

CLAIM SUMMARY / DETERMINATION

Claim Number:	E16608-0005
Claimant:	American Pollution Control Corporation
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

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).

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:

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 last 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. On August 3, 2017, AMPOL submitted a claim in the amount of \$361,472.21 for reimbursement.⁹

This claim represents unpaid response personnel, equipment, materials, and third party removal costs.¹⁰ AMPOL 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 upon which it based its invoice generation.

II. FACTS

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.

2. The Claim history and Adjudication.

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 *See* claim file.

As noted in the written determination for AMPOL's claim # E11608-0001, AMPOL had initially submitted Invoice #19198 as part of the claim. NPFC's audit of AMPOL's supportive evidence revealed that AMPOL had used estimated costs as a basis for Invoice #19198. After NPFC pointed this fact out to AMPOL, and also showed AMPOL what portions of Invoice #19198 had already been paid, AMPOL agreed to withdraw the invoice from consideration.¹¹ AMPOL has now amended Invoice #19198 to reflect its actual costs, and submits this invoice as well as Invoice #19345 for consideration today.

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.

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.¹⁴ 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.

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).

2. 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

¹¹ For a more complete discussion, see NPFC's written determination for Claim #E11608-0001 dated June 28, 2017.

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 *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).

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 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.¹⁵

ANALYSIS:

1. The 2016 rate schedule will govern.

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

¹⁵ *See, Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

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.

The 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).¹⁶ 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 adjudicating the current claim, the NPFC has not been presented with any evidence to support a different conclusion than what was set forth in the previous written determinations for claim # E16608-001 and 004 regarding the reasonableness of AMPOL's 2016 rate schedule, or the propriety of paying AMPOL its removal costs according to that schedule. Because this third claim arises out of and shares the same nucleus of operative facts, and because there are no new facts to suggest a different analysis applies, the NPFC adopts the same reasoning and conclusion on the issue as stated in the previous claim decisions.

2. Invoice 19198 – Total Denied \$117,391.16

The total amount of this invoice was \$2,646,346.79. The NPFC determined that of this amount \$2,615,850.22 was compensable, as explained below. The evidence further showed that AMPOL had already received \$2,311,642.13 from Chubb,¹⁷ which left a remaining balance of \$334,704.69 on the invoice. Due to credits it issued to PSC, AMPOL only sought \$326,899.24 from the NPFC for this invoice.

The NPFC has denied a total of \$117,391.16 representing those costs associated with CTEH subcontractor charges. CTEH was hired to augment AMPOL personnel, materials and supplies in performing response actions for PSC. The amounts are denied because the charges were not supported by the record with proper evidentiary documentation. The denied items are itemized in the NPFC Summary of Costs spreadsheets.

¹⁶ 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.

¹⁷ When AMPOL presented the remaining uncompensated costs for this invoice to the NPFC, it only requested \$326,899.24 for invoice 19198 as a result of credits it issued for certain costs which are identified within Enclosure (1) NPFC Summary of Costs spreadsheet in the amount of \$7,805.45. See Enclosure (1) NPFC Summary of Costs spreadsheets.

In subtracting \$117,391.16 from the \$326,899.24, the NPFC has determined that it will pay \$209,508.08 representing uncompensated removal costs.

3. Invoice 19345 – Total Denied \$3,253.75

The total amount of this invoice was \$42,508.79. The NPFC determined that of this amount, \$39,255.04 was compensable, as explained below.¹⁸ The evidence further showed that \$7,935.82 had already been received from Chubb. AMPOL submitted a claim for \$34,572.97 after subtracting the \$7,935.82 from Chubb for payment toward this invoice.

The NPFC denied \$3,253.75 for AMPOL's failure to provide adequate cost documentation and supportive evidence. That amount is broken down as follows: \$2,711.45 in costs associated with TRG (AMPOL submitted no documentation to support its claim for this amount); the NPFC also denied the \$542.29 markup charges associated with the TRG denied cost.¹⁹

In subtracting \$3,253.75 from AMPOL's \$34,572.97, the NPFC has determined that it will pay \$31,319.22.

TOTAL AMOUNT DENIED: \$120,644.91²⁰

Based on the foregoing, the NPFC hereby determines that the OSLTF will offer **\$240,827.30** 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 for removal actions as that term is defined in OPA and are compensable removal costs by the OSLTF as presented by AMPOL.

AMOUNT: \$240,827.30

Supervisor Name

[REDACTED]

[REDACTED]

Date of Supervisor's review: *9/22/17*

Supervisor Action: *Approved*

¹⁸ For this invoice AMPOL had claimed \$34,572.97 which was the difference from the invoice amount and Chubb's payment. See Enclosure (1) NPFC Summary of Cost Spreadsheet. However, when NPFC adjudicates any claim, it always begins with adjudication of the invoice amount, rather than the remaining balance of the invoice. This allows NPFC accurately adjudicate all costs associated with the claim.

¹⁹ See Enclosure (1) NPFC Summary of Costs spreadsheet.

²⁰ See Enclosure (1) NPFC Summary of Costs spreadsheet.