

CLAIM SUMMARY / DETERMINATION

Claim Number:	E16608-0001
Claimant:	American Pollution Control Corporation (AMPOL)
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$743,015.41

I. INTRODUCTION:

1. Oil Spill Incident:

This claim arises from an oil spill incident that occurred on March 28, 2016 when crude oil escaped from above-ground storage tanks (“ASTs”) located at the PSC Industrial Outsourcing (“PSC”) site in Jeanerette, Louisiana. The oil traveled through the storm water system downhill, and migrated into the Bayou Teche. The spill was estimated to be in the amount of 300 barrels of oil (“bbls”) and affected approximately two miles of the bayou, with 15% of the area covered from bank to bank with oil. It was declared by the Environmental Protection Agency (“EPA”) to be a major inland spill. The remaining sections of the bayou had oil coverage ranging from sheen to large pools of oil.¹

PSC hired its facility response contractor, American Pollution Control Corp. (“AMPOL”) to provide emergency-spill response and removal services. From March 28th until May 12th, AMPOL, with the oversight of the Environmental Protection Agency (“EPA”) and local authorities, conducted emergency response and removal activities, and removed a total of 996 barrels² of oil and oily waste water from the Bayou Teche.³

2. The Responsible Party.

PSC is the responsible party because it owned and operated the above-ground storage tanks from which the oil escaped. PSC was founded in 1977, and is headquartered today in Houston Texas. It has a nationwide presence and provides a variety of services, including crude oil recovery, facilities management, and environmental management, to operators within the U.S. energy infrastructure.⁴

PSC’s business at the Jeanerette location focuses primarily in salt water injection and crude oil salvage from produced water. PSC receives produced water and oil from oil and gas exploration operations, and also purchases quantities of crude oil from production companies. The produced water is stored within three (3) 10,000-bbl above-ground storage tanks and is injected into the salt water disposal well. Residual oil is skimmed from the stored water and transferred to one of five crude oil ASTs (two (2) 10,000-bbl, three 2,000-bbl) located within the site. Purchased oil is also stored within these crude oil ASTs. The ASTs are located within a secondary containment berm. The oil that escaped into the Bayou was from a 2,000-bbl AST that contained pure crude oil.

¹ See EPA POLREP 6 (Final).

² See EPA POLREP 6 (final), Section 2.1.4, the combination of columns 2 and 3 of the table totals this amount.

³ See EPA POLREPS 1- 6 and Incident Action Plans (IAPs) Initial through 6.

⁴ See <http://pscnow.com/about-psc/our-company.aspx>

The Jeanerette PSC site had an Environmental Protection Agency (“EPA”) Facility Response Plan (R6-LA-1487)⁵ in which AMPOL is the contracted Oil Spill Response Organization (“OSRO”). In 2007 PSC and AMPOL entered into a general service agreement wherein AMPOL agreed to provide project-based services to PSC from time to time and as-needed.⁶ It was not until 2016 that PSC engaged AMPOL to conduct emergency response services.

3. The Claim:

AMPOL invoiced PSC for its work, the bulk of which was contained in five separate invoices: #19198, 19249, 19267, 19292, and 19337, for a grand total of \$5,203,346.65⁷ Through its insurance carrier, PSC paid a total of \$4,460,331.14⁸ toward these invoices, leaving a shortfall of \$743,015.41.

On August 10, 2016, AMPOL submitted a removal cost claim to the National Pollution Fund Center (“NPFC” or “Fund”) for reimbursement of the remaining uncompensated amount. The claim was for its unpaid response personnel, equipment, materials, and third party costs.⁹ As part of its submission, AMPOL provided a Invoice Evaluation Summary identifying the five invoices at issue, and how AMPOL applied PSC’s three lump-sum payments to those invoices.¹⁰ It also included a variety of supporting evidence, such as receipts, dailies, emails, payment summaries both made by PSC and Chubb and received by AMPOL, Incident Action Plan, third-party invoices, and the AMPOL 2016 rate schedule of prices for which it based its invoice generation on.

During the course of adjudication, NPFC determined that AMPOL’s claim contained significant discrepancies, the most notable of which was an attempt to recover costs for subcontractors that it had not yet paid in full, the premature submission of one invoice, and misallocation of PSC payments to the wrong invoices. After substantial communications between the Claimant and the NPFC, on January 9, 2017, AMPOL amended its claim down to **\$408,310.75**. Of this amount, NPFC has determined that **\$403,627.28** is approved as reasonable removal costs under the OPA.

II. FACTS

1. The Spill.

According to PSC, a valve linking a 10,000-bbl crude oil AST to the southernmost 2,000-bbl crude oil AST had malfunctioned allowing oil to gravity feed into the smaller and lower AST. The crude oil then discharged from the top hatch, overflowed into the secondary containment, and existed through an open storm water drain.¹¹ The storm water drain had been opened the morning of the incident to release rainwater from a recent rainfall.¹² The oil migrated downhill, through a drainage ditch, and ultimately into the Bayou Teche. The PSC site is located approximately 400 feet north and upgradient of the Bayou Teche. The Bayou Teche flows southeast approximately 9.3 miles where it meets the Charenton Navigation Canal, which then flows south for eight-miles until it reaches the Gulf of Mexico.

⁵See EPA POLREP 6 (Final).

⁶ The contract itself identifies PSC as the “contractor” and AMPOL as the “company.” It is clear that this is a typographical error, as the rate schedule attached to the contract references AMPOL as the provider of services.

⁷ The claim as submitted to NPFC covered five invoices: #19198, 19249, 19267, 19292, and 19337. In its submission letter, AMPOL explained that the remaining five invoices totaling \$215,520.00 were not yet 90 days old, therefore, they were not included.

⁸ AMPOL’s Initial Claim Submission, dated August 05, 2016

⁹ See claim file.

¹⁰ See Invoiced Evaluation Summary with claim submission, in claim file.

¹¹ See EPA POLREP 6 (Final).

¹² See EPA POLREP 1 – 6 (Final).

The Bayou Teche meets the definition of “navigable waters” of the United States (US) as defined in Section 502(7) of the Federal Water Pollution Control Act, (FWPCA).¹³

2. Response Activities.

Following the discovery of the oil spill on March 28, 2016, PSC began oil spill response activities and engaged AMPOL and other contractors to assist. AMPOL’s work commenced on March 28th and focused primarily on deploying boom and containment materials.

The United States Coast Guard (“USCG”)¹⁴ also responded to the incident upon receiving the report from the National Response Center (“NRC”).¹⁵ The USCG assumed the role of first Federal Official on scene until the United States Environmental Protection Agency (“EPA”) could take over. The USCG notified the cities of Charenton and Franklin to ensure that they took necessary precaution to prevent drinking water intakes from being impacted. The Louisiana State Police (LSP) was on scene and issued a shelter in place for residents along Bayou Teche between the upper and lower booms. The City of Lafayette’s Hazmat team was on scene and conducted air monitoring. The National Oceanic and Atmosphere Administration (NOAA) provided USCG trajectory maps that showed potential downstream impacts of the oil. United States Fish and Wildlife (USFW) provided USCG an IPaC Trust Resources Report that identified endangered and threatened species that could be impacted.¹⁶

The EPA mobilized to the incident the following day. EPA’s START 3 contractor was also mobilized to observe and document the oil spill response activities and assist with the response. A transition from first Federal Official to the Federal On Scene Coordinator (FOSC) occurred once USEPA arrived on scene. When USEPA arrived, USEPA’s FOSC engaged with the Unified Command which included representatives from the USCG, Louisiana Oil Spill Coordinator’s Office (LOSCO), and the Responsible Party (RP). Assisting agencies included Louisiana State Police (LSP), Louisiana Department of Environmental Quality (LDEQ), Louisiana Department of Wildlife and Fisheries (LDWF), USFWS and NOAA.¹⁷ A Notice of Federal Interest (NOFI) was issued to PSC on March 30, 2016.

AMPOL personnel excavated impacted soil and vegetation from the spill site, and disposed of the oily waste and soil. Other work performed included staffing, equipping cleanup operations, as well as managing the operations and maintenance phase.¹⁸ Initially, the oil spill response mainly consisted of oil containment within the bayou to prevent further migration of the oil. The spilled oil was contained within an estimated two-miles of the bayou through deployment of boom at one location upstream and four locations downstream of the spill site. However, the complexity of the spill grew, requiring the affected areas to be divided into four divisions to facilitate the response and clean up.¹⁹

Division A²⁰ was the furthest containment zone downstream of the spill. When small amounts of recoverable oil was discovered, AMPOL deployed absorbent material recovery teams to the area and applied absorbent boom and pads to the isolated pockets of oil. Response crews only utilized absorbent recovery techniques in this Division, no mechanical means were employed.

¹³ See EPA POLREP 6 (Final).

¹⁴ Marine Safety Unit Morgan City

¹⁵ See EPA POLREP 6 (Final).

¹⁶ See EPA POLREP 6 (Final).

¹⁷ See EPA POLREP 6 (Final).

¹⁸ See Incident Action Plans (IAP) and POLREPs 1 – 6.

¹⁹ See EPA POLREP 6 (Final).

²⁰ See EPA POLREP 6 (Final).

Division B²¹ was located upstream and adjacent to Division A. Division B was the most heavily oiled, primarily along the northern shoreline. AMPOL worked primarily along the shoreline, conducting washing operations, oiled debris collection, and utilizing absorbents to recover oil. Oil that was washed from the banks of the bayou was directed towards boomed catch pockets, where drum skimmers removed the oil from the water's surface. Washing operations utilized water that was emitted from an open ended (no spray nozzle) hose connected to a pump. The water was used to free oil from the shoreline, debris, and vegetation areas. Then the oil was directed toward the collection points. Absorbent boom and pads were deployed along both the northern and southern shorelines and adjacent to containment boom. Oiled absorbents and debris were collected, bagged, and transported to the PSC dock, where the bags were placed into roll-off containers. Absorbents were replaced as necessary throughout the Division.

Division C²² was located upstream and adjacent to Division B. The oil within the Division was primarily located on the northern bank of the bayou, with a minor amount located along the southern shoreline. The focus was primarily on the shoreline, conducting washing operations, oiled debris collection, and utilizing absorbents to recover oil. Shoreline washing operations were conducted in a similar fashion as previously described. Oiled absorbents and debris were collected, bagged, and transported to the PSC dock where the bags were placed into roll-off containers. Absorbents were replaced as necessary throughout the Division during the operational period.

Division D²³ includes the point of discharge and the furthest upstream containment boom. It was reported that very small amounts of visible sheen were present within the Division and very small amounts of recoverable oil existed along the shoreline. Absorbent pads were utilized to remove any visible oil. Very little oil was reported to be on the water or on the shoreline, however, shoreline activities were conducted and were required within Division D.

Response personnel continued to utilize an excavator to remove contaminated soil from the spill pathway. Approximately 512 yards were excavated and placed within 25-yard roll-off boxes or staged on plastic sheeting. Ecoserv landfill (29-B waste permitted landfill) in Morgan City, LA was used to dispose of the oil impacted soils. The contaminated soil was sent to the waste facility on April 4, 2016. Approximately 337 yards of contaminated soil were transported.²⁴

Oiled absorbent material, oiled vegetation, and oiled debris that were generated during the response were taken to Republic Services Colonial Landfill in Sorrento, LA to be disposed of. Transportation of staged roll-off boxes began on April 6th and approximately 600 yards of oiled materials were disposed of at the facility.

3. The Claim and Adjudication.

Early in the adjudication process NPFC discovered a number of significant problems with the claim that reached beyond minor accounting and price reconciliation issues. The resolution of these concerns spanned over eight months and required NPFC to issue three requests for additional information to PSC and Chubb, along with numerous requests made to AMPOL for additional information. The claim adjudication process also required substantial auditing of the invoices themselves, one of which was ultimately withdrawn. The most notable concerns were as follows. First, AMPOL sought to be paid for subcontractor costs that it had not yet incurred. Second, AMPOL had attributed PSC payments to the wrong invoices, requiring significant analysis and recalculation. Third, AMPOL incorrectly submitted

²¹ See EPA POLREP 6 (Final).

²² See EPA POLREP 6 (Final).

²³ See EPA POLREP 6 (Final).

²⁴ See EPA POLREP 6 (Final).

Invoice #19198, which sought, among other things, estimated costs, and not actual costs, from a subcontractor. Finally, because PSC's insurer, Chubb, made lump-sum payments based on the results of its audits, NPFC determined those audits to be relevant and material, and on numerous occasions requested those audits. It first requested them from AMPOL, who claimed it did not have the information. Then, NPFC requested the audits from PSC, who also claimed it did not have/and ostensibly could not get, the information. NPFC issued a formal demand for additional information to AMPOL, PSC, and Chubb (PSC's insurer). It was not until March 15, 2017 that Chubb provided, within its 2,000+ pages of documentation, the audits. Due to the complicated and detailed procedural history, with issues arising concurrently, each issue and resolution is addressed by topic below.

a. Payment to Subcontractors

Shortly after NPFC received AMPOL's claim, AMPOL informed the Fund that it had not paid its third party costs in full, but that it was making several progress payments. AMPOL further indicated that it intended to finalize these payments once it received an award from the Fund.²⁵ NPFC advised that it could not adjudicate the claim if the third party contractors had not yet been paid in full. AMPOL acknowledged this and on September 7, 2016, submitted a "verification" statement that all third-party contractors were paid in full.²⁶ However, NPFC continued to receive proof of payment evidence for these third-party contractors after the September 7th date, notwithstanding AMPOL's verification. As a result, NPFC conducted a partial random audit of some of AMPOL's subcontractors. One subcontractor, ES&H, confirmed that AMPOL still had an outstanding balance of \$147,879.80.²⁷ Another subcontractor, Oil Mop, confirmed that AMPOL's balance with it was \$389,879.50, but that it anticipated a check to be forthcoming.²⁸ Because AMPOL still had not yet paid its subcontractors, notwithstanding its declaration otherwise, NPFC issued its first request for additional information ("AI") on September 21, 2016, seeking all documentation and evidence related to subcontractor work, billing and payments.²⁹ NPFC placed the claim in AI status and imposed upon AMPOL a deadline of October 12, 2016 to provide all of the requested support documentation and proof that all of the outstanding balances had been paid.³⁰

While the claim was in AI status, AMPOL provided weekly payment updates in the form of a document entitled, Accounts Payable, PSC – 10101 Subcontractors. This document contained the names of the subcontractors, invoice numbers, invoice dates, payment amounts, payment dates, check numbers, check cleared dates, and any balances owed. On October 12, 2016, AMPOL sent the Fund a final statement which indicated that all the third party contractor balances had been paid.³¹ Finally, on October 25, 2016 AMPOL provided the remainder of evidence requested, comprised of two binders of information, which included documents demonstrating payment in full to all subcontractors.

b. Improper Credit of PSC Payments

The problems with AMPOL's accounting did not end there, however. NPFC also noticed significant disparities between the amounts that AMPOL sought for each invoice, and the amounts that had already been paid by PSC. The crux of those disparities was that AMPOL did not credit PSC's

²⁵ Email to AMPOL from NPFC dated August 16, 2016 at 2:49 p.m. summary of telephone call.

²⁶ Email from Mr. [REDACTED] (AMPOL's response manager) to NPFC dated September 07, 2016.

²⁷ See email to NPFC from ES&H dated September 20, 2016.

²⁸ See email to NPFC from Oil Mop dated September 20, 2016.

²⁹ See email to AMPOL from NPFC dated September 21, 2016.

³⁰ See email from Ms. [REDACTED] to Mr. [REDACTED], dated September 21, 2016.

³¹ See AMPOL October 12, 2016 Accounts Payable Statement.

payments appropriately toward each invoice.³² In its initial claim, AMPOL submitted a table containing the invoice date, amount, and payment information for three PSC payments. Essentially, AMPOL applied the first \$3,000,000 payment to Invoice #19198, leaving an overage of \$353,653.21, which AMPOL then applied to the next invoice #19249. It also applied a \$1,460,331.14 payment to invoice #19249.

Invoice Date	Invoice #	Invoice Amt.	Payment amount	Remaining balance
4/12/2016	19198	\$2,646,346.79	\$1,000,000.00 (paid on 5/5/2016) \$2,000,000.00 (paid on 6/24/2016)	(overage \$353,653.21) ³³
4/15/2016	19249	\$1,833,535.28	\$353,653.21 (carry over from #19198) \$1,460,331.14 (paid on 7/27/2016)	\$19,550.93
4/20/2016	19267	\$369,341.74	\$0	\$369,341.74
4/27/2016	19292	\$239,455.58	\$0	\$239,455.58
5/5/2016	19337	\$114,667.16	\$0	\$114,667.16
				Total: \$743,015.51

Table 1.³⁴

In September 2016, NPFC forwarded this information to Ms. [REDACTED] (of PSC) to confirm the invoice amount and payments.³⁵ Ms. [REDACTED] responded with PSC's own spreadsheet, reflecting an entirely different allocation of the \$4.4 million payments:

³² PSC made lump sum payments, but did not communicate to AMPOL how those payments should be applied. See email to AMPOL from PSC dated June 23, 2016 (re: June 24th payment).

³³ AMPOL credited Invoice #19249 with the \$353,653.21 overage, thereby reducing the remaining balance to \$19,550.93.

³⁴ On or about September 9, 2016, AMPOL submitted an amended Table 1, which added five additional invoices, and two additional payments. AMPOL presented the amended table to NPFC simply to illustrate the totality of invoices generated and payments received for the project. NPFC forwarded the information to PSC seeking input regarding AMPOL's application of those payments to each invoice. See Email to PSC from NPFC dated September 14, 2016 with attachment "09-09-16 PSC Industrial 10101 Invoices To Date". For clarity, only the invoices that make up the subject of the claim are included herein for discussion.

³⁵ Email to PSC from NPFC dated September 14, 2016 with attachment "09-09-16 PSC Industrial 10101 Invoices To Date".

Invoice Date	Invoice #	Invoice Amt.	Payment amount	Amount Not Reimbursable	Amount Pending ³⁶
4/12/2016	19198	\$2,646,346.79	\$2,311,642.13	\$224,322.66	\$110,382.00
4/15/2016	19249	\$1,833,535.28	\$1,508,270.06	\$205,990.22	\$119,275.00
4/20/2016	19267	\$369,341.74	\$324,471.87	\$32,869.87	\$12,000.00
4/27/2016	19292	\$239,455.58	\$212,073.11	\$27,382.47	\$0
5/5/2016	19337	\$114,667.16	\$103,873.97	\$10,003.19	\$790.00

Table 2. The “amount not reimbursable” determinations were made concurrent with ongoing audits of the invoices by Chubb, and the “amount pending” required resolution of questions raised by those audits.³⁷ Ultimately, the “amount pending” was not paid, presumably due to the inability of the parties to resolve the outstanding questions.

AMPOL’s allocation of PSC’s payments created significant disparities that impacted NPFC’s ability to do an accurate, line-item reconciliation of the costs that were still outstanding. In December 2016, NPFC provided AMPOL with a spreadsheet reflecting much of the information in Table 2 to demonstrate and summarize the disparity in amounts claimed by each invoice. The spreadsheet was organized by invoice number, and reflected each original invoice amount, each payment made by PSC (via its insurer), and the amount claimed by AMPOL. The final column of the spreadsheet provided what the Fund found to be the true representation of the unpaid amount, totaling \$408,310.75.³⁸ Based on the proof of payment, the Fund estimated that the sum certain that was truly eligible for consideration for the four AMPOL invoices was \$408,310.75 vice \$743,015.75.³⁹ AMPOL stated that they submitted five invoices rather than four with the claim, and that NPFC’s summary omitted AMPOL invoice 19198, which resulted in a \$300,000.00 shortfall.⁴⁰

NPFC checked its work to ensure that the measurement was accurate. It was there that the Fund found, based on AMPOL’s own claim submission, that PSC overpaid invoice 19198-IN by \$353,653.21 which AMPOL had then brought forward and applied to Invoice #19249. The Fund explained that AMPOL miscalculated what they were due by invoice when they incorrectly applied the Chubb payments that were made on AMPOL invoices 19198, 19267, and 19292.⁴¹

c. Estimated Costs Contained in Invoice #19198.

As the Fund addressed the PSC payment credit concerns, it also realized that AMPOL’s Invoice #19198 (in the amount of \$2,646,346.79) contained estimated costs, not actual costs, and as such, it had not been properly presented to PSC.

³⁶ The “amount pending” was never actually paid.

³⁷ See Chubb’s letter to AMPOL dated July 20, 2016 (stating that the items listed as “pending” are awaiting clarification from PSC/AMPOL).

³⁸ See spreadsheet created by Ms. [REDACTED], dated December 13, 2016.

³⁹ See PSC payments to AMPOL and PSC Insurance Company, Insurance adjustment of AMPOL costs spreadsheet created by RP.

⁴⁰ See email reply from Mr. [REDACTED] to Ms. [REDACTED], dated December 13, 2016.

⁴¹ See email string between Ms. [REDACTED] and Mr. [REDACTED], dated December 14, 2016.

Specifically, Invoice #19198 included estimated costs of one subcontractor (CTEH), rather than actual invoiced amounts. The issue was initially discovered after NPFC attempted to reconcile the CTEH charges contained within Invoice #19198 with supportive documentation, such as a contract agreement or time and materials rate schedule to support the CTEH charges. In short, AMPOL provided no objective documentation to support its claimed CTEH rates. It was not until January 4, 2017, when NPFC and AMPOL discussed the issue in a conference call that AMPOL admitted Invoice #19198 had been created using only CTEH’s “estimated dailies”, as opposed to CTEH’s actual invoices. It also admitted that the CTEH’s estimated dailies, not the actual invoices, were presented to PSC for billing. During the conversation, NPFC learned that the costs that are related to Invoice #19198 had not been properly presented because the invoice contained only estimates and not actual charges. The Fund explained that the governing claims regulations in 33 CFR 136 and that NPFC cannot adjudicate costs that have not been properly presented to the responsible party. Further, the Fund explained that AMPOL must present all costs related to invoice 19198 to PSC. It is upon PSC’s denial or nonpayment of that invoice, that AMPOL could then resubmit the costs in Invoice #19198 to the Fund for adjudication.⁴²

Given this, AMPOL agreed to remove Invoice #19198 from consideration. On January 9, 2017, by way of email, AMPOL adjusted its sum certain, reflecting \$408,310.75 as the amount of the claim.⁴³ The allocation of PSC payments was as follows:

Invoice Date	Invoice No.	Invoice Amt	Payment Amount	Balance
4/15/2016	19249	\$1,833,533.28	\$1,508,270.06	\$325,265.22
4/20/2016	19267	\$369,341.74	\$324,471.87	\$44,869.87
4/27/2016	19292	\$239,455.58	\$212,073.11	\$27,382.47
5/5/2016	19337	\$114,667.16	\$103,873.97	\$10,793.19

d. Chubb’s Audit and the Rate Dispute.

Concurrent with the above three issues, NPFC was also trying to determine what was paid and what remained outstanding for each invoice, the material information of which was contained in the insurer’s audits. Over the course of the next seven months, NPFC continually requested the audit information, initially from AMPOL, and then from PSC. It was not until March 2017, after issuing a formal Request for Information to PSC and Chubb, that NPFC finally received the requested information. The following is a brief recitation of the efforts expended by NPFC to obtain this relevant information.

As early as August 2016, NPFC learned that Chubb had hired Antea Group to audit AMPOL’s invoices and that over \$4 million dollars had been paid on the invoices. NPFC requested that PSC provide those audits.⁴⁴ In September, PSC’s CFO, [REDACTED], contacted the Fund to reiterate the \$4 million payment, which amounted to 85% of the claim. He further explained the audits had raised questions regarding the claim, some of which involved “commercial disputes between the parties”.⁴⁵ He also provided 71 pages of select⁴⁶ email and letter communications between AMPOL, PSC, and Chubb

⁴² See 33 CFR §136.103(b) Order of Presentment – of this section, all claims for removal costs or damages must be presented first to the responsible party or guarantor of the source designated under section 136-305.

⁴³ See Email from AMPOL to NPFC dated January 9, 2017.

⁴⁴ See email from [REDACTED] to NPFC dated August 16, 2016.

⁴⁵ See PSC letter to NPFC dated September 9, 2016 from Mr. [REDACTED], CFO of PSC. Email to [REDACTED] (PSC) from NPFC, dated September 22,2016.

⁴⁶ As will be discussed below, the selection did not include the entirety of the discussions regarding the relevant billing rates. He did, however, provide the first page of a letter from Chubb to AMPOL dated July 20, 2016, wherein Chubb explains a portion of its audit analysis. PSC did not provide the entire letter, however. Most notably missing was Mr. [REDACTED] email of June 20, 2016, wherein he informed Chubb that the 2016 rate seemed

spanning June through August 2016, discussing the issues raised by the audits, including the applicable rate schedule,⁴⁷ and asked that the NPFC allow the insurer and AMPOL additional time to resolve the remaining disputes.⁴⁸

NPFC denied the request for additional time, and informed that NPFC intended to use the 2016 rate schedule provided by AMPOL. NPFC again requested a copy of the insurer's audits so that it could line-item verify what was paid and what remained outstanding.⁴⁹ In addition, NPFC forwarded AMPOL's spreadsheet detailing both the invoices and the payments to each invoice, and sought PSC's confirmation of the information therein.⁵⁰ PSC submitted its own spreadsheet entitled "Invoice Evaluation Summary" (see Table 2 above) wherein it identified for each of AMPOL's invoices, the amount due, amount pending, amount not reimbursable, and amount reimbursable.⁵¹ However, there was no line-item indicia as to which items were paid, and which were denied, nor was there any cogent explanation or rationale for the denial of payment.

By November 2016, NPFC still had not yet received these "audits" from PSC or its insurer. During a telephone conference on November 9, 2016 with NPFC, Mr. [REDACTED] of PSC agreed to request the audits from Chubb.⁵² Several weeks later, he informed NPFC that he had "requested a fellow team member" to obtain the information. Later that day, the "team member" sent a duplicate copy of information that AMPOL had already provided in the initial claim filing.⁵³ He did not send any audit information.

On February 1, 2017, the Fund reached out to Mr. [REDACTED] of AMPOL to inquire as to what rate the insurer had paid. Mr. [REDACTED] replied that he understood PSC to have agreed to use the 2016 rate schedule, but apparently the insurer used different rates. He was not sure what rate was used because PSC never provided any audit or explanation.⁵⁴

On February 9, 2017, rather than providing the audits, PSC instead requested NPFC to stay the adjudication indefinitely because it had filed a lawsuit against AMPOL in Texas state court, the litigation of which involved "a dispute regarding the issues giving rise to AMPOL's purported claim."⁵⁵ PSC provided a copy of the complaint, which appeared on its face to be a simple breach of contract claim. At the heart of the complaint was PSC's contention that a 2007 contract provided the governing rate schedule for the 2016 clean up.⁵⁶ Initially NPFC agreed to stay the adjudication, but AMPOL objected.⁵⁷ Given the objection, NPFC informed both PSC and AMPOL that it would continue the adjudication process.⁵⁸

"reasonable" as these were the current rates that AMPOL would have charged any customer for these kinds of services.

⁴⁷ See Email from Ms. [REDACTED] dated August 16, 2016.

⁴⁸ See PSC letter to NPFC dated September 9, 2016.

⁴⁹ See emails to PSC from NPFC dated September 15, 2016, and September 22, 2016.

⁵⁰ See email to PSC from NPFC dated September 14, 2016. The spreadsheet also included additional invoices (and payments) that are not part of this claim. For clarity, this decision only concerns the invoices that AMPOL has sought in this claim.

⁵¹ See email to NPFC from PSC dated September 22, 2016.

⁵² See email from NPFC to Mr. [REDACTED], dated November 18, 2016;

⁵³ See email to NPFC from Mr. [REDACTED], dated November 23, 2016.

⁵⁴ See Email string between Ms. [REDACTED] and Mr. [REDACTED] dated February 01, 2017.

⁵⁵ See email to NPFC from Mr. [REDACTED] (PSC) dated February 9, 2017.

⁵⁶ The contract itself was eventually provided to NPFC. The parties names are switched on the contract (AMPOL is the "company" and PSC is the "contractor"). The contract indicates that pricing is based on a 2007 "Schedule of Rates", but that the parties could agree in writing to a different rate schedule.

⁵⁷ Ordinarily when there is a pending lawsuit, both the claimant and the responsible party agree to stay the NPFC adjudication.

⁵⁸ Indeed, it would appear that PSC's complaint in Texas court should be dismissed because AMPOL has chosen to submit its claim to the Fund and therefore PSC does not have any right to relief other than what is provided by OPA:

Due to the ambiguity concerning the rate schedule, the complete inability to determine what was paid and what was not paid due to lack of the audit information, and the Texas state-court lawsuit, NPFC issued a second request for additional information on February 24, 2017, this time to Chubb, as well as AMPOL and PSC. The requests required, among other things, the audits Chubb used to support its payment determination, including the rate information that formed the basis of its calculations; AMPOL's 2012/2014 rate schedule; any contracts, releases, or other agreements between PSC and AMPOL; and information regarding previous incident responses performed by AMPOL on behalf of PSC since 2007.⁵⁹

On March 9, 2017, by way of email, AMPOL provided its response, but it was minimal and none of the information was new.⁶⁰ PSC also provided its response, but most of the information was the same.⁶¹ It was not until March 15, 2017, that NPFC finally received the documentary evidence from Chubb comprised of 2,000+ pages. Buried within that disclosure were the long-sought audits. Based upon receipt of all of this information, NPFC adjudicates the claim as follows.

APPLICABLE LAW:

1. The OPA and Claims Procedure.

Under the Oil Pollution Act of 1990 (OPA 90), at 33 USC § 2702(a), each responsible party for a vessel or facility from which oil is discharged, or that poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for removal costs and damages resulting from the incident, as described in Section 2702(b) of OPA 90. In the case of an “onshore facility”, the responsible party is “anyone owning or operating the facility”. 33 USC §2701(32)(B). A responsible party’s liability includes “removal costs incurred by any person for acts taken by the person that are consistent with the National Contingency Plan”. 33 USC § 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 USC § 2701(31).

It is this statutory scheme of the OPA that provides a procedure for submission, consideration, and payment of cleanup expenses by the Oil Spill Liability Fund (the “Fund”) when the responsible party

Our inquiry presents the question of whether OPA provides the exclusive source of law for an action involving a responsible party’s liability for removal costs governed by OPA. For the following reasons, we find that it does, and accordingly **we hold that ACL does not have a cause of action against the spill responders who exercised their statutory right to file claims with the Fund after ACL failed to timely pay their claims.** [...]

Nothing in OPA authorizes a responsible party to bring a third-party complaint against a claimant that has chosen, under § 2713(c)(2), to submit claims to the Fund after 90 days without payment. As the district court noted, such a third-party complaint would risk “avoid[ing] the strict liability that OPA places on responsible parties to pay the cleanup and removal costs,” and frustrate the statutory scheme and its goal of providing rapid cleanup and claim resolution.

United States v. Am. Commercial Lines, L.L.C., 759 F.3d 420, 424-425 (5th Cir. 2014)(emphasis added).

⁵⁹ See, February 24, 2017 letters from the NPFC to AMPOL, Chubb and PSC.

⁶⁰ See email to NPFC from AMPOL dated March 9, 2017.

⁶¹ See PSC document production to NPFC March 2017.

fails to settle such claims within 90 days. *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420, 426 (5th Cir. 2014). The Fund, which is administered by the NPFC, is available to pay claims for damages and uncompensated removal costs that are determined to be consistent with the National Contingency Plan pursuant to 33 USC §§ 2712(a)(4) and 2713, and 33 CFR Part 136, the corresponding Fund claims adjudication regulations. All claims for removal costs or damages must (with certain exceptions not applicable here) be presented first to the responsible party. 33 USC §2713(a). If the responsible party denies liability or does not settle the claim, the claimant may then commence an action in court or file a claim against the Fund. *Id.* at §2713(c), (d).

Through its authority as a command within the U.S. Coast Guard, the NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims. 33 USC §2713(e). Title 33 CFR Part 136, Subparts A and B set forth the general requirements of presentment and filing and establishes, among other things, that it is the claimant's burden to "provide all evidence, information, and documentation deemed necessary to support the claim". 33 CFR 136.105(a),(e)(6); *see also Smith Property Holdings, 4411 Connecticut LLC v. U.S.*, 311 F. Supp. 2d 69 (D.D.C. 2004). It also establishes that NPFC has the "discretion" to determine whether any other information is "relevant and necessary to properly process the claim". 33 CFR §136.105(e)(13). Subpart C sets forth requirements for particular claims, including those for removal costs. While a claim for removal costs may be presented by any claimant (*Id.* at §136.201), the 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.

33 CFR §136.203. The amount of compensation allowable for removal costs is:

[t]he 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.

33 CFR §136.205 (emphasis added). The claimant has 60 days in which to accept any offer of settlement from the Fund; the failure to do so automatically voids the offer. 33 CFR §136.115(b). The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁶²

2. The NPFC's Role in Adjudication of Claims Against the OSLTF

When adjudicating claims against the Fund, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.⁶³ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination is issued to satisfy that requirement. Because this determination is a settlement offer under 33 C.F.R. § 135.115 (b), it will automatically expire 60 days after the date it has been mailed to AMPOL. The NPFC reserves the right to revoke this settlement offer

⁶² *See, Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

⁶³ The court in *Bean Dredging, LLC v. United States*, characterized the informal adjudication process for OSLTF claims with the following: "[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, *see* 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting the OPA was to 'streamline' the claims adjudication process ..." 773 F. Supp. 2d 63, 75 (D.D.C. 2011).

at any time.⁶⁴ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and should not be viewed as precedent controlling other NPFC claims determinations.

During the adjudication of claims against the Fund, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. The NPFC's review of the evidence is *de novo*, and the NPFC is not bound by the findings of fact and conclusions reached by other entities.⁶⁵ If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence. During the adjudication of this claim, NPFC considered over 2,000 pages of documents comprised of invoices, memoranda, correspondence and communications related to this spill.

In addition to recovering costs against the responsible parties, NPFC's mission is to compensate those who have suffered certain damages or incurred removal costs because of a discharge or a substantial threat of a discharge of oil to U.S. navigable waters. Without the Fund, parties whose claims are not paid in full by the responsible parties would have no recourse but costly and time-consuming litigation. The OPA 90 was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry. *Rice v. Harken Expl. Co.*, 250 F.3d 264, 266 (5th Cir. 2001)(citing Senate Report No. 101-94, reprinted in 1990 U.S.C.C.A.N. 722, 723).

DETERMINATION OF LOSS:

A. Overview:

1. [REDACTED], USEPA, as the Federal On-Scene Coordinator (FOSC) for this incident, determined that the actions undertaken by AMPOL were consistent with the NCP⁶⁶ for the payment of uncompensated removal costs 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 to "navigable waters."
3. The claim was submitted to the Fund within the six year period of limitations for removal costs claims. 33 U.S.C. §2712(h)(1).
4. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined which of the costs claimed were associated with OPA compensable removal actions in accordance with the NCP and that costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

⁶⁴ See, *Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

⁶⁵ See, *Bean Dredging, LLC v. United States*, 699 F. Supp. 2d 118, 128-29 (D.D.C. 2010) (noting that the NPFC may consider a marine casualty investigation report but is not bound by it).

⁶⁶ See POLREPS 1 – 6.

B. Analysis:

1. AMPOL's 2016 Rate Schedule is Reasonable and Will be Used to Adjudicate the Claim.

The OPA and its implementing regulations control a claimant's entitlement to OSLTF compensation, not a contract between the claimant and the responsible party, or the insurance carrier's position on what rates it is willing to pay. Under 33 CFR 136.203, a claimant should receive OSLTF reimbursement for reasonable removal costs for actions determined by the FOSC to be consistent with the National Contingency Plan. Although a rate schedule agreed upon by an OSRO and a RP may provide some evidence of a reasonable removal cost, the total amount of OSLTF compensation is ultimately controlled by the standards in 33 CFR 136.203. When determining whether costs are reasonable under 33 CFR 136.20, NPFC considers the scope of work, appropriateness of the response tactics undertaken, quantity of personnel, materials and equipment deployed, demographics of the spill location, as well as the reasonableness of rates used to bill costs.

NPFC views the facts and circumstances of each case in combination with information available as it pertains to general standard industry practices for emergency response contractors, or in this case, the Oil Spill Response Organizations (OSROs).⁶⁷ Whether an OSRO is directly hired by the Coast Guard under a Basic Ordering Agreement, or whether hired as a primary response contractor for a responsible party, current rate pricing is what is typically used to determine an OSRO's uncompensated removal costs under the OPA. Without evidence that the rate schedule was outrageous, substantially inconsistent with market rates in the locality for emergency response, or other dispositive facts that justify using a different rate schedule or pricing metric, an OSRO's most current rate schedule is often deemed the most reasonable metric for determining uncompensated removal costs. The current rate schedules are used because they ordinarily have the most updated pricing schedule for all services, staff, and equipment provided during the response.

In this case, the preponderance of evidence in the administrative record supports using AMPOL's 2016 rate schedule. First, this was an emergency response incident that occurred in 2016. There is no evidence that the 2016 rate schedule itself is inflated or contrary to the current locality, or in any other way unreasonable. Indeed, even ██████████ agreed, in an email to Chubb, that using the 2016 rate schedule seemed reasonable:

██████████

[...] I spoke to ██████████ at AMPOL today and he informed me that AMPOL billed PSC at current 2016 rates. **It seems reasonable to use current rates as they are what AMPOL would charge any customer for these services.** We assume that Chubb has access to rate data for this sort of work and that you are in a position to evaluate whether the rates being charged are in line with market rates.⁶⁸

⁶⁷ See, 33 CFR §§154.1035 and 155.1035. The Coast Guard created the voluntary oil spill removal organization (OSRO) classification program so that plan holders could list OSROs in response plans in lieu of providing extensive detailed lists of response resources if the organization has been classified by the Coast Guard and their capacity has been determined to equal or exceed the response capability needed by the plan holder.

⁶⁸ See email to ██████████ (Chubb) from ██████████ (PSC) dated June 20, 2016.

Chubb's refusal to use AMPOL's 2016 rate schedule was not because these rates were out of line with "market rates." Rather, Chubb rejected the 2016 rate schedule citing "PSC's understanding that AMPOL would use 2012 rates, supplemented by the 2014 rates to prepare their billing".⁶⁹

Second, AMPOL submitted billings based on its 2016 schedule.⁷⁰ Although [REDACTED] initially sought to amend the 2007 contract to use a 2012 rate schedule, supplemented by the 2014 schedule,⁷¹ PSC summarily refused and instead instructed AMPOL to "pick a set of rates" and start generating invoices.⁷² Implicit within that instruction was that AMPOL would continue to provide emergency response services and not wait for the insurer to sort out the rates.⁷³ AMPOL did so, and now has unpaid response costs based on a 2016 rate schedule.

Based upon the unique facts underlying this claim, the NPFC determines that AMPOL's reimbursement should be based upon its 2016 rates. The 2016 rate schedule provides a pricing inventory for all items used during the response at issue and, with the exception of the items below, this claim's administrative record establishes by a preponderance of the evidence that the 2016 rate schedule should be used when determining the total amount of uncompensated removal costs incurred by AMPOL. The NPFC reached this conclusion after carefully weighing all of the evidence in the administrative record.

2. Invoice 19249 – Total Denied \$2,593.75

The total amount of this invoice was \$1,833,535.28 and the evidence shows AMPOL received \$1,508,270.06, which left a remaining balance of \$325,265.22. In reconciling the invoice with Chubb's audit and the evidence AMPOL submitted, NPFC determined that all of the costs stated therein qualified as OPA-compensable removal costs, with the exception of the following:

M/V Express Safety Ship – On November 15, 2016, by way of email, AMPOL notified NPFC that AMPOL had billed for this vessel incorrectly. AMPOL explained that the daily charge for this vessel was billed at \$750.00 when it should have been billed at \$500.00 for the period of April 6, 2016 until April 23, 2016, resulting in an over charge of \$4,500.00 (total across invoices). Accordingly, NPFC denies each of these line items in the amount of \$250 per day because the daily charge for this vessel during the period between April 6, 2016 and April 23, 2016 was overcharged.⁷⁴

Unidentified Technician – Ampol's invoice has a total number of hours for Technicians at 856.25hrs although the individual names and dailies reflect only a total of 843.75 hrs documented this date and therefore the difference is denied.

3. Invoice 19267 – Total Denied \$1,249.97

⁶⁹ See Chubb letter to AMPOL dated July 20, 2016.

⁷⁰ See email to [REDACTED] (PSC) from [REDACTED] (PSC) dated March 29, 2016 ("We need a daily report from AMPOL on what we have spent with them. [...] The daily report should go to [REDACTED] and me [...]").

⁷¹ See email from [REDACTED] (AMPOL) to [REDACTED] (PSC) dated April 1, 2016.

⁷² See email to [REDACTED] of Forefront from [REDACTED] (PSC) dated April 7, 2016.

⁷³ Although not germane to this decision, it should be noted that AMPOL repeatedly sought payment on its invoices, and PSC repeatedly deferred to its insurer to determine those payments. See email to [REDACTED] (AMPOL) from [REDACTED] (PSC) dated April 2, 2016 (stating that PSC "can not [sic] approve the rates without consulting [its] insurance carrier") and email to [REDACTED] (AMPOL) from [REDACTED] (PSC) dated April 11, 2016, (stating that "the insurance company will be responsible for approving the rates and invoices."), and email to [REDACTED] (Chubb) from [REDACTED] (PSC) dated June 20, 2016 (stating "we never reached an agreement on this. We told AMPOL that we would defer a final determination of the appropriate rates to our insurance carrier.").

⁷⁴ See Email from AMPOL dated, November 15, 2016. Re: M/V EXPRESS. This vessel was leased to AMPOL by a private individual that AMPOL contracted with. AMPOL provided a signed service agreement, dated April 04, 2016.

The total amount of this invoice was \$369,341.74 and the evidence shows AMPOL received \$324,471.87, which left a remaining balance of \$44,869.87. In reconciling the invoice with Chubb's audit and the evidence AMPOL submitted, NPFC determined that all of the costs stated therein qualified as OPA-compensable removal costs, with the exception of the following:

M/V Express Safety Ship – Again, each of these line items were denied by \$250 per day because the daily charge for this vessel during the period between April 6, 2016 and April 23, 2016 was overcharged.

Anchor - NPFC allowed the rental rate for 4 anchors based on the rate schedule but the NPFC denied the charge of \$75 a day for anchors that were sold to PSC. That action is not related to the removal of oil by the OSRO and therefore not OPA compensable.

Unsubstantiated Costs – The NPFC denied \$0.02 as undocumented.

4. Invoice 19292 – Total Denied \$500.00

The total amount of this invoice was \$239,455.58 and the evidence shows that AMPOL received \$212,073.11, which left a remaining balance of \$27,382.47. In reconciling the invoice with Chubb's audit and the evidence AMPOL submitted, NPFC determined that all of the costs stated therein qualified as OPA-compensable removal costs, with the exception of the following:

M/V Express Safety Ship – Again, each of these line items were denied by \$250 per day because the daily charge for this vessel during the period between April 6, 2016 and April 23, 2016 was overcharged.

5. Unidentified Difference - Total Denied \$339.75

NPFC has denied an unreconciled amount of \$339.75. It is unclear based on a line by line review of individual costs how AMPOL arrived at the amount. Because NPFC cannot identify the source, it therefore denies it.

Based on the foregoing, the NPFC hereby determines that the OSLTF will offer **\$403,627.28** as full compensation for the reimbursable removal costs incurred by AMPOL and submitted to the NPFC under claim # E16608-0001. All reimbursable costs are for charges paid by AMPOL for removal actions as that term is defined in OPA and are compensable removal costs by the OSLTF as presented by AMPOL.

AMOUNT: \$403,627.28

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *6/28/17*

Supervisor Action: *Approved*