

CLAIM SUMMARY / DETERMINATION FORM

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| Claim Number | : J09011-0002 |
| Claimant | : Water Quality Insurance Syndicate |
| Type of Claimant | : Corporate |
| Type of Claim | : Limit of Liability |
| Amount Requested: | \$1,897,299.99 |

I. INTRODUCTION

This claim involves costs associated with the removal of oil and mitigation of a substantial threat of oil discharge when the offshore supply vessel MONARCH (MONARCH) sank in the Central Cook Inlet, Alaska. Ocean Marine Services, Inc. (OMSI) owned and operated the MONARCH and was therefore determined to be the responsible party under the Oil Pollution Act, 33 U.S.C.A. 2701 *et seq.* Water Quality Insurance Syndicate (WQIS or Claimant) insured the vessel and paid for oil pollution response costs. WQIS now brings this claim for uncompensated removal costs that exceed the vessel's statutory limit of liability.

II. INCIDENT AND REMOVAL ACTIVITY:

The offshore supply vessel MONARCH allided with the Granite Point Oil Platform in Central Cook Inlet, Alaska at 0545 on January 15, 2009, and discharged oil.¹ The vessel subsequently sank to the bottom of the inlet in approximately 80 feet of water. Approximately 35,000 gallons of diesel fuel and oil were onboard the vessel at the time of the allision.

Upon notification of the incident, OMSI activated their Oil Spill Response Organization (OSRO) Alaska Chadux, who initiated mobilization of pollution removal resources and Incident Management Team to the location. The motor vessel VIGILANT (VIGILANT) was also diverted from a tow in Nikiski and responded to provide assistance. However, by the time the VIGILANT arrived on-scene, the MONARCH was on her side alongside the platform and sinking. A light sheen was observed emanating from the back of the vessel. The MONARCH sank shortly after the arrival of the VIGILANT. Global Diving Services and Stirling Salvage were also contacted and mobilized in anticipation of the complex activities associated with the survey, salvage and removal of oil from the sunken vessel. Global Diving personnel deployed onboard the motor vessel SAND ISLAND (SAND ISLAND) in anticipation of diving on the sunken vessel.²

Attempts to locate the vessel over the next several days were limited due to the strong currents and ice flow. Side scanning sonar operations were conducted off the motor vessel CHAMPION (CHAMPION) as well as the Granite Point platform with limited results. On January 21, 2009, Global Diving personnel on the SAND ISLAND stood down and de-mobilized from the scene. On January 22, 2009, side scanning sonar operations located the MONARCH and determined that the vessel had come to rest on the bottom of Cook Inlet at the base of the

¹ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000040-43.

² Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000045-46.

Granite Point platform. Recognizing the danger and complexity of continuing response operation in the heavy ice, the Unified Command consisting of CG Sector Western Alaska, AK Department of Environmental Conservation, and OMSI developed, signed and implemented an Ice Season Monitoring Plan (ISMP) which established numerous objectives. The ISMP was scheduled to remain in effect until April, 1 2009.³ The ISMP's objectives included:

- Monitor the stability and status of the vessel;
- Minimize the environmental impact of the incident;
- Platform personnel and service vessels to monitor and report ice conditions and maintain a lookout or any pollution or debris that may be liberated from the wreck;
- Routine flights to monitor for pollution and debris;
- Pollution response equipment and materials to remain staged and available onboard the CHAMPION and at the Offshore Systems Kenai (OSK) facility in Kenai, AK.

For the remainder of January and through the month of February, heavier than normal ice flows severely hampered efforts to better document the position and condition of the MONARCH. An Acoustic Doppler Current Profiler (ADCP) was deployed from the Granite Point platform to measure loads being placed on the hull of the MONARCH and a high resolution multibeam sonar was deployed from the towing vessel GLACIER WIND (GLACIER WIND). On February 18, 2009, the Unified Command reached consensus that the risk of pollution needed to be mitigated prior to any attempts to determine the fate of the wreck. As such, the issue of determining a final plan and ultimate disposition of the MONARCH would remain open pending a comprehensive evaluation after ice conditions permitted an underwater survey and assessment. Side scanning sonar was discontinued and de-mobilized on February 27, 2009.⁴

Ice conditions continued to thwart sonar deployment throughout the month of March and into April. The ISMP was extended through May 1, 2009, when weather and ice condition moderated and Global Diving personnel could commence underwater operations to ascertain damage to the vessel; her position on the bottom of Cook Inlet and options to mitigate the pollution from the sunken vessel.⁵

