

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	916044-0002
<b>Claimant:</b>	Clean Gulf Associates
<b>Type of Claimant:</b>	Corporate (US)
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$9,499.31

### **FACTS:**

**Oil Spill Incident:** On June 28, 2015, at approximately 0730, multiple leaks were found in a 4-inch flow line connected to the Dune Operating Company's (Dune) South Flank Platform, located in Garden Island Bay, Venice, LA. Oil was discovered in the hyacinth<sup>1</sup> adjacent to the South Flank Platform.

All lines in the area were shut in and in the days following the investigation, it was confirmed that the source of the leak was the 4-inch fluid transfer line which runs from the South Flank Platform to the nearby Tank Battery 49 Facility.<sup>2</sup> It was estimated that approximately 80 barrels of oil was released<sup>3</sup> into the South Pass, a tributary to the Gulf of Mexico and a navigable waterway of the United States, as a result of the incident.

The initial source of the leak was believed to be an abandoned 8-inch gas suction line that runs below the South Flank Platform. The line was shut in and divers engaged to clamp the line. After successfully clamping the 8-inch gas suction line, the oil accumulations in the hyacinth were discovered to be increasing. Divers were engaged once again and the actual source of the leak was discovered to be a hole in a 4-inch total fluid transfer line connecting the South Flank Facility and the nearby Tank Battery 49 Facility. The line was repaired by way of a clamp and pressured up for testing. Divers found that approximately 1,000 feet down the line, gas bubbles were discovered emanating from a hole in the same 4-inch fluid line. A clamp was placed over the second hole. The line was then in the process of being pressure tested again when a third hole was discovered in the line, approximately 1,000 feet from the second hole. Two additional holes were discovered in close proximity of the third hole.<sup>4</sup> At this point, the decision was made to permanently abandon the line. It is believed that the 4-inch fluid transfer line leaked for approximately 26 hours before the flow was stopped.<sup>5</sup>

### ***Description of Removal Activities for this incident:*** .

On July 1, 2015, the claimant, Clean Gulf Associates Inc., (CGA) was notified by Witt-O'Brien's of the spill and Witt-O'Brien hired CGA as the Spill Management team (SMT) for Dune Energy, to respond and assist in the clean up efforts. That same day, Clean Gulf

<sup>1</sup> Hyacinth, also commonly referred to as a type of water lily, grows to about 3 feet in height and is characterized by its thick, heavily branched root system. A majority of the spill was contained underneath the hyacinth, as it was trapped in the plant's intricate root system.

<sup>2</sup> BC Johnson Associates, Initial Report, (Report 1), Executive Summary, p. LAIN 000005.

<sup>3</sup> BC Johnson Associates, Initial Report, p. LAIN 000010.

<sup>4</sup> BC Johnson Associates, Initial Report, p. LAIN 000008.

<sup>5</sup> BC Johnson Associates, Initial Report, p. LAIN 000009.

Associates Services (CGAS), a CGA contractor, responded for Dune Operating, Co., with a 56' shallow water skimmer (CGA-72) and crew that included subcontracted personnel from AMPOL, in order to mitigate the effects of the spill.<sup>6</sup> CGAS worked under the direction of Dune Energy, Witt O' Briens, (Dune's Spill Management Team (SMT) and the United States Coast Guard Federal On Scene Coordinator's Representative (FOSCR). CGAS provided response services from July 1, 2015 through July 2, 2015.

Federal on Scene Coordination (FOSC) was made with Coast Guard Sector New Orleans. The Sector's FOSCR responded to conduct oversight of the pollution removal activities.<sup>7</sup> This spill was reported to the National Response Center and was assigned incident number 1121229

**Responsible Party:** The Responsible Party (RP) is Dune Operating Company (Dune), located in Venice, LA, Garden Island Bay. Shortly after this oil spill incident, the RP filed for Chapter 11 Bankruptcy.<sup>8</sup> RP Dune sold all of its assets to Trimont, including the Garden Island Bay field. The Responsible Parties (RP) are Dune Operating Company (Dune) and Trimont Energy (Trimont) – South Flank Platform, located in Venice, LA, Garden Island Bay. At the time of this oil spill incident the RP, Dune, was fully engaged in filing Chapter 11 Bankruptcy. Dune sold all of its assets to Trimont, including the Garden Island Bay field.

