

CLAIM SUMMARY / DETERMINATION

Claim Number:	E16901-0001
Claimant:	NRC Environmental Services Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$389,002.96

FACTS:

A. Oil Spill Incident: On May 13, 2016, a tanker truck belonging to the SOCO Group flipped over while transitioning from I-8 west onto Moreno Blvd., releasing 3,715 gallons of diesel fuel, in San Diego, California. The diesel migrated through weep hole drains onto the San Diego River flood plain and into the River itself. The contamination also affected Friars Road and the Morena Blvd. overpass. A Unified Command was set up and included the RP, San Diego County Environmental Health Hazmat, California Department of Fish and Wildlife, Office of Oil Spill, Prevention and Response and Mr. ██████████ represented the U.S. Environmental Protection Agency (“USEPA”) and acted as the Federal On-Scene Coordinator (“FOSC”).¹

The spill impacted the San Diego River and its associated flood plain, which are both, waters of the United States. The River drains approximately two miles downstream into the Pacific Ocean.² Approximately 500 meters of river channel east of the overpass and 100 meters west of the overpass were impacted by the spill. There was a heavy sheen in the river channel, east of the overpass, and an intermittent sheen west of the overpass. Vegetation along the shorelines of the river channel was saturated with product. Numerous areas of soil in the flood plain beneath the Morena overpass were impacted by diesel to a depth of three to four feet, below ground surface. The groundwater in the flood plain was approximately three to four feet depending on the tidal cycle. Light sheening was detected in the groundwater which appeared during the excavated areas north of the river channel.³

A USEPA website was also set up for this oil spill incident.⁴

B. Description of Response Actions Performed: NRC Environmental Services Inc. (“NRCES” or “Claimant”) arrived on-scene and over the course of the cleanup, NRCES personnel excavated the impacted soil and vegetation from the spill site and disposed of the oily waste and soil. Other work performed included; providing response personnel, providing equipment for cleanup operations, as well as managing the operations and maintenance phase of the response effort. Response operations included the removal of diesel contaminated soil in the San Diego River flood plain, removal of contaminated vegetation in the San Diego River flood plain, removal of diesel contamination in the water and on vegetation of the San Diego River, removal of diesel that impacted the parking lot beneath the Morena Boulevard overpass northern abutment. Confirmation sampling was taken from the River and along the flood plain to determine

¹ See, POLREP #1.

² See, POLREP #1.

³ See, POLREP #1.

⁴ https://www.epaossc.org/site/site_profile.aspx?site_id=11613

completion of the removal. Assessment of the impacts to the groundwater was performed as well as restoration of all impacted areas.⁵

The excavation was conducted until groundwater was reached at approximately four feet below ground surface. Samples were taken of the groundwater and the excavated soil was placed in 20 cubic yard bins for off-site disposal.⁶ Vegetation that was removed from the River generated pockets of diesel that also had to be removed. NRCES used sorbent booms and sorbent pads to collect the pockets of diesel. Mitigation booms were placed at Pacific Coast highway. Liquid waste was stored onsite in large storage tanks.

NRCES continued to remove soil and continued water cleanup operations, collecting sheen and diesel contaminated debris. Additionally, NRCES performed asphalt absorbent treatment as a safety precaution on the bridge.⁷ Response activities continued until May 30, 2016, at which time, FOOSC Wise conducted a final walk through and all areas had been backfilled and there was no visible sheen on the River.⁸ Disposal of contaminated soil and material was taken to South Yuma County Landfill. Disposal manifests can be found in NRCES' binders.

C. Presentment to the Responsible Party: SoCo Group from Carlsbad, California has been identified as the Responsible Party (hereinafter referred to as "SoCo" or "RP") under the Oil Pollution Act (OPA). NRCES made presentment of all costs associated with this claim, directly to SoCo Group on June 24, 2016.⁹ The initial invoiced amount was \$1,358,666.16 however, the RP's insurer, Nationwide Agribusiness Insurance Co., paid NRCES \$953,811.12. NRCES later issued two credits in the total amount of \$15,852.08,¹⁰ which left an outstanding balance of \$389,002.96.

