTED] letter to [REDACTED] dated March 13, 2013.

¹⁴ See footnote 11 supra.

¹⁵ The \$1,857,748.00 included Invoice #14226 in the amount of \$290,350.

¹⁶ See footnote 8 supra.

The 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 (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 whether the costs were adequately documented and reasonable.

As discussed above, the initial claim (913086-0001) presented to the Fund was in the amount of \$1,567,398.09 for costs associated with this incident.¹⁷ It included three invoices: 14029, 14114, and 14074 and they covered work performed from January 15, 2013 through February 28, 2013 and were paid in full after the NPFC made notification that AMPOL had presented its claim to the Fund. The claims manager reviewed these invoices and circumstances surrounding the first claim in order to have a clear picture of the uncompensated removal costs associated with the instant claim for AMPOL invoice # 14226 and to ensure that any claimed costs in the second claim did not include removal costs that had been reimbursed in the first claim.

The claims manager determined that invoice # 14226 was not submitted to the Fund with the first claim. Invoice # 14226 is for costs associated with 18” containment boom rental for March 2013 not previously billed or paid, and for the adjustment on the discounted rates given on the sorbent pads rental rates given in the previous invoices. The invoice also applied a credit for boom on invoice # 14074 for February 5, 2013 through February 24, 2013 and February 26th and February 27th.

Upon adjudication of the costs presented in this claim, the NPFC created a spread sheet of costs that delineated the 4 invoices that had been previously paid by the RP.¹⁸ These 4 invoices are identified as 13978, 14029, 14074, 14114, and the spreadsheet notes the amount paid by the RP for each invoice and the delta between the discounted rates and the MSA rates on each invoice. The delta between the discounted and MSA rates are costs determined to be uncompensated removal costs because they had not been previously billed to the RP, have not been paid by the responsible party and are not duplicative.

The claim also includes \$141,750.00 in costs associated with containment boom rental for March 2013. Claimant presented its contemporaneous daily field logs to the NPFC for each day they were on scene from January 15, 2013 through February 27, 2013. AMPOL demobilized from the site on March 5, 2013 as confirmed to the NPFC via an email from Marine Safety Technician First Class (MST1) Gregory Bailey on September 18, 2013.¹⁹

While AMPOL demobilized from the site on March 5, 2013, information in the record reflects that the AMPOL boom was primary containment put out at the beginning of the response and could not be removed because removal would allow an additional discharge of

¹⁷ See NPFC claim # 913086-0001 dated September 4, 2013.

¹⁸ The spread sheet is attached to this determination.

¹⁹ MST 1 Gregory Bailey was a member of the USCG pollution response team on location and who handled the incident response.

oil.²⁰ On April 1, 2013, [REDACTED] notified [REDACTED] to pick up the boom; the boom was picked up on April 2, 2013.²¹ Additionally, AMPOL invoice #14396 (dated April 30, 2013) reflects that it covered AMPOL services provided to ORB on April 2, 2013. This invoice in the amount of \$1,945.00 was paid by ORB via check # 1-6573 on July 1, 2013. Thus, there is evidence in the record that AMPOL was not in error when billing for containment boom rental for the month of March 2013.

C. Summary and Determined Amount:

This claim is for removal costs in Invoice #14226 for containment boom rental for March 2013 and for the delta between discounted rates for sorbent pads and containment boom rental credits reflected in four invoices. The administrative record establishes that the AMPOL containment boom was in place in March 2013 (\$141,750). It also establishes that the agreement between AMPOL and ORB for discounted sorbent pads and containment boom rental was not accepted by ORB and was rescinded by AMPOL; therefore, the delta between the reduced rates and the MSA rate schedule (\$85,474) are uncompensated removal costs and are not duplicative billing.

The NPFC hereby determines that the NPFC will offer \$227,224.00 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 913086-0002. All costs are for charges incurred 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

AMOUNT: \$227,224.00

Claim Supervisor: [REDACTED]

Date of Supervisor's review: 5/13/14

Supervisor Action: *Approved*

Supervisor's Comments:

²⁰ See [REDACTED], AMPOL project manager, note dated February 5, 2014.

²¹ See [REDACTED], note dated February 5, 2014.