

CLAIM SUMMARY / DETERMINATION

Claim Number:	M10016-0001
Claimant:	Resolve Salvage & Fire (Americas), Inc.
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$142,478.73

FACTS:

Incident:

On March 28, 2010 the M/V KALEBAH (KALEBAH or the vessel), carrying an estimated 3,520 barrels of bunker fuel, suffered engine failure and given its location in the United States exclusive economic zone (EEZ) and potential to drift into the Florida Keys National Sanctuary, Coast Guard Sector Key West, utilizing its authority as a federal onscene coordinator (FOSC), determined that the vessel posed a substantial threat of discharge of oil into navigable waters, adjoining shoreline or the waters of the EEZ. On March 29, 2010, Sector Key West issued a Notice of Federal Interest (NOFI) to the vessel owner. Also, the Captain of the Port (COTP), Sector Key West, issued Administrative Order (03-29-10) as authorized by Section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. § 1321) and as amended by the Oil Pollution Act of 1990 (OPA), to mitigate or prevent a substantial threat of discharge into or on navigable waters of the US.¹ The administrative order directed the Responsible Party (RP) to submit a written tow plan identifying an available tug of a size suitable to achieve and maintain control of the vessel until the cause of the casualty was determined and repairs made.

Sector Key West diverted the Coast Guard Cutter (CGC) DECISIVE to place the vessel KALEBAH under its tow in order to prevent grounding and a substantial threat of a discharge of oil.² On March 29, 2010 the CGC DECISIVE took the KALEBAH under tow approximately 13 nautical miles south of Marathon, Florida, in order to prevent the vessel from grounding in area reefs. At this time, Sector Miami assumed tactical control (TACON) of the CGC DECISIVE and began to make arrangements with the vessel's agent to relieve the CGC DECISIVE of the tow.³

Managers of the KALEBAH contacted Resolve Salvage and Fire (Resolve) for emergency towing assistance and on March 30, 2010, the Bahamian tug, SVITZER GRAND BAHAMA, relieved the CGC DECISIVE and towed the KALEBAH out of U.S. waters and into Bahamian waters.⁴ The vessel interests initially intended to tow the vessel into Freeport, Bahamas but subsequently determined to tow the vessel into Miami for repairs. The Captain of the Port (COTP), Sector Miami, issued Captain of the Port Order # 3704822 dated March 29, 2010,

¹ See USCG Admin Order (03-29-10).

² See Hudson Marine Management Vessel Propulsion Loss Response Report dated March 29, 2010.

³ See USCG SITREP One for FPN # M10016 dated March 30, 2010.

⁴ See Resolve Marine Preliminary DEAD SHIP TOW PLAN – Rev 1 dated April 1, 2010.

which outlined the conditions of entry into the Port of Miami, if the vessel interests chose Miami.⁵

The COTP Order required that prior to entry a dead ship tow plan must be submitted. The plan should include vessel equipment status, the number of tugs, horsepower, a towing diagram, vessel traffic considerations and Biscayne Bay Pilot recommendations. Additionally, prior to reentering U.S. waters the vessel interests were required to meet the OPA 90 financial responsibility requirements. The vessel was towed from a location off Freeport, Bahamas, reentered U.S. waters and docked in Miami on April 1, 2013.

Resolve arranged with Moran Towing to tow the KALEBAH from the tug SVITZER at its location at the Port of Miami seabuoy, to the Port of Miami. Pursuant to the COTP order Biscayne Bay Pilots required four tugs for this movement: a lead and a tail tug, and two assist tugs. Moran provided the tugs, which took the vessel to berth 129 in the Port of Miami. The vessel arrived on April 1, 2013.

Because both Sector Key West and Sector Miami were involved in these operations, each opened Federal Project Numbers (FPNs). Sector Key West opened FPN M10015; Sector Miami opened FPN M10016.⁶ Coast Guard cutter and personnel costs associated with the removal actions to prevent, mitigate or minimize the substantial threat of a discharge of oil were paid from the Fund under these FPNs.