On May 1, 2009, Global Diving personnel mobilized and deployed on the SAND ISLAND from Nikiski to evaluate the condition of the MONARCH. Over the next 14 days, Global Diving personnel conducted a total of 34 dives on the wreck and determined the exact position of the wreck; damage incurred to the wreck during its allision and sinking; and a fuel/oil distribution within the wreck. Based upon their fuel/oil distribution assessment, Global Diving personnel estimated that approximately 3550 gallons of diesel fuel/oil were lost from the port fuel oil day tank and port hydraulic oil tank onboard the MONARCH during it's allision with the Granite Point platform. But as there was no other apparent damage to any of the remaining fuel tanks

³ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000057-58.

⁴ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000061-65.

⁵ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000068-69.

onboard the vessel, approximately 31,500 gallons of diesel fuel/oil remained onboard the sunken vessel.⁶

Defueling operations were scheduled to start during the summer months of 2009. The first phase of defueling involved the utilization of the motor vessel PERSERVERANCE as the operational platform for the defueling. Global Diving mobilized personnel and equipment to the PERSERVERANCE and the PERSERVERANCE departed Nikiski on June 11, 2009, to anchor off the Granite Point platform and begin dive operations. Dive operations began on June 13, 2009, and divers were able to successfully dive on the MONARCH and remove approximately 1,000 gallons of diesel fuel from one of the vessel's fuel tanks. However, the starboard anchor on the PERSERVERANCE dragged and released on the evening of June 13, 2009, which resulted in a near allision with the Granite Point platform. Due to the strong currents and vessel's inability to continually idle its main engines, the PERSERVERANCE was released from further operations and the Unified Command began assessing other vessels better equipped to conduct fuel removal operations from the MONARCH.⁷

The next phase of recovery involved the SAND ISLAND which wouldn't permanently anchor over the wreck but would instead anchor well away from the wreck and shift into location during periods of a slack tide and tie off to the legs of the platform during diver operations. During this phase, Global Diving personnel were tasked with analyzing the best approach to access each of the MONARCH's fuel tanks and make preparations which included:

- Clearing the wreck of entanglement hazards;
- Using underwater burning equipment to cut away bulwarks obstructing access to fuel tank openings;
- Removing MONARCH debris in way of fuel tank openings;
- Cutting away frames and other obstructions limiting access to tank vents and fill pipes.

The SAND ISLAND with Global Diving personnel conducted these operations through July 1, 2009.⁸

The final phase of the recovery involved the landing craft POLAR BEAR (POLAR BEAR) which was determined to be better suited for the conditions as it had a flat bottom, shallow draft and open afterdeck. Global Diving personnel also developed a four point anchoring system for the POLAR BEAR making it better equipped for the strong currents and would prevent anchor release and near misses with the Granite Point platform as experienced by the PERSERVERANCE. Preparations for deployment began on July 19, 2009, and the POLAR BEAR departed for the Granite Point platform on July 29, 2009. The SAND ISLAND joined the POLAR BEAR as it was loaded with oil spill recovery materials and would serve as a secondary oil spill response vessel as well as the dive safety vessel and platform for USCG personnel. The PERSERVERANCE was again engaged as the primary oil spill response vessel. Over the next 12 days, Global Diving personnel dove on the wreck on a three tide dive cycle to remove diesel

⁶ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000073-79.

⁷ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000083-85.

⁸ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000086-87.

fuel and oil remaining onboard the MONARCH. In all, a total of 12,445 gallons of diesel fuel and oil were recovered from the vessel, 860 gallons were determined to be unrecoverable and 21,958 gallons were unaccounted for and assumed lost during the sinking of the vessel. With the removal operations complete, the POLAR BEAR departed for her home port of Homer, AK, on August 13, 2009. All of the diesel fuel and oil recovered from the MONARCH was transferred to a shore facility for recycling and proper disposal.⁹

Final disposition options of the wreck were considered and included removing the wreck intact; removing the wreck in sections; scrapping the wreck in situ; moving the wreck away from the Granite Point platform into deeper water or leaving it in place. After considering all of the risks involved with removing the wreck and confirming that the wreck hadn't moved from its initial resting place next to the base of the Granite Point platform for over a period of 12 months, a recommendation was made to leave the wreck in place.¹⁰ To date, the MONARCH remains at the bottom of Cook Inlet at the base of the Granite Point platform.

