

CLAIM SUMMARY / DETERMINATION

Claim Number:	E16608-0005
Claimant:	American Pollution Control Corporation (AMPOL)
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$361,472.21

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.

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

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>

⁵ See EPA POLREP 6 (Final).

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 History:

The incident gave rise to three separate removal-cost claims filed by AMPOL with the National Pollution Funds Center (herein referred to as “NPFC” or “Fund”), the lastest of which is presently before NPFC. NPFC adjudicated AMPOL’s claims #E16608-0001 on June 28, 2017; and #E16608-0004, which was adjudicated on reconsideration on August 14, 2017. Although this is a separate claim, it arises out of the same facts and circumstances as were discussed in the NPFC’s written determinations for AMPOL’s previous and related claims. In the interest of brevity, the underlying facts and circumstances of the incident and removal operations described in the previous NPFC determinations are incorporated herein by reference.

For the current claim #E16608-0005, AMPOL submitted two invoices for consideration: #19198 and #19345, both of which totaled \$2,688,855.58.⁷ The record revealed that PSC’s insurance carrier, Chubb, paid \$2,319,577.95⁸ toward these invoices, leaving a shortfall of \$369,277.63. AMPOL then issued a credit on invoice # 19198 in the amount of \$7,805.42 bringing the unpaid balance of both invoices to \$361,472.21. On August 3, 2017, AMPOL submitted a claim in the amount of \$361,472.21 for reimbursement.^{9 10} On September 22, 2017, the NPFC offered \$240,827.30, with the analysis of the offer set forth in the NPFC’s determination.

4. Request for Reconsideration:

On September 28, 2017, the AMPOL contacted the NPFC via email officially requesting reconsideration of the September 22, 2017 determination. Specifically, AMPOL sought \$94,700.01, representing costs that were originally approved by Chubb, but never paid. The NPFC inadvertently failed to include that amount in its original offer to AMPOL in its September 22, 2017 offer. The NPFC also denied a total amount of \$117,391.16 in invoiced costs and associated taxes and markup based on what originally appeared to be costs that were not supported by the record. AMPOL requested reconsideration of \$7,440.00 in denied costs for Environmental/Analytical Data Service Fees original invoiced daily by a subcontractor, CTEH, and invoiced in AMPOL invoice # 19198 in its original claim submission. AMPOL provided a copy of the rate schedule between CTEH and AMPOL whereby the rate schedule shows that there is a listed charge for the Environmental/Analytical Data Service Fee. AMPOL also explained these charges in its email to the NPFC dated September 28, 2017.¹¹

II. FACTS

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 Invoice #19198 had previously been submitted under AMPOL’s original claim, E16608-0001. The NPFC was prepared to deny the invoice in its entirety on the grounds that AMPOL had failed to properly present the invoice to PSC based on the fact that the invoice contained estimated, not actual costs. AMPOL agreed to withdraw Invoice #19198 for consideration until proper presentment could be made and would resubmit at a later time. See NPFC’s determination therein dated June 28, 2017. It now submits Invoice #19198 after having adjusted the calculations to properly reflect actual costs incurred and after having properly presented the invoice to PSC.

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 claims E16608-001 and E16608-0004 are separate and distinct invoice numbers than the AMPOL invoices identified and presented in this claim, E16608-0005. The claimant is presenting standalone invoices for this incident that are being adjudicated on their individual merits. There is a delta between the amount unpaid vice the amount claimed to the NPFC. The delta of \$7,805.42 represents amounts credited and explained in the claim submission.

¹⁰ AMPOL presented two invoices that total to its sum certain of \$361,472.21. Invoice #19198 in the requested amount of \$326,899.24 and Invoice # 19345 in the requested amount of \$34,572.97.

¹¹ See CTEH rate schedule and AMPOL email to NPFC dated September 28, 2017 providing clarification of the charges and why.

1. The Spill and removal actions.

The facts surrounding the spill and the removal actions have been set forth exhaustively in the NPFC's previous two written determinations for Claim #E11608-0001, and Claim #E11608-004, and are therefore incorporated by reference herein.

APPLICABLE LAW:

1. The NPFC's Administrative Role in the Claims Adjudication against the OSLTF

When adjudicating claims against the Fund, the NPFC utilizes an informal process controlled by the Administrative Procedure Act found in 5 U.S.C. § 555.¹² 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.¹³ 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.

The NPFC's initial determination dated September 22, 2017 is incorporated herein by reference. A request for reconsideration of an initial determination must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim.¹⁴ When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including new information provided by the claimant in support of the request for reconsideration. During the adjudication of this claim on reconsideration the NPFC considered the initial submissions at the inception the first of the three AMPOL claims, along with the submissions and the legal arguments in support of the request for reconsideration.

Analysis on Reconsideration:

1. Invoice 19198 – Total Denied on reconsideration \$16,091.15

In its determination of September 22, 2017, the NPFC denied a total of \$117,391.16, which included \$7,440.00 CTEH's subcontractor charges "Environmental/Analytical Costs". AMPOL now seeks reconsideration of the \$7,440.00. In support of this reconsideration, AMPOL submitted CTEH's rate sheet and a description of the "Environmental/Analytical Costs".¹⁵

AMPOL also seeks the \$94,700.01 that Chubb had approved in its audits, but failed to pay AMPOL, and that NPFC likewise determined was compensable, but inadvertently omitted in the September 22, 2017 determination.

With respect to the CTEH "Environmental/Analytical Costs", AMPOL explained that these are CTEH's "data services fees" that CTEH passes onto its clients. AMPOL further explained that the data

¹² 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).

¹³ See, *Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

¹⁴ 33 CFR § 136.115(d).

¹⁵ See AMPOL email to NPFC dated September 28, 2017.

services fees relate to the use and maintenance of various technology tools, such as the PDAs and smartphones utilized onsite during the removal operations, as well as the server systems and software that capture and process analytical data. The data is telemetted over a wireless network to a centralized server that CTEH maintains. Because the tools—PDAs, smartphones, and the data software—were utilized to effectuate the removal, the NPFC determines that these are reasonable removal costs. Based on the new information submitted, the NPFC reconsiders the denial of \$7,440.00.

The NPFC also includes the \$94,700.01, which the NPFC had already determined was OPA compensable but that was inadvertently excluded from the September 22, 2017 decision.

AMPOL did not request reconsideration for Invoice 19345, and accordingly, the NPFC reaffirms its denial of \$3,253.75.

TOTAL AMOUNT DENIED: \$19,344.90

Based on the foregoing and new information provided on reconsideration, the NPFC hereby determines that the OSLTF will offer **\$342,127.31¹⁶** as full compensation for the reimbursable removal costs incurred by AMPOL and submitted to the NPFC under claim # E16608-0005. All reimbursable costs are for charges paid by AMPOL are determined to be reasonable removal costs and are therefore OPA compensable.

RECONSIDERATION AMOUNT: \$342,127.31

Claim Supervisor: [REDACTED]

Date of Supervisor's review: **10/17/17**

Supervisor Action: ***Reconsideration Approved***

¹⁶ See Enclosure (1) NPFC Summary of Costs on recon spreadsheet. The original offer of September 18, 2017 was \$240,827.30. The amendment to the offer in today's determination includes \$94,700.01 and \$7,440.00. When adding the amendments to the original offer, the total is \$335,601.74, or \$6,525.60 less than today's offer of \$342,127.31. The \$6,525.60 discrepancy is due to some minor calculation discrepancies that were caught on de novo review and corrected herein.