The first credit was issued on August 19, 2016, for invoice number 642985, in the amount of \$8,026.70 for various equipment charges, materials, miscellaneous items, and subcontractors.¹¹ The second credit was issued on October 14, 2016 by way of letter to the RP.¹² The second credit was given in the amount of \$7,825.38 for various restaurant charges that were billed for water filled K rails, plus 20% markup, and 6.25% ESIC fee on the credited items.

⁵ See, POLREP #1.

⁶ Samples were conducted by Geosyntec Consultants through Calscience, work order number 16-05-1479. Eurofins/Calscience report is in the claim file.

⁷ Lane closure permits were obtained and the permit costs are part of this claim.

⁸ See, POLREP Five and FINAL.

⁹ Presentment was verified by the RP by way of a letter to Mr. [REDACTED], NPFC, dated December 09, 2016.

¹⁰ NRCES made reductions on invoices 640539 and 642985, 25% reductions were made on temporary labor and hotel stays. See, Invoice Evaluation Summary.

¹¹ See Claimant's Binder #1, p. 0066.

¹² See NRCES letter to Mr. [REDACTED] at the SoCo Group dated, October 14, 2016.

Original Invoice	\$1,358,666.16
RP/Insurer	
Payments	<u>(\$953,811.12)</u>
	\$404,855.04
(2) Credits issued	
by NRC	<u>(\$15,852.08)</u>
Balance Unpaid /	
Sum Certain of	
Claim	\$389,002.96

D. Claim and Claimant:

On November 23, 2016, NRCES (hereinafter referred to as “NRCES” or “Claimant”) submitted a removal cost claim to the National Pollution Fund Center (“NPFC” or “Fund”) for reimbursement of its uncompensated removal costs in the amount of \$389,002.96. The claim is for its response personnel, equipment, materials, and third party costs.¹³ With its claim submission, NRCES enclosed two binders that contained documentation that supports NRCES’ removal costs that it incurred.

The claim submission consists of: NRCES invoices and support that demonstrate the credit that NRCES applied to the invoices;¹⁴ the additional NRCES credit that was given later, via a letter to the RP, in the amount of \$7,825.38; NRCES’ daily work sheets and subcontractor/vendor invoices;¹⁵ Master Service Agreement between NRCES and the RP;¹⁶ NRCES’ Published 2016 Price List,¹⁷ a flash drive that contains 173 photos of the spill response efforts, and a copy of the Hazardous Material Spill Report, along with updates for the incident.

E. The RP’s response to the claim:

On November 28, 2016, the NPFC sent SoCo Group an RP Notification letter stating that the Fund was in receipt of NRCES’ claim and provided information to the SoCo Group regarding the claim submission.¹⁸

On December 05, 2016, the NPFC received an email from Mr. [REDACTED], the RP’s attorney,¹⁹ indicating that the RP paid over \$953,000 to NRCES and that the remaining invoices lacked documentation and was not reasonable or necessary costs to respond to the spill.²⁰ Also, the email stated that NRCES agreed to waive the 6.5% ESIC charge. Mr. [REDACTED] stated that he attempted to negotiate directly with NRCES’ in house attorney, Mr. [REDACTED] but that Mr. [REDACTED]

¹³ See claim file.

¹⁴ See, Claimant’s first binder, p. 0066

¹⁵ See, Claimant’s p. 0121 through p. 0574

¹⁶ See, Claimant’s p. 1116 through p. 1136.

¹⁷ See, Claimant’s p. 1137 through p. 1148

¹⁸ Mr. [REDACTED] sent the RP Notification letter.

¹⁹ Barber Law Group, BLG

²⁰ The same letter was sent to the NPFC from Mr. [REDACTED], dated December 13, 2016.

had not contacted Mr. [REDACTED].²¹ Mr. [REDACTED] requested that the NPFC provide him with the claim submission.²²

On December 9, 2016, NPFC received a letter from Action Environmental Group (“Action”), the RP’s consulting auditor on the project. Action provided a number of explanations as to why the RP refused to pay or reduced the invoices noting the deficiencies as follows:

1. NRCES failed to provide a yearly cost update to the RP;
2. Current rate sheet failed to provide information how rates are applied;
3. NRCES improperly charged double time for what should have been overtime charges;
4. NRCES improperly charged for administrative labor;
5. NRCES charged for a project manager whom the RP was unaware of;
6. Overbilling for equipment and miscellaneous materials;
7. Subcontractor expenses are too expensive; and
8. Energy, Security, Insurance and Compliance (“ESIC”) fee is “predatory and unreasonable”.

After receiving the claim submission, provided by the NPFC,²³ Mr. [REDACTED] sent a letter to the NPFC advising that he had received the claim submittal and stated that he had additional comments. He asserted that the RP and its insurance carrier, Nationwide, have paid the invoices and any additional amounts sought are not properly documented or reasonable and necessary and were not contracted by the RP. Mr. [REDACTED] also stated that Mr. [REDACTED], an environmental consultant who was on site and is familiar with the spill, raised issues regarding the reasonableness and necessity of the work. Mr. [REDACTED] attached five exhibits to his December 12th letter²⁴ as follows:

Exhibit A: A letter from the RP to NRCES, dated October 06, 2016.²⁵ The letter is in response to previous communications between the parties. The letter documents that the parties discussed a possible waiver of the ESIC 6.25%. The RP stated that they wanted to suggest a path forward in order to reach resolution of the remaining balances on the invoices.²⁶ The letter stated that SoCo’s insurer paid \$953,811.12 of the \$1,350,639.46 invoiced by NRCES and that Nationwide paid that amount to NRCES in good faith, relying on NRCES’ alleged promises to respond to the questions raised and to the requests for documentation.²⁷ The letter indicated that there was a phone call between both parties on September 22, 2016 that suggested that NRCES was willing to waive the ESIC surcharge of 6.25% to avoid a line by line review.²⁸ The letter further stated that NRCES’ invoices lacked support documentation, had improper markup, double billed for equipment, and contained unreasonable and non-customary charges for work that was allegedly not authorized by SoCo’s on site “Qualified Individual”. SoCo asserted that the Claimant billed

²¹ See [REDACTED] email to [REDACTED], dated December 05, 2016.

²² Mr. [REDACTED] Provided the RP Counsel with the Claimant’s claim submittal.

²³ See signed certified mail receipt, dated December 12, 2016.

²⁴ Exhibits A through E.

²⁵ SoCo Group letter, dated October 6, 2016, paragraph one.

²⁶ SoCo Group letter, dated October 6, 2016, paragraph one.

²⁷ SoCo Group letter, dated October 6, 2016, paragraph two.

²⁸ SoCo Group letter, dated October 6, 2016, paragraph two.

thousands of dollars in equipment that was paid for by Nationwide but had not been accounted for.²⁹

The letter stated that SoCo Group asserted that NRCES had not provided rate sheets to SoCo since the original 2005 Agreement went into effect.³⁰ Mr. [REDACTED] letter stated that a rate sheet that was provided by NRCES was not until May 24, 2016, after the work commenced on, May 13, 2016, and that the first Daily Billing Estimate was not provided to SoCo until May 18, 2016. The letter alleges that the work billed was not authorized by SoCo.³¹ On page two of the letter, SoCo indicated that they had not received anything in writing regarding NRCES' 20% markup associated with third party services and that it was not articulated in the original 2005 executed Agreement.³² SoCo Group provided a spreadsheet with their letter to NRCES that outlined its disagreement with certain charges (i.e. double time charges, administrative charges, temporary worker charges, miscellaneous charges, trucks and equipment, traffic control, double charges and air monitoring equipment). Finally, the SoCo Group did not agree with the NRCES accounting of roll-off bin charges or the accounting of rental versus owned equipment was requested by SoCo Group but never provided by NRCES.³³

Exhibit B: A letter to the NPFC from Action Environmental Group, (Action), dated December 09, 2016, signed by Mr. [REDACTED], Emergency Response Manager/Senior Hydrogeologist. This letter addressed NRCES-SoCo invoice and attachments. The letter was sent to the NPFC at the request of Nationwide Agribusiness Insurance Co., and it's insured, the SoCo Group.³⁴ Action stated that it has extensive experience with environmental cleanups related to tanker accidents and has worked in 48 out of the 50 states on various incidents ranging from tanker and pipeline spills to releases at industrial facilities, and over-the-road accidents that involved, both, saddle tank and cargo releases. Action provided consulting services on this incident to assist Nationwide and the SoCo Group that included discussions with the SoCo Group and the review of regulatory information and correspondence from NRCES.

Action oversaw the site activities, met with the NRCES Project Manager and the regulators on site. They also reviewed the NRCES daily estimates and invoices and were involved in discussions with NRCES regarding billing concerns. Action reviewed NRCES' invoice number 640539.³⁵ Action stated, in its letter, that NRCES provided an initial adjustment on Invoice No. 642985 whereby they added \$2,550.00 in supplemental hotel charges but also removed \$2,200.00 in restaurant charges that were charged over and above the per diem rate. They also made adjustments on charges for personal automobiles and vans in the amount of \$2,722.50, and adjustment to other charges that were identified as *double charges*. The charges that were identified as double were for specific equipment or supply items that were charged directly to the project as expenses, but then charged again as line item rental items. Action's letter asserted that the improper billing by NRCES constituted fraudulent behavior by NRCES and that the billing issue cannot be resolved solely via "credits" to the invoices.³⁶

²⁹ SoCo Group letter, dated October 6, 2016, paragraph four.

³⁰ SoCo Group letter dated October 6, 2016, paragraph five, first sentence.

³¹ SoCo Group letter, dated October 6, 2016, paragraph five.

³² SoCo Group letter dated October 6, 2016, p. 2 paragraph ten.

³³ SoCo Group letter, dated October 6, 2016, p. 4 and p. 5.

³⁴ See, Action Environmental Group letter, dated December 09, 2016, p. 1.

³⁵ See, Action Environmental Group letter, dated December 09, 2016, p. 1.

³⁶ See, Action Environmental Group letter, dated December 09, 2016, p. 1 and p. 2.

Action stated that a rate sheet was provided by NRCES on May 25, 2016 after it was requested by the SoCo Group.³⁷ Action alleged that NRCES did not explain how charges and rates would be applied. Action provided an example of such as it pertains to the billing of double time charges. Action stated that there was no effort by NRCES to keep the billing within straight time or overtime rates.³⁸ Action's letter disputed labor charges, equipment charges, miscellaneous and materials charges, expenses and subcontractor charges, to include the 6.25% ESIC fee for Energy, Security, Insurance, and Compliance. Action asserted that the ESIC fee was predatory and unreasonable, regardless of the fact that it is identified on the NRCES 2016 rate sheet.³⁹

Exhibit C: NRCES response letter with attachments. It is important to note that there is a text box added to the letter that indicates "Letter not provided to SOCO" so it is not clear how the RP obtained this letter. The letter explained that effective January 01, 2016, NRCES began applying the ESIC fee of 6.25% and that the fee is based upon the customer's total invoice excluding taxes, state, and local fees. The ESIC fee replaced the previous fees for fuel surcharges or other non-service related fees. The fee is assessed quarterly utilizing a combination of various economic and pricing benchmarks including, but not limited to, the Department of Labor's Producer Price Index, Consumer Price Index, Department of Energy Diesel Price Index, and other indicators.

The RP asserts that Exhibit C explaining the 6.25% ESIC fee was not provided to them although it does not state where it obtained the letter from.⁴⁰ Attached to Exhibit C, the RP provided various NRCES costs and invoices with receipts and comments on the receipts alleging that items were charged to the project and then billed back as line items.⁴¹

Exhibit D: An Excel spreadsheet from Nationwide SoCo; NRCES invoice evaluation, the final spreadsheet. The audit indicates that the adjustments that were taken on the Nationwide invoice evaluation include 25% reductions only on temporary labor and hotel stays. The audit states that cost rationale is required from NRCES in order to receive the full hotel charge payment. It also states that temporary labor OSHA documentation is required for full payment of those charges. The NRCES total as created by the RP reflects a reduction for K-Rail rental and also NRCES invoice #642985 credits plus additional charges.⁴²

Exhibit E: Nationwide SoCo NRCES invoice evaluation.

Exhibit F: A letter dated October 14, 2016, from NRCES to Mr. [REDACTED], Chief Financial Officer with SoCo Group, regarding invoices 64539 and 642985. The letter stated that "NRC" received SoCo Group's October 6, 2016 letter and that the letter reiterated a number of questions that were raised by SoCo regarding NRCES' billing on the project. The letter addressed each and every item, by category, which SoCo Group disputed. The letter advised that the agreement between "NRC" and SoCo states that the rates for services that were performed under the Agreement are rates in the most current NRC West Coast Price List and that NRC West Coast

³⁷ See, Action Environmental Group letter, dated December 09, 2016, p 2, paragraph one.

³⁸ See, Action Environmental Group letter, dated December 09, 2016, p. 2 paragraph two.

³⁹ See, Action Environmental Group letter, dated December 09, 2015, p. 2 through 8.

⁴⁰ See, the comment on RP's Exhibit C subsection 1-A.

⁴¹ See, Exhibit C, various NRCES support documentation with RP comments on them.

⁴² See, SoCo – Nationwide Invoice Evaluation Summary.

updates its Price list annually on February 18. The most current time and material Price list can be accessed through NRC's website.⁴³

F. Information provided by the FOSC

On December 02, 2016, the NPFC reached out to Mr. [REDACTED], USEPA FOSC, to advise that the NPFC was in receipt of an OSLTF claim from NRCES on the tanker spill project. The NPFC informed Mr. [REDACTED] of the RP's position that the Claimant employed more personnel, equipment, and did more work than what was necessary and reasonable. Because Mr. [REDACTED] was the FOSC for the incident, the NPFC requested that he provide input and information regarding the scope of work and amount of resources on scene as provided by NRCES, during the response.⁴⁴ The NPFC sent a similar email to the State of California in its capacity as the State On Scene Coordinator (SOSC) for this incident, on December 02, 2016, addressed to Mr. [REDACTED]s [REDACTED] and Ms. [REDACTED].⁴⁵

Mr. [REDACTED] replied on December 14, 2016 and stated that the Moreno/I-8 oil spill was conducted under a Unified Command in which the SoCo Group participated. Mr. [REDACTED] further indicated that there were two on-site briefings a day. During those briefings, the Unified Command discussed activities and logistics, including the amount of work that was performed. Because all information was presented during the daily briefings, in the presence of the SoCo Group, Mr. [REDACTED] opined that the costs should not have been a "surprise".⁴⁶

On behalf of the State of California, Mr. [REDACTED], the SOSC of the incident, also replied to the NPFC's inquiry. Mr. [REDACTED] stated that the scope of work that was performed was broad. There were impacts to public roads, parking areas, riparian soil, structural soil, and direct impacts to the San Diego River. The environmental efforts focused on removing oil from the water, removing oiled vegetation, and replacing the impacted soil in the San Diego River channel. Mr. [REDACTED] likewise confirmed that the SoCo Group was engaged and on-scene in every aspect of the response and that SoCo and NRCES worked together.⁴⁷

APPLICABLE LAW:

The NPFC administers the Oil Spill Liability Trust Fund (OSLTF) and adjudicates claims against the OSLTF pursuant to the Oil Pollution Act of 1990 (OPA 90). Under 33 U.S.C. §§ 2712 (a) and 2713, the OSLTF is available to reimburse claims for "uncompensated removal costs determined by the President to be consistent with the National Contingency Plan ..." OPA defines removal costs to include "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."⁴⁸

NPFC's adjudication of OSLTF claims is controlled by the requirements in 33 U.S.C. § 2713 and the regulations at 33 C.F.R. Part 136. As this determination is a settlement offer under 33 C.F.R.

⁴³ RP's Exhibit F, NRC letter to SoCo Group, Inc. dated October 14, 2016.

⁴⁴ NPFC email to Mr. [REDACTED], dated December 02, 2016.

⁴⁵ NPFC email to Mr. [REDACTED], dated December 02, 2016.

⁴⁶ Mr. [REDACTED] email, dated December 14, 2016.

⁴⁷ Mr. [REDACTED] email, dated January 25, 2017.

⁴⁸ 33 U.S.C. § 2701 (31).

§ 135.115 (b), it will automatically expire 60 days after the date it has been mailed to Claimants. The NPFC reserves the right to revoke this settlement offer at any time.⁴⁹ Because NPFC uses an informal process to adjudicate OSLTF claims,⁵⁰ 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining the basis for any denial. This determination is issued to satisfy the brief statement requirement.

Each claim against the OSLTF must be in writing and demand a sum certain for each category of uncompensated removal costs or damages.⁵¹ When adjudicating OSLTF claims, 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*. 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.

The claimant bears the burden of proving an entitlement to OSLTF compensation for the claimed amounts.⁵² In addition to numerous specific items, a claimant must submit all evidence, information, and documentation deemed necessary by the Director, NPFC to support the claim.⁵³ Before the OSLTF can reimburse removal costs, a claimant must show the following:

- 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.⁵⁴

In response to a claim for uncompensated removal costs, the OSLTF will only reimburse the reasonable cost of activities that were either directed by the FOSC or determined by the FOSC to be consistent with the NCP. In particular, 33 CFR § 136.205 (emphasis added) limits compensation for removal costs with the following:

The amount of compensation allowable is the total amount 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.

⁴⁹ See, Smith Property Holdings v. United States, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

⁵⁰ The court in Bean Dredging, LLC v. United States, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), 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, [citations omitted] an entirely unremarkable fact given that Congress’ overarching intent in enacting the OPA was to ‘streamline’ the claims adjudication process”

⁵¹ 33 CFR § 136.105 (b).

⁵² 33 CFR 136.105(a) (“The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.”); and 33 CFR 136.105(e)(6) (requiring that each claim include evidence to support the claim).

⁵³ 33 CFR § 136.105.

⁵⁴ 33 CFR § 136.203.

Among other things, a claimant must show that its claim was first presented to the responsible party or guarantor of the incident's designated source.⁵⁵ If the responsible party or guarantor fails to settle the claim within 90 days or denies liability, then the claimant can present its claim to the OSLTF. A claimant's entitlement to OSLTF compensation and a responsible party's liability for an oil spill is controlled by OPA.⁵⁶ Also, a responsible party may not avoid OPA liability by entering into a contract.⁵⁷ If the OSLTF compensates a claimant, then the OSLTF becomes subrogated to all of the claimant's rights and causes of actions under any law.⁵⁸ When asserting a claimant's rights against a responsible party, the OSLTF stands in the shoes of the claimant and does not assert any greater rights than originally held by the claimant.

DETERMINATION OF LOSS:

A. Overview:

1. [REDACTED], USEPA, was the Federal On-Scene Coordinator (FOSC) for this incident and he determined that the actions undertaken by NRCES were consistent with the NCP⁵⁹ 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 § 136.205⁶⁰.

B. NPFC Analysis

The focus of the NPFC's review of this claim is as follows:

- (1) whether the actions taken were compensable "removal actions" under OPA;
- (2) the actions taken were to prevent, minimize, and mitigate the effects of the incident;
- (3) whether the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or directed by the FOSC; and
- (4) whether the costs were adequately documented and reasonable.

⁵⁵ 33 U.S.C. § 2713 (a).

⁵⁶ United States v. American Commercial Lines, L.L.C., 759 F.3d 420, 426 (5th Cir. 2014)(holding that OPA displaced a responsible party's claims under the general maritime law).

⁵⁷ 33 U.S.C. § 2710 (b) ("No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.").

⁵⁸ 33 U.S.C. § 2715 (a).

⁵⁹ See, POLREPS.

⁶⁰ See NPFC Summary of Costs Spreadsheet.

It is undisputed that Claimant performed oil spill cleanup utilizing personnel, boat assets, drum skimmers, sorbent booms, and absorbent pads as needed to remove the oil associated with this incident and ensured disposal was properly performed and documented.⁶¹ Claimant performed operations beginning May 13, 2016 until May 30, 2016.

In reviewing this claim, the NPFC considered Claimant's evidence consisting of a payment summary, invoices, third-party receipts, proof of payment, and disposal manifests. The NPFC also corresponded with the FOOSC and the SOOSC regarding Claimant's costs and expenses. In addition, the NPFC reviewed evidence that Claimant had first submitted its claim to the RP, as well as the RP's submissions to the NPFC.