II. CLAIMANT AND CLAIM HISTORY

On January 11, 2012, Claimant submitted a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund). On behalf of OSMI, Claimant asserted entitlement to the statutory limit of liability, stating that they expended \$2,697,299.99 in uncompensated removal costs. The applicable statutory limitation of liability of the responsible party at the time of the incident was \$800,000.00; therefore, Claimant sought reimbursement of \$1,897,299.99.¹¹ The NPFC reviewed the documentation submitted by the Claimant in support of the asserted entitlement to a limitation on liability and documentation independently gathered by the NPFC.¹²

On June 30, 2014, the NPFC denied the claim in accordance with 33 U.S.C. § 2704(c)(1)(a) on the grounds Claimant was not entitled to a statutory limitation of liability because the incident was proximately caused by the gross negligence of the responsible party.¹³

On August 11, 2014, the Claimant through its legal representative, Mr. [REDACTED] of Rubin, Fiorella & Friedman LLP, requested reconsideration via email to Mr. [REDACTED]. Mr. [REDACTED] requested a 90 day extension of time to submit further factual and legal support and rebuttal.¹⁴ On August 12, 2014, the NPFC advised Counsel that he needed to provide the factual

⁹ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M000091-95.

¹⁰ Disposition of Wreck provided by the Claimant on August 5, 2013, p. M0000169-191.

¹¹ In their original claim submission, the Claimant asserted that they expended \$2,698,159.59 in removal costs before the \$800,000.00 limit of liability and were seeking \$1,898,159.59 in reimbursement. After a mistake in the cost documentation was identified, the Claimant changed their sum certain to \$2,697,299.99 before the \$800,000.00 limit of liability and was seeking \$1,897,299.99 in reimbursement. See, email from Claimant to Mr. [REDACTED] NPFC dated July 7, 2017.

¹² Claim submitted by WQIS dated January 11, 2012.

¹³ NPFC determination dated June 30, 2014.

¹⁴ Claimant's initial request for reconsideration August 11, 2014.

or legal grounds for the request in order for the NPFC to properly consider a request for reconsideration.¹⁵ On August 12, 2014 at 4:59pm, Mr. ██████ responded to the NPFC outlining his intention to submit a request for reconsideration. Although in compliance with the governing claims regulation for requesting reconsideration, 33 C.F.R. §136.115(d), the request only included a sampling of the grounds for reconsideration.¹⁶ On August 13, 2014, the NPFC granted the Claimant's request for extension of the deadline to provide a fully supported request for reconsideration. A December 1, 2014 due date was provided to the Claimant.¹⁷ On December 1, 2014, the Claimant sought reconsideration, arguing that the NPFC had misapplied the law as there was no evidence supporting the NPFC determination that the incident was caused by the gross negligence of the responsible party.¹⁸

On July 21, 2015, the NPFC denied the Claimant's request for reconsideration on the grounds that under 33 U.S.C. § 2704(c)(1)(a) the Claimant was not entitled to a statutory limitation of liability because the incident was proximately caused by the gross negligence of the responsible party.¹⁹

On December 21, 2015, the Claimant filed a Motion for Summary Judgment against the United States of America in the United States District Court of Columbia, Civil Action No. 15-789.²⁰ On December 22, 2016, the United States District Court of Columbia granted the Claimant's Motion for Summary Judgment and remanded claim J09011-0001 back to the NPFC for adjudication consistent with its ruling.²¹

In response to the court's order, the NPFC commenced adjudication of the claim, assigned it a new claim number, and treated it as an ordinary removal cost claim. After careful review of Claimant's documents, the NPFC determined that a significant amount of the claim was not supported by adequate documentation, such as work descriptions, dailies, or other third-party, objective evidence demonstrating that the items and personnel billed were related to oil pollution response. Accordingly, on February 24, 2017, the NPFC requested additional information concerning sixteen subject areas of Claimant's submissions. The NPFC gave the Claimant a deadline of April 3, 2017 to address the concerns and to provide the additional information.

¹⁵ NPFC email to Mr. ██████ dated August 12, 2014.

¹⁶ Claimant's email outlining factual basis for reconsideration along with a 90 day extension of time to submit official request and supporting documentation dated August 12, 2014.

¹⁷ NPFC email granting extension to submit fully supported request for reconsideration dated August 13, 2014.

¹⁸ Claimant's request for reconsideration dated December 1, 2014.

¹⁹ NPFC determination on reconsideration dated July 21, 2015.