Responsible Party:

The owners of the M/V KALEBAH are Wonderland International Corporation/ Technical Ship Support BV.⁷ KALEBAH's manager has been identified as Magdiel Ships Company Limited.⁸ The vessel's guarantor was listed as The UK P&I Club.⁹ KALEBAH's home port and flag was St. John's, Antigua & Barbuda. Hudson Marine Management Services (HMMS) served as the vessel's Qualified Individual (QI) who notified the National Response Center (NRC) via report #935472 and Florida Department of Environmental Protection (case # 2008). HMMS contacted Resolve Salvage & Fire who mobilized the SVITZER GRAND BAMAHA to relieve the CGC DECISIVE near Miami anchorage, per the FOOSC's order and direction.

Claim and Claimant:

On April 3, 2013, Resolve submitted its removal cost claim to the National Pollution Funds Center (NPFC) seeking reimbursement from the Oil Spill Liability Trust Fund (Fund) for its alleged uncompensated removal costs in the amount of \$142,478.73 for towing services associated with relieving the CGC DECISIVE and getting the vessel safely to a berth at the Port of Miami.

After KALEBAH's engine was repaired, it departed Miami without paying Resolve for its services. Resolve's attempts to collect its costs from the M/V KALEBAH's owners were

⁵ See COTP Order # 3704822 dated March 29, 2010.

⁶ See USCG MISLE Case # 494881 dated March 28, 2010.

⁷ See POLREP #1 & 3

⁸ See tow contract between Resolve Salvage & Fire in administrative record

⁹ Ibid

ignored. Because the M/V KALEBAH's owner was heavily in debt to others, the vessel was arrested in Panama and eventually sold at auction. Resolve was unable to collect its costs after the sale of the M/V KALEBAH.

APPLICABLE LAW:

Under OPA 90, at 33 U.S.C. § 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 U.S.C. § 2702(b)(1)(B).

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 U.S.C. § 2701(31).

"Oil" is defined in relevant part, at 33 U.S.C. § 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".

Guarantor" means "any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act." 33 U.S.C. § 2701(13).

Subject to certain defenses and subject to paragraph (2), a claim for which liability may be established under section 2702 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains.

33 U.S.C. § 2716(f)(1)(A)-(C).

A claim may be asserted pursuant to paragraph (1) directly against a guarantor providing evidence of financial responsibility under subsection (c)(1) of this section only if

- (A) the responsible party for whom evidence of financial responsibility has been provided has denied or failed to pay a claim under this Act on the basis of being insolvent, as defined in section 101(32) of Title 11, and applying general accepted accounting methods; or
- (B) the claim is asserted by the United States for removal costs and damages or for compensation paid by the Fund under this Act, including costs incurred by the Fund for processing compensation claims.

33 U.S.C. § 2716(f)(2)(A) and (C).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 U.S.C. §§ 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.

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].

Under 33 CFR 136.105(e)(8), the claim must include the reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with preparation of the claim.

A. Overview:

1. FOSC coordination has been established for costs associated with removal actions only via Sector Key West Admin Order (03-29-10) and Sector Miami Admin Order # 494881.¹⁰ 33 U.S.C. § 1321(c);
2. The OPA incident involved a substantial threat of discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. The claim was submitted within the six year period of limitations for removal claims to the Fund. 33 U.S.C. § 2712(h)(1);
4. A Responsible Party for the incident was identified but failed to pay the claim on the basis of being insolvent. 33 U.S.C. § 2701(32).
5. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs;

B. Analysis:

¹⁰ See Sector Key West Admin Order (03-29-10) and Sector Miami Admin Order # 494881 dated March 30, 2010.

The claimant seeks reimbursement of its claimed removal costs: costs associated with the SVITZER tug that relieved the CGC DECISIVE, the costs of towing the vessel from a location in Freeport, Bahamas, to the Port of Miami, harbor assist tugs, costs of acquiring OPA-required financial responsibility and repairs to deficient running lights on the vessel.

