

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	P16006-0001
<b>Claimant:</b>	Elizabeth City-Pasquotank County Airport Authority
<b>Type of Claimant:</b>	Local Government
<b>Type of Claim:</b>	Loss of Profits and Earnings
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$45,301.52

### **FACTS:**

#### ***Incident:***

The United States Coast Guard Sector North Carolina reports<sup>1</sup> that on December 8, 2015, it received notification of a pollution incident at the Elizabeth City Regional Airport (ECRA). Mr. ██████████, of Base Elizabeth City, reported the incident to the National Response Center (via report # 1135254<sup>2</sup>) requesting oil boom from the Sector to prevent the observed oil from making it to the Pasquotank River, a navigable waterway of the US. During the preliminary investigation by Sector Nags Head Incident Management Division (IMD), it was found that the nexus to the Pasquotank River was an unnamed tributary that is subject to the ebb and flow of tide. The IMD authorized Station Elizabeth City and Mr. ██████████ to gain access to the pollution response trailer and utilize the containment boom in order to contain the oil and prevent further pollution.

#### ***Claim and Claimant:***

This claim for uncompensated removal costs was presented to the National Pollution Funds Center (NPFC) on January 23, 2017 in the amount of \$45,301.52 by the Elizabeth City Regional Airport (ECRA). The Claimant is specifically seeking uncompensated removal costs in the amount of \$45,301.52, asserting that no Responsible Party (RP) has been identified and as such, Claimant contends the incident was a mystery spill.<sup>3</sup>

#### ***Description of Removal Activities for this incident:***

Upon discovery of the incident, the Claimant, ECRA, hired Eastern Environmental Management, LLC (Eastern Environment) to handle clean-up and removal operations. Eastern Environment arrived on site on December 8, 2015 and removed an estimated 390 gallons of oil from two storm drain accesses. Response actions then focused on the affected waterway and removal of the emulsified oil pockets that had begun to form. On December 11, 2015, both the United States Environmental Protection Agency (USEPA) and the Federal On Scene Coordinator's representative (FOSCR) arrived on scene and found clean-up operations being conducted as scheduled and, by the end of the day, minimal sheen was observed in the waterway.

USEPA representative recommended a passive approach to clean up. He suggested maintaining absorbent boom throughout the waterway and to remove any emulsified oil pockets that form

<sup>1</sup> See, Sector North Carolina Case Report # 1008466, opened 12/08/2015.

<sup>2</sup> See, NRC Report # 1135254, opened 12/08/2015.

<sup>3</sup> See, OSLTF Claim Form dated December 22, 2016.

over time. He further advised that the best method for clean-up moving forward, was natural flushing. The FOSCR advised the ECRA that he would intermittently spot check the site. When the EPA representative was no longer needed, he completed the scope of work requested and demobilized back to Raleigh, NC.

On December 15, 2015, the FOSCR arrived on scene to conduct a spot check of the waterway and the passive response actions. While the FOSCR was on site, an ECRA employee stated that a pressure washing truck that was on site during the time of the incident was back on Airport property and available to be sampled. The FOSCR took a sample from the truck and also a sample from the waterway. The samples were then sent to the Coast Guard's Marine Safety Lab (MSL) for testing.

The CG's MSL issued laboratory results that found four (4) conclusive non-matches and one (1) conclusive match. The sample that matched was taken from a McCarthy contractor water truck.<sup>4</sup> It is important to note that McCarthy was on the Claimant's property behind fence lines while working as a subcontractor to Barnhill Contracting Company. Barnhill Contracting Company had an executed contract with the Elizabeth City-Pasquotank County Airport Authority, Claimant, dated March 23, 2015 for an airport project described as "...construction associated with the rehabilitation of the General Aviation Ramp." The work being performed by Barnhill and any of its subcontractors included, but was not limited to, the construction and maintenance of erosion control measures, replacement of the existing drainage system, full depth reclamation of existing asphalt pavement and aggregate base for incorporation into a new cement treated base, construction of approximately 25,500 square yards of new concrete pavement, electrical work to include the replacement of gate loops and airfield lighting relocation, and other incidental items necessary to complete the project.<sup>5</sup>

***Responsible Party:***

Upon review of the claim submission and based on the evidence either presented to or obtained by this office, the NPFC has determined that in accordance with the Oil Pollution Act of 1990 and based on its definition of a Responsible Party (RP), it states ....,"(32) "responsible party" means the following:

(B) Onshore facilities.-In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

While the Coast Guard Pollution Investigation Report has labeled the incident as a "mystery spill" and as such, no Responsible Party (RP) was tagged.<sup>6</sup> The NPFC has determined that by a preponderance of the evidence and in consideration of a conclusive laboratory matching product within a McCarthy truck that was inside the fence line and on airport property, that the Claimant is the Responsible Party (RP) for this incident.

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<sup>4</sup> See, FOSCR witness statement dated January 4, 2016.

<sup>5</sup> See, Barnhill / ECRA contract dated March 23, 2015.

<sup>6</sup> See, Pollution Investigation Report written by MST2 [REDACTED], dated 1/04/2016.