²⁰ Claimants Motion for Summary Judgment filed with the United States District Court for the District of Columbia Order, Civil Action No. 15-789 dated December 21, 2015.

²¹ United States District Court for the District of Columbia Order, Civil Action No. 15-789 dated December 22, 2016.

On March 31, 2017, Mr. [REDACTED], the spill manager working on the project and on behalf of Claimant²², requested a 60 day extension of the deadline. The NPFC denied the request, but advised that Mr. [REDACTED] should provide what he had by the April 3rd deadline, and that he could, on that day, seek an extension if he needed.

On April 3, 2017, Mr. [REDACTED] did request more time and on April 4, 2017, the NPFC granted an extension until May 25, 2017. On May 18, 2017, Mr. [REDACTED] made a third request for an extension. The NPFC granted the request and the new deadline was set for June 25, 2017.

Between February 24, 2017 and June 25, 2017, Claimant submitted evidence in piecemeal fashion, attaching voluminous documentation to emails as exhibits. On June 23, 2017, the NPFC requested clarification of some of the information that had been provided to date and as it pertained to Claimant's Invoice Log²³, listing all eleven vendors/payees that Claimant had paid over the course of the response and for which it sought reimbursement. NPFC highlighted the specific problems with the documentation as it related to this Invoice Log. On July 7, 2017, Mr. [REDACTED] answered the NPFC's latest request only in part as he was still awaiting more information. The NPFC advised the Claimant that it was moving forward with full adjudication, but that the Claimant could respond any time with new information up until the time the adjudication was completed. On July 14, 2017, Mr. [REDACTED] sent additional information for consideration. The July 14, 2017 submission was Claimant's final submission. No further information has been received prior to the issuance of this determination.

IV. ANALYSIS

A. Adjudication of Claims Against the OSLTF

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.²⁴ 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.

The claims adjudication process is also subject to the regulations at 33 C.F.R. Part 136. Because this determination is a settlement offer under 33 C.F.R. § 135.115 (b), it will

²² Claimant hired the Maritime Alliance Group Inc. ("MAGI") to conduct spill management services on its behalf. Mr. [REDACTED] oversaw the spill management services for this particular project, and, as will be discussed in greater detail, was NPFC's primary point of contact during the adjudication process.

²³ See OSV MONARCH Invoice Log. This document was submitted by Claimant in its initial claim. The Invoice Log included identification of the vendor, the invoice number and date, the amount paid and date paid, and the check number associated with the payment. The total amount on the Invoice Log was \$2,698,159.59 but Claimant's actual claim was \$1,898,159.59 (\$2,698,159.59 less the \$800,000 limit of liability). On July 7, 2017, Claimant amended its sum certain to \$1,897,299.99 due to a mathematical error in one of its cost submissions.

²⁴ 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, 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"

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.²⁵

During its adjudication of claims against the OSLTF, 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. 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.

B. Claimant's entitlement to limit liability under OPA

In this case, Claimant insured the responsible party, OMSI, and paid removal costs on its behalf. As a result of those payments, Claimant was subrogated to the rights of OMSI and may receive OSLTF compensation to the same extent OMSI could have been compensated.²⁶ In order to receive reimbursement from the OSLTF, however, the evidence produced by Claimant must satisfy a responsible party's burden of proof under the OPA.

Under the OPA, a responsible party is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.²⁷ Further, a responsible party's liability is strict, joint, and several.²⁸ In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.²⁹ When enacting OPA, "Congress explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as... burdens of proof unfairly favoring those responsible for the spills."³⁰ OPA was intended to cure these deficiencies in the law.

Notwithstanding the above, under limited circumstances the OSLTF may reimburse a responsible party for some uncompensated removal costs and damages. To be eligible for reimbursement, the responsible party must, in addition to showing that it has actually incurred uncompensated removal costs determined to be consistent with the National Contingency Plan ("NCP"), or OPA damages resulting from the incident, demonstrate either an entitlement to a defense or to a limitation of liability:

The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs

²⁵ See, Smith Property Holdings, 4411 Connecticut L.L.C. v. United States, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

²⁶ 33 U.S.C. § 2715 (a). See also, 33 C.F.R. § 136.107.

²⁷ 33 U.S.C. § 2702(a).

²⁸ See, H.R. Conf. Rep. No. 101-653, 102, 1990 U.S.C.C.A.N. 779 (August 1, 1990)

²⁹ 33 U.S.C. § 2701(32)(A).