The NPFC issued an RP Notification on May 9, 2017 to Mr. [REDACTED] as the Bankruptcy Trustee for the Dune Energy Liquidating Plan Trust.<sup>9</sup> On May 22, 2017, the NPFC received an email from Mr. [REDACTED] stating that Dune confirmed a Chapter 11 Bankruptcy Plan in September 2015 and he further stated that he has no claims filed under the Bankruptcy for the Coast Guard.<sup>10</sup> Upon receipt of the email, [REDACTED], NPFC, replied to Mr. [REDACTED] the same date and explained that the NPFC was seeking information on whether Clean Gulf Associates was a listed creditor in the Dune Bankruptcy and not in fact the Coast Guard.<sup>11</sup> Later in the day on May 22, 2017, the NPFC received a three (3) page letter from Mr. [REDACTED] of Condon Tobin Sladek Thronton. The letter states that they represent Mr. [REDACTED], Plan Trustee of the Dune Liquidating Plan Trust and Authorized Representative of Reorganized debtors. The letter goes on to say that they have searched the records of the Debtors and have not found anything that indicated Clean Gulf Associates performed any services for Dune in the time frame referenced.

The letter goes on to inform the NPFC that any claim from Clean Gulf Associates is barred by the confirmed plan of reorganization. The letter confirms that Clean Gulf Associates has not filed a request for an Administrative Claim as required by the Plan and is now barred from doing so. Finally, the letter concludes that even if Clean Gulf Associates had performed the services and had properly filed an Administrative Claim, that particular liability was assumed by a third party, Trimont Energy (Now) LLC, which purchased the field where the spill occurred. Finally, the letter closes advising that based on the Purchase Sale Agreement between Dune Energy and Trimont Energy (Now), Dune satisfied all of their obligations with respect to the oil spill and any further costs or expenses related to the oil spill are the responsibility of Trimont under the Court approved Purchase Sale Agreement dated June 30, 2015.<sup>12</sup>

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<sup>6</sup> See Claimant's Narrative Statement enclosed with claim submission.

<sup>7</sup> See USCG Sector New Orleans Case Report # 717260.

<sup>8</sup> See letter to Oil Mop LLC from Anderson Toblin PLLC dated January 6, 2017. See claim # 915081-0003.

<sup>9</sup> See RP Notification Letter from NPFC to [REDACTED], dated May 9, 2017.

<sup>10</sup> See May 22, 2017 Email from Mr. [REDACTED] to Ms. [REDACTED], NPFC.

<sup>11</sup> See May 22, 2017 email from [REDACTED], NPFC to Mr. [REDACTED].

<sup>12</sup> See May 22, 2017 letter from Mr. [REDACTED] to [REDACTED], NPFC regarding Dune Bankruptcy.

Upon receipt of this information from the Bankruptcy Trustee's Counsel, the NPFC sent an email to Mr. [REDACTED] of Clean Gulf Associates and advised that proper presentment of costs needed to be made to Trimont Energy (Now) LLC. The NPFC provided the contact information by which they could make proper presentment.<sup>13</sup> On July 13, 2017, Mr. [REDACTED] sent [REDACTED], NPFC an email and confirmation that Trimont Energy (Now) LLC, had received their invoices constituting proper presentment on may 27, 2017.<sup>14</sup>

***The Claim and Claimant:*** On May 5, 2017, Clean Gulf Associates, Inc. (CGA) submitted a pollution removal cost claim to the NPFC for reimbursement of its uncompensated pollution removal costs totaling, \$9,499.31.<sup>15</sup>