**APPLICABLE LAW:**

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

However, OPA allows certain RPs to limit their liability under certain conditions. At 33 USC 2704 the OPA states the provisions for limiting liability. In pertinent part, 33 USC 2704 follows:

*(a) General Rule.—Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal cost incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—*

*(1) for a tank vessel, the greater of—*

*(A) \$1,200 per gross ton; or*

*(B)(i) in the case of a vessel greater than 3,000 gross tons, \$10,000,000; or*

*(ii) in the case of a vessel of 3,000 gross tons or less, \$2,000,000;*

*(2) for any other vessel, \$600 per gross ton or \$500,000, whichever is greater...*

*(c) Exceptions—*

*(1) Acts of Responsible Party.—Subsection (a) does not apply if the incident was proximately caused by—*

*(A) gross negligence or willful misconduct of, or*

*(B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party...*

*(2) Failure or Refusal of Responsible Party.—Subsection (a) does not apply if the responsible party fails or refuses—*

*(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;*

*(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or*

*(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).*

"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 and damages under section 1013 only if the responsible party demonstrates that –

(2) the responsible party is entitled to a limitation of liability under section 1004.” 33 U.S.C. 2708

A responsible party may present a claim directly to the Oil Spill Liability Trust Fund. 33 U.S.C. 2713

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”.

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. 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”.

Under 33 USC §2713(b)(2) and 33 C.F.R. § 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 C.F.R. § 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that “If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.”

Under 33 C.F.R. § 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 C.F.R. § 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 C.F.R. § 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 C.F.R. § 136.203, “a 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.”

Under 33 C.F.R. § 136.205 “the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOOSC to be consistent with the National Contingency Plan or were directed by the FOOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOOSC.” [Emphasis added].

### **NPFC DETERMINATION:**

#### ***Findings of USCG Marine Safety Laboratory:***

Six (6) samples were sent to the USCG Marine Safety Laboratory (MSL) for testing: Sample 16-038-1 (“spill sample”) was specified to be representative of spilled oil. Analysis indicated this sample contained very slightly weathered light fuel oil with characteristics most resembling those of lower-sulfur diesel fuel with non-petroleum contamination is present. Sample 16-038-4 contained light fuel oil with characteristics similar to those of the spill sample. Sample 16-038-2 contained light fuel oil with characteristics similar to those of spill sample; however, sample 16-038-2 was red-dye diesel, whereas the spill sample 16-038-1 was yellow diesel. Sample 16-038-3 contained light fuel oil in the #1 range, such as kerosene or jet fuel, with characteristics different from those of the spill sample. Sample 16-038-5 contained light fuel oil with characteristics different from those of the spill sample. Finally, Sample 16-038-6 was specified to represent clean water, and thus, no petroleum oil was detected.

The MSL concluded that Sample 16-038-4 and the spill sample, 16-038-1, were derived from a common source of petroleum oil.

#### ***Findings on Removal Costs claimed:***

During the adjudication of the claim, the NPFC determined additional information was needed and as such, the Claimant, ECRA, was asked<sup>7</sup> to provide the following:

1. A copy of the name of the fuel truck supplier that delivered diesel fuel to the Airport location for ***any and all assets whether owned by the Airport or owned and/or operated by McCarthy or Barnhill during the project;***
2. A copy of any and all invoices that the Airport may have received, paid, or intended to pay to the fuel supplier, if any, for the purchase of diesel fuel that was delivered on site to the airport location between November 1, 2015 and the present (***if applicable***);
3. An itemization of ***all diesel consuming equipment utilized (by the airport or its contractors) and on the job site, as well as how much those pieces of equipment consumed on a daily basis*** (whether owned by the ECRA or by McCarthy or Barnhill). This was to include the week leading up to the oil spill incident, through the end of the project, providing where and how the equipment was refueled.

The NPFC also sent the same request to both McCarthy and Barnhill in light of the fact that these companies were under contract with the Claimant and had assets on site that contained product similar to what was discovered following the incident on airport property.

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<sup>7</sup> See, Letter from the NPFC to the ECRA, dated 3/16/2017.

In accordance with 33 CFR §136.105(e)(10), the Claimant, was to provide a copy of all written communications and the substance of any and all verbal communications, if any, between it and any diesel fuel supplier, contractor or subcontractor that was working on the project being conducted during the time period of the oil spill. It is important to note that the burden is on the Claimant to prove its claim and as such, that includes providing all information requested which would include information this office desired from its contractors. While the Claimant states that it does not have diesel delivered or fuel on its property<sup>8</sup>, but the Claimant was in a contractual relationship with contractors that did in fact have equipment on site that used and carried diesel fuel.<sup>9</sup> Based on the fact that there was a laboratory match to the product recovered combined with the fact that the match came from an asset located within the fence line on airport property, the Claimant has failed to prove that it and/or its contractor/subcontractor was not the source of the spill and as such, the Claimant is liable under OPA.<sup>10</sup>

Should the Claimant seek reconsideration, it would need to provide any and all requested documentation, including what this office requested from its contractor/subcontractor.

**DETERMINATION:**

Based on the foregoing, the NPFC determines that the Claimant has failed to prove it is not a Responsible Party (RP) under OPA. OPA provides that a responsible party is not liable for removal costs and damages if it establishes, by a preponderance of the evidence, entitlement to a complete defense. To establish a defense, the responsible party must establish that the incident and resulting removal costs and damages were caused solely by the acts or omissions of a third party and that the responsible party exhibited due care with respect to the oil. Additionally, the third party cannot have a contractual relationship with the responsible party.

**DETERMINED AMOUNT: \$0.00**

Claim Supervisor: 

Date of Supervisor's review: *4/14/17*

Supervisor Action: *Denial Approved*

Supervisor's Comments:

<sup>8</sup> See, Email from the ECRA to the NPFC, dated 3/21/2017.

<sup>9</sup> See, Letter from Barnhill to the NPFC, dated 3/30/2017.

<sup>10</sup> See, *Buffalo Marine Services, Inc. v. United States*, 663 F.3d 750 (5<sup>th</sup> Cir. 2011).