³⁰ Apex Oil Co., Inc. v. United States, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002)(citing S. Rep. No. 101-94 (1989); 1990 U.S.C.C.A.N. 722.).

and damages under section 2713 of this title only if the responsible party demonstrates that--

(1) the responsible party is entitled to a defense to liability under section 2703 of this title; or

(2) the responsible party is entitled to a limitation of liability under section 2704 of this title.³¹

The OPA also defines how much OSLTF reimbursement a responsible party may receive. If the limits of liability apply, the OSLTF may reimburse OPA removal costs or damages paid by the responsible party or its guarantor to the extent such amounts exceed the limits of liability.³²

Accordingly, under the plain meaning of 33 U.S.C. § 2708, it is the responsible party who has the burden to demonstrate an entitlement to the amounts claimed.³³ Consistent with this statute, the OSLTF's claims regulations require all claimants to carry the burden of proving an entitlement to reimbursement of the specific amounts claimed. The regulations provide: "[t]he claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director to support the claim."³⁴ The regulations also specifically require all claimants to submit "[e]vidence to support the claim."³⁵ The regulations further require all claimants to submit any information deemed relevant and necessary by the NPFC to properly process the claim.³⁶

³¹ 33 U.S.C. § 2708(a)(emphasis added).

³² 33 U.S.C. § 2708 (b).

³³ OPA's legislative history supports NPFC's conclusion that a responsible party has the burden of showing how much, if any, OSLTF reimbursement it should receive. As explained in the House Conference Report on OPA:

Section 1008 of the House bill allows a responsible party or the owner of oil on a tank vessel, or a guarantor for that responsible party or owner of oil, to assert a claim for removal costs and damages only if the responsible party or owner can show that the responsible party or owner has a defense to liability, or is entitled to a limitation of liability. In the latter case, a claim may be submitted only to the extent amounts paid by the responsible party or owner, or by a guarantor on the responsible party's or owner's behalf, exceeds the applicable limit on liability.

H.R. Conf. Rep. 101-653, 110, 1990 U.S.C.C.A.N. 779 (August 1, 1990). See also, Apex Oil Co., Inc. v. United States, 208 F.Supp.2d 642 (E.D. La., 2002)(claimant failed to carry its burden of proof with respect to the "act of God" defense); International Marine Carriers v. OSLTF, 903 F.Supp. 1097 (S.D. Tex. 1994)(claimant must show elements of a "third party" defense by a preponderance of the evidence); Bean Dredging, LLC v. United States, 773 F.Supp.2d 63, 86 (D.D.C. 2011)(the responsible party "had the burden of proof of establishing its entitlement to reimbursement on the administrative level" ...); and Water Quality Ins. Syndicate v. United States, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(holding that Water Quality Insurance Syndicate must prove that its insured was entitled to limited liability when making a claim against the OSLTF under 33 U.S.C. § 2708).

³⁴ 33 C.F.R. § 136.105(a).

³⁵ 33 C.F.R. § 136.105(e)(6).

³⁶ 33 C.F.R. § 136.105 (e)(13). See also, Smith Property Holdings, 4411 Connecticut L.L.C. v. United States, 311 F.Supp.2d 69, 84 (D.D.C. 2004)(recognizing that the OSLTF claimant was obligated to produce documents deemed necessary by the NPFC).

As a threshold matter, the NPFC determines that Claimant has demonstrated that it incurred removal costs as a result of an OPA incident. The record unequivocally establishes that this incident involved the discharge of “oil” into “navigable waters” as defined in OPA.³⁷ Consistent with the District Court’s order, the NPFC further determines that Claimant has carried its burden of proving an entitlement to limited liability under the OPA. Although these determinations resolve the issue of whether Claimant’s liability is limited under OPA, Claimant must still demonstrate how much OSLTF reimbursement should be paid.

C. Claimant’s OSLTF Compensable Removal Costs

Under 33 U.S.C. § 2712 (a)(4), the NPFC is authorized to pay claims for uncompensated removal costs in accordance with 33 U.S.C. § 2713. Additionally, 33 U.S.C. § 2712 (a)(4) limits reimbursement to those removal costs determined by the President to be consistent with the NCP. Removal costs include “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 . . .”³⁸

OSLTF claims regulations specifically address what a claimant must show in order to obtain reimbursement for removal costs. Before OSLTF reimbursement can be authorized, the claimant must show that “the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident” and that “the removal costs were incurred as a result of these actions”.³⁹ A removal cost claimant must also show “[t]hat the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.”⁴⁰

The regulations also control how much OSLTF compensation is allowable for a removal cost claim. Only reasonable and uncompensated removal costs can be reimbursed. The applicable regulation explains:

The amount of compensation allowable is the 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.⁴¹

The OSLTF can only reimburse removal costs for activities that were determined by the FOSC to be consistent with the NCP or were directed by the FOSC. Here, CG Sector Western Alaska, the FOSC for this incident, determined that OMSI’s actions during the response were

³⁷ 33 U.S.C. §§ 2701 (21) and 2701 (23).

³⁸ 33 U.S.C. § 2701 (31).

³⁹ 33 C.F.R. § § 136.203 (a) and (b).

⁴⁰ 33 C.F.R. § 136.203 (c).

⁴¹ 33 C.F.R. § 136.205.

consistent with the NCP. Thus, Claimant has satisfied that part of its burden of proof. However, Claimant must still show that the specific costs claimed were incurred as a result of “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident). Claimant must also show that the costs were reasonable and uncompensated. On the issue of whether costs were uncompensated, the NPFC requires proof that Claimant actually paid the costs.

During the adjudication process, the NPFC reviewed all documentation submitted with the claim. This review included an analysis of the actual cost invoices and dailies in an effort to determine whether Claimant had shown that it actually incurred the claimed costs. Relying on its review, NPFC determines that the majority of the claimed costs were actually incurred by the Claimant, reasonable, and necessary to mitigate the effects of the incident. Specifically, after analyzing \$2,697,299.99 in claimed costs, the NPFC determines that a total of \$1,832,519.35 have been shown to be OPA compensable removal costs. However, as addressed more fully below, the NPFC determines that Claimant has failed to demonstrate how the remaining claimed costs in the amount of \$864,780.64 satisfy OPA’s criteria for compensable removal costs.

Accordingly, a total of \$1,832,519.35 represents OPA-compensable removal costs. After deducting the \$800,000.00 statutory limit of liability from this amount, the NPFC concludes that the OSLTF may reimburse \$1,032,519.35 to Claimant.

The denied costs are comprised of those where the Claimant failed to provide sufficient explanations as to how the claimed costs were the result of “removal actions”, and/or supporting documentation evidencing those costs. The denied costs are itemized in detail in Enclosure (1) to this determination.⁴² In an effort to provide further explanation as to why these costs were denied, the denied costs are identified and described below.

Line 4 of the Invoice Log: Alaska Chadux personnel were billed as on-scene but were not supported with a clear description of their pollution removal activities. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant provided some but not all information. Accordingly, the Alaska Chadux costs that are not supported by the record are denied, the total of which is \$2,645.61. The denied costs consist of \$2,375.00 in Planning Chief costs, \$237.50 in administrative costs associated with the denied personnel costs, and \$33.11 in meal costs that do not have itemizations of purchase.

Line 6 of the Invoice Log: Blackwater Marine personnel and equipment costs were submitted without any supporting documentation. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide any information. Accordingly, all Blackwater Marine costs are denied, the total of which is \$10,945.97.

Line 7 of the Invoice Log: Clyde & Co. personnel and equipment costs were submitted without any supporting documentation. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for

⁴² NPFC Summary of Costs spreadsheet.

the costs. The Claimant failed to provide that information. Accordingly, all Clyde & Co. costs are denied, the total of which is \$13,194.00.

Line 8 of the Invoice Log: Global Diving & Salvage subcontractors that were part of Global Diving & Salvage Invoice # 0113094: Glosten Associates; Stirling Salvage; Aldrich Offshore Services. The NPFC denied \$1,063.15 for Glosten, \$25,743.48 for Stirling Salvage Ltd, \$16,069.03 for Aldrich Offshore Services and the 20% administrative markup on those three subcontractor invoices in the amount of \$6,165.53 for a total amount denied of \$49,041.18 on this particular Global Diving Invoice. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. Because Claimant failed to provide that information, these costs are denied.

Line 9 of the Invoice Log: Global Diving & Salvage subcontractors that were part of Global Diving & Salvage Invoice # 0113431-IN R3: The NPFC denied \$2,262.00 for Columbia Sentinel, \$91,123.18 for Stirling Salvage, \$1,450.00 for Aldrich Offshore Services, and \$6,883.61 for Carlisle Transportation Services. The NPFC also denied all of the administrative markup charges for these subcontractors as follows: \$452.40 for Columbia Sentinel, \$18,224.64 for Stirling Salvage, \$290.00 for Aldrich Offshore Services and \$1,376.72 for Carlisle Transportation. Total subcontractor denied costs total \$122,062.55 in its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. Because Claimant failed to provide that information, these costs are denied.