On July 27, 2015, Claimant invoiced Dune Operating Co., via its Spill Management Team (SMT) Witt-O'Brien's, for the unpaid balance on its invoices and received no reply. August 2015, the Claimant received notice that [REDACTED] acquired some of Dune Operating properties and that a separate company bought the water properties.<sup>16</sup> In September 2015, the Claimant reached out to Witt-O'Brien's concerning the balance that remained outstanding on its invoices. Witt-O'Brien informed the Claimant that someone from the legal department of Whitney Oil and Gas or Dune's insurance company would be contacting the Claimant.<sup>17</sup> On September 21, 2015, the Claimant sent an email to a Mr. [REDACTED] of Dune Energy requesting a point of contact to receive payment for the invoices that were generated from the Dune Spill.<sup>18</sup> Finally, on October 21, 2015, the Claimant terminated Dune Operating Company's membership with Clean Gulf Associates, Inc. for oil spill response coverage, due to non-payment.<sup>19</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

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<sup>13</sup> See May 23, 2017, email from [REDACTED], NPFC to Mr. [REDACTED] regarding presentment.

<sup>14</sup> See July 13, 2017 email from Mr. [REDACTED] to [REDACTED], NPFC regarding presentment to Trimont.

<sup>15</sup> See Optional OSLTF Claim Form from CGA to the NPFC, dated March 25, 2016.

<sup>16</sup> See email between CGA Services and [REDACTED] dated August 18, 2015.

<sup>17</sup> See email between Witt-O'Brien's and Claimant dated, September 9, 2015.

<sup>18</sup> See Email between [REDACTED] to Mr. [REDACTED] dated September 21, 2015.

<sup>19</sup> See letter between Claimant and [REDACTED], Dune Operating Company, dated, October 21, 2015.

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”.

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].

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 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. CDR ██████████ of USCG Sector New Orleans, as the FOSC for this incident, determined that the actions undertaken by the Claimant are deemed consistent with the NCP. 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);<sup>20</sup>
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. §2701(23), to navigable waters;
3. 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;
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined which of the removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed 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 to be consistent with the NCP, and (4) whether the costs were adequately documented and reasonable.

Upon adjudication of the claim, the NPFC sought verification of payment to any and all third party contractors, proof of presentment to the RP, and it requested a copy of the Claimant’s rate schedule that was in place at the time services were rendered along with a copy of AMPOL’s rate schedule since they worked as a subcontractor on this response under the Claimant,

Upon receipt of all requested information, the NPFC has determined that the majority of the costs incurred by the claimant in this claim submission 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 in place at the time the services were rendered and were determined by the FOSC, CDR ██████████ ██████████, to be consistent with the NCP.

The NPFC has denied \$50.00 of AMPOL subcontractor costs invoiced to the Claimant on the basis that the overtime rates charged by AMPOL for the position of Technician was not in accordance with the AMPOL rate schedule that was provided in support of the invoiced pricing and as such, the NPFC has reduced the overtime rate from \$60.00 per hour to the \$50.00 per hour rate as outlined in the AMPOL rate schedule.<sup>21</sup>


<sup>20</sup> See email from CDR ██████████ to ██████████, NPFC dated May 15, 2017

<sup>21</sup> See AMPOL 2012 Schedule of Rates.

The NPFC has also denied \$7.50 of 15% markup charged by the Claimant on its invoice # 970399-001. The CGA's rate schedule on page 3, item # 3 which states in relevant part..."ALL 3<sup>rd</sup> party personnel contracted through CGAS will be assessed a 15% administrative fee."<sup>22</sup>

The NPFC therefore determines that the OSLTF will pay **\$9,441.81** as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim # 916044-0002. 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 claimant.

**AMOUNT: \$9,441.81**

Claim Supervisor:	
Date of Supervisor's review:	<i>8/29/17</i>
Supervisor Action:	<i>Approved</i>

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<sup>22</sup> See CGAS rate schedule of prices.