Based on its review, the NPFC determined that the majority of the costs incurred by Claimant are compensable under the OPA. The costs were reasonable and necessary to mitigate the effects of the incident and were determined by the FOOSC to be consistent with the NCP. The damage from the spill was extensive, and required significant coordination, including contracting with a highway maintenance crew to assist with traffic control, detours, and road closures. Time was also of the essence, as the spill occurred in a busy area of the Moreno Boulevard. Claimant adequately documented its costs, including proof that all third-party contractors were paid in full, the evidence of which consisted of check copies, Excel Spreadsheet of Vendor invoices, E-Payable Remittance Spreadsheet, and a canceled check for proof of payment for GeoSyntec.

The NPFC also considered the RP's submissions, the majority of which seemed to focus on a contractual dispute between the parties regarding rates, complaints about overtime, improper markup, double charging, and a perceived lack of documentation. It's important to note that OPA controls Claimant's entitlement to OSLTF compensation, not a contract between Claimant and the RP. Nevertheless, NPFC will consider any applicable contractual provisions when determining whether a reasonable uncompensated removal cost under 33 CFR § 136.205 has been established. In this instance, Claimant submitted a contract titled "Agreement for Provision of Response Resources" and dated August 1, 2005. The contract is signed by [REDACTED] of "National Response Corporation" and [REDACTED] of "The SOCO Group Inc.". The agreement suggests that the agreed upon rates are in conformance with "Schedule 4", although no schedule 4 was provided. Rather, the only mention of rates is set forth in a "Schedule 2" as follows:

Time and Material Rates in most current NRC West Coast Price List (NRC West Coast Price List updated annually on February 18. The most current time & material Price List can be accessed through NRC's website at www.nrcc.com. Client will need their Client Identification Number to access Time and Material Rates through website.)⁶²

The RP does not dispute that it entered into the 2005 contract, rather it contends that it did not have an updated rate sheet until May 24, eleven days after NRCES' work commenced and thus was not aware of the current rates.⁶³ Notably, the RP does not suggest that the current schedule is unreasonable or that a different rate governs. Based upon the unique facts of this case, the

⁶¹ See disposal manifests in file folder.

⁶² See "Agreement for Provision of Response Resources" dated August 1, 2005 (hereinafter referred to as the "Master Service Agreement"), Sched. 2.

⁶³ RP's Exhibit B (letter to NRCES dated October 6, 2016).

NPFC concludes that the 2016 rate schedule should be relied upon when determining Claimant's reasonable uncompensated removal costs and that the rates therein are reasonable.

With respect to the RP's remaining contentions, the NPFC considered the RP's Nationwide/SoCo/NRCES Invoice Evaluation (its audit of the NRCES' invoices in an excel spreadsheet). The audit provided a per line itemization of what payments the RP's insurance carrier approved and denied. The NPFC incorporated the electronic audit into its adjudication resulting in a line by line adjudication of all the invoices that were billed to SoCo Group in the amount of \$1,278,744.65.⁶⁴ The NPFC approved \$1,264,879.06 in various OPA compensable line items.

The NPFC allowed the 6.25% ESIC charge based on the the fact that the 2016 published rate schedule included this fee, that this fee is in lieu of surcharge fees that NRCES historically imposed, and that this fee represents administrative costs typically imposed by OSROs.⁶⁵

The two approved amounts equate to NRCES' original invoice amount of \$1,358,666.16. The NPFC applied the SoCo Group payment amount of, \$953,811.12, to the original invoiced amount, bringing the balance to \$404,855.04. It is important to note that NRCES issued two credits to SoCo Group, in the amount of \$15,852.08, which the Fund applied to the balance of \$404,855.04. This action brought the invoice balance to \$389,002.96 which is NRCES' sum certain amount. The NPFC denied \$13,865.56 in various line items and is explained below. In addition, the Fund denied \$866.60 of ESIC charges, based on non OPA (denied) compensable costs that were identified. These actions ultimately bring the offer amount to \$374,270.77.⁶⁶