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 National Contingency Plan (NCP) or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The record supports the costs of the SVITZER tug that relieved the CGC DECISIVE and towed the vessel out of U.S. waters because that action mitigated the threat of a discharge of oil. However, the costs of towing the vessel from a point near Freeport, Bahamas back to U.S. waters and to the Port of Miami for the purpose of engine repairs, costs of harbor assist tugs, the costs of acquiring required financial responsibility were costs associated with the conditions of reentry and to safely navigate the vessel into the Port of Miami pursuant to the COTP Order and are not reimbursable from the Fund. These determinations are described more fully below.

On March 28, 2010, when the KALEBAH experienced an engine failure, was disabled and adrift Sector Key West FOSC determined that the vessel posed a substantial threat of a discharge of oil and he issued Admin Order (03-29-10). This order directed agents of the KALEBAH to submit a written tow plan which would identify an available tug of a size suitable to achieve and maintain control of the KALEBAH until repairs could be made. At the same time the FOSC directed the United States Coast Guard Cutter (USCGC) KEY BISCAYNE and the United States Coast Guard Cutter (USCGC) DECISIVE to take immediate action to reduce the substantial threat of a discharge by providing assistance to the KALEBAH, by taking it under tow.¹¹

This Order's purpose was to to prevent a substantial threat of a discharge of oil into US waters; thus, the costs associated with the hiring of Resolve Marine for emergency towing in order to relieve the CGC DECISIVE were removal costs because towing the KALEBAH out of U.S. waters to Freeport, Bahamas, prevented, minimized and mitigated the substantial threat of a discharge of oil to U.S. waters. Therefore, Resolve's costs in the amount of \$59,500.00 are determined to be OPA compensable removal costs as ordered by the FOSC.

Certain ancillary costs incurred and associated with Freeport Tug & Towing, are determined to be OPA compensable removal costs because the costs are associated with the Tug SVITZER GRAND BAHAMA that relieved the USCGC DECISIVE as ordered by Captain [REDACTED] in accordance with Admin Order # 494881. The total approved costs for Freeport Tug & Towing are \$13,416.23. However, the NPFC denies a total of \$3,473.50 in Freeport Tug & Towing costs because they are associated with the premium insurance payment for the

¹¹ Ibid

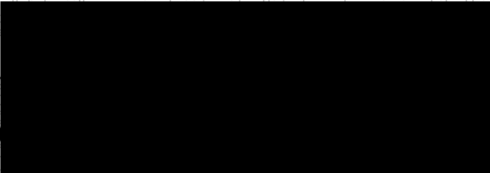
Certificate of Financial Responsibility (COFR) application (\$2,750.00) and the 25% markup on the insurance premium charge (\$687.50). These are not OPA-compensable removal costs.

The costs incurred by Moran Towing for three harbor tugs (\$63,000.00) are not reimbursable from the Fund because these costs were not associated with a substantial threat of discharge but were incurred pursuant to the COTP order providing the conditions of reentry into U.S. waters and the Port of Miami from Freeport, Bahamas.

Based on the foregoing, the NPFC determines that \$72,916.23 is reimbursable from the OSLTF as uncompensated removal costs associated with removal actions taken to prevent, minimize or mitigate the substantial threat of a discharge of oil into US waters as determined by the FOSC and pursuant to Admin Order (03-29-10) and Admin Order # 494881.

C. Determined Amount: \$72,916.23

The NPFC hereby determines that it will offer to pay from the Fund \$72,916.23 as full compensation for the removal costs incurred by the Claimant and submitted to the NPFC under claim #M10016-0001. These costs are for charges paid for or 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.

Claim Supervisor: 

Date of Supervisor's review: *12/19/13*

Supervisor Action: *Approved*

Supervisor's Comments: