

CLAIM SUMMARY / DETERMINATION

Claim Number:	E16608-0004
Claimant:	American Pollution Control Corporation (AMPOL)
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$44,381.45

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 some of its work, which was contained in four separate invoices: 26-IN, 76-IN, 129-IN, and 287-IN, for a grand total of \$168,628.13.⁷ Through its insurance carrier, PSC paid a total of \$124,246.68⁸ toward these invoices, leaving a shortfall of \$44,381.45.⁹

On July 6, 2017, AMPOL submitted a removal cost claim to the National Pollution Fund Center (“NPFC” or “Fund”) for reimbursement of the remaining uncompensated amount for the referenced AMPOL invoices. The claim was for its unpaid response personnel, equipment, materials, and third party costs.¹⁰ The claimant 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.

4. Request for Reconsideration:

On August 4, 2017, the AMPOL contacted the NPFC via email officially request reconsideration of the denied costs associated with the BFI vendor invoicing. The NPFC denied a total amount of \$827.34 in invoiced disposal costs and associated taxes and markup based on what originally appeared to be a miscalculation on disposal along with missing documented costs. The Claimant officially requested reconsideration of the \$827.34 in denied costs stating that it failed to produce the second page of the invoice provided in its original claim submission. The Claimant also provided a copy of the contract between BFI and AMPOL whereby the provisions of the contract show that there is a minimum load price of \$150.00 which explained the confusion on how some of the disposal charges totaled \$150.00 per load vice the \$35.00 per ton price.¹¹

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.¹² The storm water drain had been opened the morning of the incident to release rainwater from a recent rainfall.¹³ The oil migrated downhill, through a drainage ditch, and

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 NPFC claim E16608-0004 as submitted to NPFC covered four invoices: #26-IN, 76-IN, 129-IN, and 287-IN.

⁸ See Email from PSC to AMPOL cc:NPFC dated September 22, 2016 providing a spreadsheet of payments made by Chubb on behalf of PSC for AMPOL invoices.

⁹ It is important to note that the AMPOL invoices presented in claim E16608-001 are separate and distinct invoice numbers than the AMPOL invoices identified and presented in this claim claim, E16608-0004. The claimant is presenting standalone invoices for this incident that are being adjudicated on their individual merits.

¹⁰ See claim file.

¹¹ See BFI Invoice pages 1 & 2 and BFI contract with AMPOL.

¹² See EPA POLREP 6 (Final).

¹³ See EPA POLREP 1 – 6 (Final).

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. 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).¹⁴

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”)¹⁵ also responded to the incident upon receiving the report from the National Response Center (“NRC”).¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰

Division A²¹ 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.

¹⁴See EPA POLREP 6 (Final).

¹⁵ Marine Safety Unit Morgan City

¹⁶See EPA POLREP 6 (Final).

¹⁷ See EPA POLREP 6 (Final).

¹⁸ See EPA POLREP 6 (Final).

¹⁹ See Incident Action Plans (IAP) and POLREPs 1 – 6.

²⁰ See EPA POLREP 6 (Final).

²¹ See EPA POLREP 6 (Final).

Division B²² 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 C²³ 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 D²⁴ 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.²⁵

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 history and Adjudication.

Early in the adjudication process of the first AMPOL claim presented to the Fund for this incident and identified as NPFC Claim # E11608-0001, the 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. 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,

²²See EPA POLREP 6 (Final).

²³ See EPA POLREP 6 (Final).

²⁴ See EPA POLREP 6 (Final).

²⁵ See EPA POLREP 6 (Final).

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.