Further, and as described above, the current NRCES rates are on the NRC website and updated annually. Pricing information was provided in the 2005 contract that the RP signed which included the provision identified under Schedule 2 that the rates would change annually and were published on the website. While the actual contract was executed on August 1, 2005, the rates to which the Claimant is permitted to charge The SoCo Group, Inc. is based on the current year's pricing matrix found on the NRC website, which in this particular incident, is the 2016 rate schedule. Finally, the ESIC charges are explained in the 2016 rate schedule as well as is the 20% markup charges that are applied to all third party contractors, meals, and etc.⁶⁷

⁶⁴ See Enclosure 1, RP Electronic audit with NPFC adjudication

⁶⁵ The RP's Auditor suggested the fee for Energy, Security, Insurance and Compliance (ESIC) is a "predatory and unreasonable, regardless if it's on the 2016 Price List". See ACTION letter to NPFC dated December 9, 2016. But the RP also provided in its submissions, NRCES' explanation of the new fee:

In an effort to provide consistent pricing across our portfolio, we will be standardizing our price schedules into one domestic schedule in 2016. This includes the application of energy, insurance, compliance and security fees. Excluding some energy related costs, we have seen some significant increase in these costs with increased security and compliance requirements as well as insurance. [...] This new line item shall replace any previous fee for fuel surcharges, or other non-service related fees.

RP submission at Exhibit B.

⁶⁶ See NPFC Summary of Costs spreadsheets

⁶⁷ See NRC Master Service Agreement with SoCo Group, Schedule 2, item 4. This provision incorporates the current NRC 2016 Rate schedule pricing for services.

Based on the review, the NPFC has determined that the payable costs were billed in accordance with the 2016 rate schedule and/or contractual agreements that were in place at the time the services were rendered and were overseen by the Unified Command.

The NPFC denied a total of \$14,732.12⁶⁸ in requested costs.⁶⁹ Descriptions of the denied costs are as follows:

- **ESIC 6.25% - Total denied \$866.60** - NPFC denied ESCIS charges for non OPA compensable costs as identified in the Summary of Costs spreadsheet. The total denied is \$875.98.
- **May 15, 2016 – Total denied \$3,260.82** - Based on a response from NRCES, any item that was charged was retained by NRCES as replacement equipment. The replacement equipment was purchased after NRCES' equipment was damaged during the SoCo spill cleanup. Damaged equipment is not an OPA compensable removal cost and therefore those costs are denied. Other denied line items for this day are similar or the Claimant did not provide justification for its third party cost.
- **May 16, 2016 – Total denied \$1,575.01** – Most of these denied costs were because the Claimant did not provide justification for the purchase of certain line items.
- **May 18, 2016 – Total denied \$387.86** – Claimant did not provide justification for a purchase.
- **May 19, 2016 – Total denied \$208.47** - Claimant did not provide justification for a purchase.
- **May 20, 2016 – Total denied \$98.03** – There were two errors in NRCES' markup calculation. The NPFC approved the appropriate amount and denied the portion that was in error.
- **May 22, 2016 – Total denied \$65.37** – Claimant did not provide justification for a purchase.
- **May 23, 2016 – Total denied \$234.71** – Claimant did not provide justification.
- **May 24, 2016 – Total denied \$700.25** – L & L invoice was not provided.
- **May 27, 2016 – Total denied \$300.00** – Claimant needs to provide support data.
- **May 31, 2016 – Total denied \$7,035.00** – Claimant charged more than 20% markup.

Please see the Nationwide/SoCo Evaluation of NRCES invoices with NPFC adjudication spreadsheet for a more detailed explanation of approved and denied line items.

⁶⁸ NPFC denied \$866.60 in ESIC costs based on the non OPA compensable costs that are identified in the Summary of Costs spreadsheet.

⁶⁹ See NPFC Summary of Costs spreadsheets.

Based on the foregoing, the NPFC hereby determines that the OSLTF will offer **\$374,270.77** as full compensation for the reimbursable removal costs incurred by NRCES and submitted to the NPFC under claim # E16901-0001. All reimbursable costs are for charges paid by the Claimant for removal actions as that term is defined in OPA and are compensable removal costs by the OSLTF as presented by the Claimant.

AMOUNT: \$374,270.77

Claim Supervisor:

Date of Supervisor's review: *4/24/17*

Supervisor Action: *Approved*