Line 10 of the Invoice Log: Global Diving & Salvage subcontractors that were part of Global Diving & Salvage Invoice # 0113568-IN: The NPFC denied \$50,830.14 for Stirling Salvage and \$486.19 for Carlisle Transportation Services. The NPFC also denied all of the administrative markup charges for these subcontractors as follows: \$10,166.03 for Stirling Salvage and \$97.24 for Carlisle Transportation. Total subcontractor denied costs total \$61,579.60. The NPFC also denied receipts provided for two third party suppliers and they are Alaska Steel in the amount of \$108.00 and Washington Chain in the amount of \$600.00. The 20% administrative markup associated with these third party receipts is also denied in the amount of \$141.60 for both. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide legible receipts for the costs. Because Claimant failed to provide that information, these costs are denied.

Line 11 of the Invoice Log: Global Diving & Salvage subcontractors that were part of Global Diving & Salvage Invoice # 0113191-IN R2: The NPFC denied \$90,880.42 for Stirling Salvage and \$5,119.58 for Carlisle Transportation Services administrative markup charges for Stirling Salvage. Total subcontractor denied costs total \$96,000.00. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. Because Claimant failed to provide that information, these costs are denied.

Lines 12-14 of the Invoice Log: [REDACTED] expenses. A claim for travel, food and lodging of [REDACTED] were submitted. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$1,637.60.

Line 15 of the Invoice Log: [REDACTED] – Invoice # 020309. A claim for personnel hours, travel, food, lodging and miscellaneous expenses of [REDACTED] were denied in part. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$4,240.00 in personnel hours and \$2,057.47 in all other expenses for a total amount denied of \$6,297.47.

Line 16 of the Invoice Log: [REDACTED] – Invoice # 073009. A claim for personnel hours of [REDACTED] were denied in part. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$16,915.00 in personnel hours.

Line 17 of the Invoice Log: [REDACTED] – Invoice # 102009. A claim for personnel hours of [REDACTED] was denied. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$2,861.28 in personnel hours.

Line 18 of the Invoice Log: [REDACTED] – Invoice # 052010. A claim for personnel hours of [REDACTED] were denied in part. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$6,210.00 in personnel hours.

Line 19 of the Invoice Log: [REDACTED] – Invoice # 072610. A claim for personnel hours of [REDACTED] were denied in part. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$4,925.00 in personnel hours.

Line 20 of the Invoice Log: [REDACTED] – Invoice # 102210. A claim for personnel hours of [REDACTED] were denied in part. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$4,405.00 in personnel hours.

Lines 21-23 of the Invoice Log: MAGI Invoice # N091311JCL. The NPFC denies various items that are summarized as follows: Personnel costs that cannot be identified as pollution in the total amount of \$1,395.00, illegible receipts in the amount of \$50.29, costs missing documentation completely in the amount of \$1,459.00, movies in the amount of \$14.99, and non-itemized food receipts in the amount of \$1,347.13. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$4,266.41.

Line 25 of the Invoice Log: Ocean Marine Services (invoice association was never specifically provided). The NPFC was unable to identify what specific items made up WQIS' claimed payment of \$32,865.11.⁴³

The NPFC expressly requested that Claimant provide "an itemization of costs that totals \$32,865.11 in support of Line 25".⁴⁴ In response, Mr. [REDACTED] explained Line 25 as follows:

25% of Global Invoice #0112259-IN in the amount of \$129,151.98. I include attachment "Global Diving Costs 01.15.09 through 01.17.09" as Global's charge for January 17, 2009 is very close to the \$32,865.11 figure identified in the adjudication.

He attached three Global Diving dailies for the period of Jan. 15th-17th, of 2009 as part of his explanation.⁴⁵

While Mr. [REDACTED]'s position may have been that Line 25 of the Invoice Log represented a partial payment of Global Invoice #0112259-IN⁴⁶, he still failed to provide a specific itemization of costs that totals the amount in Line 25 as NPFC requested. Instead, and perhaps as an implicit acknowledgement that the dailies did not even add up to the amount on Line 25, he explained that he included the January 17, 2009 daily because it was "very close" to the claimed amount. But an item whose total is "very close" to the claimed amount is not sufficient evidence to support the claimed amount. Because the Claimant has failed to specifically identify each item that comprises the payment of \$32, 865.11 on Line 25, the amount must be denied.

Line 31 of the Invoice Log: Ocean Marine Services, paid on November 16, 2010 for the amount of \$152,506.46 is denied in its entirety. Again, supportive evidence was requested on multiple occasions by the NPFC. Specifically, NPFC explained that it could not determine from where Line 31 costs originated and asked for a "detailed description of what contractor/subcontractor invoices in total comprise Line [...] 31".⁴⁷ NPFC further requested that the invoices and supporting cost documentation be submitted. Mr. (b) (6) responded with the following:

Subcontractor & Contractor invoices at lines 29-31; See, Attachment 01.21.09 Monarch Costs to Date submitted to WQIS by OMSI. Also included are attachments "Monarch 5th POA including WQIS detail" and "Monarch wqis pymts 2.22.10" both produced by OMSI's adjuster [REDACTED].⁴⁸

⁴³ According to the Invoice Log, this payment was made via WQIS check #24060 on May 22, 2009.

⁴⁴ NPFC's email to [REDACTED] dated June 23, 2017.

⁴⁵ The three dailies totaled \$72,427.23.

⁴⁶ Actually, 25% of \$129,151.98 is \$32,287.99.

⁴⁷ June 23, 2017 email from NPFC to [REDACTED].

⁴⁸ July 25, 2017 email from [REDACTED] to NPFC and corresponding attachments.

Notwithstanding Mr. [REDACTED]'s response, none of the attachments show that the Line 31 costs were incurred and paid for pollution removal, let alone which entries related to Line 31. The document titled "Attachment 01.21.09 Monarch Costs to Date" is wholly unhelpful. This document is simply a spreadsheet listing vendor charges from January 15-20th of 2009. There are no dailies, receipts, or even actual invoices demonstrating the costs listed were actually incurred and paid. There is no evidence that any of those vendor charges are related to Line 31.

Mr. [REDACTED]'s reliance on "Monarch 5th POA including WQIS detail" is equally unavailing as support for Line 31. Again, this document is yet another spreadsheet listing vendors and payments, and contains no third-party evidence that the costs were incurred and paid for pollution removal, let alone any indicia of how it relates to Line 31.

Mr. [REDACTED]'s reliance on "Monarch wqis pymts 2.22.10" is likewise ineffective as support for Line 31. Once again, this document is a spreadsheet listing vendors and payments, and contains no third-party evidence that the costs were incurred and paid for pollution removal, let alone any indicia of how it relates to Line 31. Accordingly, Line 31 is denied in its entirety.

Lines 33- 35 of the Invoice Log: Reuben, Riorella and Friedman Invoice # 110510, 122910, & 022311 for personnel costs were submitted, but do not appear to be related to OPA compensable pollution removal activities. The costs were described as "legal services", but that description is insufficient to demonstrate that the services provided are related to removal activities. In its request for additional information dated February 24, 2017, the NPFC asked the Claimant to provide an explanation and supporting evidence for the costs. The Claimant failed to provide that information. Accordingly, these costs are denied, the total of which is \$17,088.50.

As an aside and to illustrate some of the confusion created by Claimant's submission, the NPFC notes that Claimant's documentation references a Global Diving Services invoice as two different invoice numbers. A claim document mentioned as "Second Payment on Account" dated 6/10/09 references Global invoice as invoice # 0112259 even though yet another document in the claim submission entitled "M/V MONARCH Invoice #1" referenced the same Global Diving invoice as 0112253. This discrepancy may have some bearing on why there is an issue reconciling two of the payments made as identified on the Invoice Log as lines 25 and 31.⁴⁹

Finally, should Claimant seek reconsideration of this determination by providing additional evidence to support the denied items, then it should organize the evidence in a way that clearly demarks the line entries on the Invoice Log to which the evidence is associated. Preparing the evidence in this manner will facilitate the reconsideration review.

The NPFC therefore determines that the OSLTF will offer \$1,032,519.35 as a settlement for the OPA-reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # J09011-0002.

⁴⁹ M/V MONARCH Invoice #1 document.

AMOUNT: \$1,032,519.35



Claim Supervisor: [REDACTED]

Date of Supervisor's review: *August 11, 2017*

Supervisor Action: *Approved*