After receiving volumes of information for consideration by the Claimant, PSC as the RP, and Chubb as the RP's insurer, during the NPFC adjudication of claim # E16608-0001, the NPFC incorporates any and all information from that claim, E16608-0001, by reference into this claim submission as the incident specifics, RP and insurer payments, and all communications and information have bearing on the outcome of this determination.²⁶

It is important to note that during the NPFC's adjudication of the first AMPOL claim associated with this incident, E16608-0001, after the NPFC made repeated requests for the RP's insurers audits to no avail, on February 9, 2017, rather than providing the audits, PSC instead requested NPFC to stay the adjudication of that claim 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."²⁷ 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.²⁸ Initially NPFC agreed to stay the adjudication, but AMPOL objected.²⁹ Given the objection, NPFC informed both PSC and AMPOL that it would continue the adjudication process.³⁰

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.³¹ 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

²⁶ See NPFC claim # E16608-0001.

²⁷ See email to NPFC from Mr. [REDACTED] (PSC) dated February 9, 2017 in claim E16608-0001.

²⁸ 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.

²⁹ Ordinarily when there is a pending lawsuit, both the claimant and the responsible party agree to stay the NPFC adjudication.

³⁰ 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:

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).

³¹ See, February 24, 2017 letters from the NPFC to AMPOL, Chubb and PSC.

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 2007.³²

On March 9, 2017, by way of email, AMPOL provided its response, but it was minimal and none of the information was new.³³ PSC also provided its response, but most of the information was the same.³⁴ 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 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

³² See, February 24, 2017 letters from the NPFC to AMPOL, Chubb and PSC.

³³ See email to NPFC from AMPOL dated March 9, 2017.

³⁴ See PSC document production to NPFC March 2017.

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.³⁵

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. § 555.³⁶ 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 at any time.³⁷ 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.³⁸ 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

³⁵ See, *Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

³⁶ 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).

³⁷ See, *Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

³⁸ 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).

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 NCP³⁹ 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.

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).⁴⁰ 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

³⁹ See POLREPS 1 – 6.

⁴⁰ 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.

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 for both AMPOL claims identified as E16608-001 and E16608-0004, 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.⁴¹

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".⁴²

Second, AMPOL submitted billings based on its 2016 schedule.⁴³ Although ██████ initially sought to amend the 2007 contract to use a 2012 rate schedule, supplemented by the 2014 schedule,⁴⁴ PSC summarily refused and instead instructed AMPOL to "pick a set of rates" and start generating invoices.⁴⁵ 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.⁴⁶ AMPOL did so, and now has unpaid response costs based on a 2016 rate schedule.

Based upon the unique facts underlying this second 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.

⁴¹ See email to ██████ (Chubb) from ██████ (PSC) dated June 20, 2016 in E16608-0001.

⁴² See Chubb letter to AMPOL dated July 20, 2016 in E16608-0001.

⁴³ See email to ██████ (PSC) from ██████ (PSC) dated March 29, 2016 in E16608-0001 ("We need a daily report from AMPOL on what we have spent with them. [...] The daily report should go to ██████ and me [...]").

⁴⁴ See email from ██████ (AMPOL) to ██████ (PSC) dated April 1, 2016 in E16608-0001.

⁴⁵ See email to ██████ of Forefront from ██████ (PSC) dated April 7, 2016 in E16608-0001.

⁴⁶ 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 ██████ (AMPOL) from ██████ (PSC) dated April 2, 2016 (stating that PSC "can not [sic] approve the rates without consulting [its] insurance carrier") and email to ██████ (AMPOL) from ██████ (PSC) dated April 11, 2016, (stating that "the insurance company will be responsible for approving the rates and invoices."), and email to ██████ (Chubb) from ██████ (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.").

2. Invoice 26-IN – Total Denied \$850.80

The total amount of this invoice was \$87,357.32 and the evidence shows AMPOL received \$81,754.60, which left a remaining balance of \$5,602.72. 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:

Subcontractor invoice: Adler Tank invoice # 4181519 – This invoice was for roll top box rentals but included three separate entries for repairs billed against AMPOL in the total amount of \$850.80 which includes associated tax and markup. The NPFC denies these costs as that is the responsibility of the vendor and not an OPA compensable response cost.

3. Invoice 76-IN – Total Denied \$292.67

The total amount of this invoice was \$23,638.60 and the evidence shows AMPOL received \$22,270.74, which left a remaining balance of \$1,367.86. 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:

Subcontractor invoice: Gulf Coast Responders, LLC invoice # 3651 – This invoice was for roll off box rentals and box washouts along with associated delivery charges but included one separate entry for repairs billed against AMPOL in the total amount of \$41.75 which includes associated tax and markup. The NPFC denies these costs as that is the responsibility of the vendor and not an OPA compensable response cost.

Third party invoice: K&J Supplies & Hardware, LLC invoice # 335288 – This invoice was for 12 gallons of Industrial strength aluminum brightener. The NPFC denies this invoice in its entirety in the total amount of \$250.92 which includes associated markup as the Claimant has failed to provide evidence that the FOSC requested the product be ordered along with a full explanation as to exactly what it was used for as it relates to the removal of oil.

4. Invoice 129-IN – Total Denied \$1,606.79

The total amount of this invoice was \$16,889.22 and the evidence shows that AMPOL received \$14,709.52, which left a remaining balance of \$2,179.70. 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:

Third party invoice: Telcom Rental, LLC invoice # 12877 – This invoice was for the purchase of lost rental equipment. This invoice is denied in its entirety as it is the responsibility of the contractor and not the NPFC for lost rental equipment and as such the invoice and associated tax and markup are also denied as this is not an OPA compensable response cost.

NPFC Determination on Reconsideration for Invoice 287-IN

5. Invoice 287-IN – Total Denied \$2,068.03

The NPFC originally determined that \$2,895.37 was denied under this invoice. On August 4, 2017, the Claimant requested reconsideration of the denied costs in the total amount of \$827.34 associated with BFI Colonial Landfill. On reconsideration, the Claimant provided the second page of the BFI invoice that had not been previously provided along with the contract between BFI and AMPOL which contained contract

provisions that each disposal load would be invoiced at \$150.00 minimum and as such, all loads that amounted to less than \$150.00 when calculating disposal rate of \$35.00 per ton, the price per load was invoiced at \$150.00, explaining the price difference. Based on the new information and second page of the invoice, the NPFC has overturned its original denied amount of \$827.34 resulting in an overall increased offer for this AMPOL invoice.

The total amount of this invoice was \$40,742.99 and the evidence shows that AMPOL received \$5,511.82, which left a remaining balance of \$35,231.17. 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:

Subcontractor invoice: Adler Tank invoice # 4187706 – This invoice was for roll top box rentals and berm rental but included two separate entries for repairs billed against AMPOL in the total amount of \$723.39 which includes associated tax and markup. The NPFC denies these costs as repairs are the responsibility of the vendor and not an OPA compensable response cost.

Subcontractor invoice: Adler Tank invoice # 4187452 – This invoice was for roll top box rentals but included one separate entry for repairs billed against AMPOL in the total amount of \$159.39 which includes associated tax and markup. The NPFC denies these costs as repairs are the responsibility of the vendor and not an OPA compensable response cost.

Subcontractor invoice: Ingraham Services, LLC invoice # 120 – This invoice was for emergency response technicians and associated fuel tickets. The NPFC denies all fuel ticket costs in the total amount of \$464.50 which includes tax and associated markup as the claimant and vendor failed to provide an itemization of each fuel ticket along with proof of payment for the fuel purchased and as such, these costs are denied as not supported by proper documentation.

TOTAL AMOUNT DENIED: \$4,818.29⁴⁷

Based on the foregoing and new information provided on reconsideration, the NPFC hereby determines that the OSLTF will offer **\$39,563.16** as full compensation for the reimbursable removal costs incurred by AMPOL and submitted to the NPFC under claim # E16608-0004. 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.

RECONSIDERATION AMOUNT: \$39,563.16

Claim Supervisor: [REDACTED]	[REDACTED]
Date of Supervisor's review: <i>8/4/17</i>	
Supervisor Action: <i>Reconsideration Approved</i>	

⁴⁷ See Enclosure (1) NPFC Summary of Costs on recon spreadsheet.