

CLAIM SUMMARY / DETERMINATION

Claim Number:	E17607-0003
Claimant:	A&M Associates, Inc.
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$233,675.62

I. INTRODUCTION

The U.S. Environmental Protection Agency (USEPA) was notified of a discharge from a 400-barrel aboveground storage tank at the Metairie Energy facility on January 31, 2017. It was later determined that the discharge had originated at this storage tank five months prior to the discovery date and had not been reported nor removed. The tank, identified as Tank No. 2, lacked secondary containment and the discharge migrated to a wetland connected to the Port Allen Lock, which connects with the Intracoastal Waterway, a navigable water of the United States. The discharge volume was approximately 200 to 400 barrels. The responsible party (RP) for the incident is Metairie Energy Company, Inc. (Metairie) because it operated the tank and its associated oil and gas wells.¹

II. CLAIMANT

Claimant, A&M Associates, Inc. (A&M) was hired to be Metairie's representative for the incident, on January 30, 2017. A verbal agreement between the Claimant and RP, provided that A&M would perform spill management services and act as the RP's Spill Manager for the incident. A&M, as the Spill Manager, served as the Responsible Party's Incident Commander (RPIC), hired contractors, oversaw response, generated Incident Action Plans (IAPs), created a valid SPCC Plan for the facility, obtained samples and was charged with ensuring proper disposal, containment, and cleanup. Removal activities were conducted from January 30, 2017 through approximately August 31, 2017.

BPR Enterprises, Inc. (BPR) executed a New Customer Setup/Credit Application with A&M Associates on February 10, 2017.² The Application was executed by [REDACTED]. LADNR records show that Mr. [REDACTED] is the President of BPR Enterprises and the listed owner for the well associated with the tank. Mr. [REDACTED] is also the listed Vice President of Metairie Energy Company, Inc. and designated RP by the USEPA FOSC.³ Under the terms of the Application BPR Enterprises, Inc. agreed to pay invoices 30 days from the date of the invoice unless other terms are agreed upon in writing prior to service.

¹ See, USEPA Metairie Energy PolRep #1 dated February 02, 2017.

² See, A&M's New Customer Setup/Credit Application with BPR executed on February 10, 2017.

³ See, LADNR Lease Facility Inspection Report dated August 29, 2016 for well serial # 75284 operated by Metairie Energy Company, Inc.

III. CLAIM HISTORY

On November 9, 2017, NPFC received a removal cost claim from A&M for reimbursement of its uncompensated removal costs in the amount of \$229,460.14. This amount was based on invoice #2016-0135 in the amount of \$83,339.93; invoice #2016-0137 in the amount of \$73,103.68; invoice #2016-0152 in the amount of \$42,220.74; invoice #2016-0167 in the amount of \$12,887.50; invoice #2016-0171 in the amount of \$15,408.29; and invoice #2016-0177 in the amount of \$2,500.00.⁴ The claim submission consisted of a cover letter, OSLTF Claim Form, an executed New Customer Setup/Credit Application between BPR Enterprises and A&M Associates dated February 10, 2017, copies of contractor correspondence between A&M and the contractors it hired for this incident, a copy of an SBA loan request from A&M, and six A&M invoices with supporting documentation and daily field notes.⁵

On November 29, 2017, the NPFC denied the claim on the grounds that the Claimant's costs were not associated with oil removal activities. The NPFC stated that should the Claimant request reconsideration, it must establish that the product discharged from the AST was an OPA oil and that the removal costs were associated with the removal of an OPA oil.⁶

IV. INITIAL DENIAL

The NPFC's denial of the claim was based on the Sampling and Analysis Reports for Tank No. 2, the source of the January 31, 2017 discovery at Metairie. The NPFC, during its early adjudication process, requested information associated with the incident from LOSCO.⁷ On July 26, 2017, the NPFC received a thumb drive containing LOSCO's files for the incident. The LOSCO documentation included two sample analyses reports. One report, dated February 10, 2017, is an eight (8) page Revised Work Plan/Sampling and Analysis Plan. The second report, dated March 8, 2017, is a five hundred and fifteen (515) page sample analysis report dated March 8, 2017.

██████████, owner and president of A&M, as the RP representative, arranged for sampling and analysis of the three Metairie tanks on February 3, 2017, several days after discovery of the discharge. Specific to this claim is the analysis of Tank No. 2 (LA 30190-2), the source of the discharge. The analysis of Tank No. 2 reflected high levels of heavy metals along with 4-Bromofluorobenzene and 1,4 Difluorobenzene, which are hazardous substances listed under CERCLA.⁸

The NPFC, on August 29, 2017, requested that Mr. ██████████ ██████████ review the results of the analysis and provide comment as to the constituents identified within the sample analysis. Specifically, he was asked: (1) if there were Comprehensive Environmental Response,

⁴ See, A&M claim package dated October 16, 2017 and received November 9, 2017.

⁵ See, A&M claim package dated October 16, 2017 and received by the NPFC on November 9, 2017.

⁶ See, NPFC Denial Determination dated November 29, 2017.

⁷ LOSCO is the state agency authorized to oversee and regulate oil and gas wells. It conducts inspections and monitors removal actions at its regulations facilities. Its inspections included the Metairie facility.

⁸ SGS Accutest, Lafayette, dated February 13, 2017.

⁹ Mr. ██████████ is the Coast Guard's Chemical Engineer from the Hazardous Materials Division (CG-ENG-5).

Compensation and Liability Act (CERCLA) hazardous substances identified within the sample analysis; (2) if the CERCLA hazardous substances identified in the sample analysis were indigenous to petroleum or added to petroleum during the refining process, and (3) if the CERCLA hazardous substances identified in the sample analysis were in excess of what was naturally occurring in oil or were added to the oil after the refining process. Further, he was asked, based upon the information contained within the analysis, if the liquid or solid samples, were an oil under the Federal Water Pollution Control Act (FWPCA) or the Oil Pollution Act of 1990 (OPA).

On October 26, 2017, Mr. [REDACTED] issued an official Memorandum, "Review of the Liquid and Core Sample Analysis associated with the Metairie Energy Company oil spill, FPN E17607" to Mr. [REDACTED], Chief of NPFC Claims Division. He stated that the sample analysis results reported for SAMPLE JAR TANKs # 1, #2 and #3 all support that the spilled material was production water, and that the production water contained numerous components that are CERCLA hazardous substances. These components are often found in flow-back or produced water associated with oil drilling operations, but are not considered to be oil or petroleum products. These components can be naturally occurring in crude oil, but in this case, the sample results indicate that oil was not present, only CERCLA hazardous materials. He determined that the contents of this spill was not an oil or oil-like substance under OPA 90 or the FWPCA.¹⁰

Based on Mr. [REDACTED]'s Memorandum and the disposal manifests the NPFC determined that the removal actions were conducted for the removal of CERCLA and/or RCRA hazardous substances and not an oil as defined by OPA. The NPFC denied the A&M Associates claim on November 29, 2017. It noted that it did not conduct a review of the cost documentation according to OPA and the Claims Regulations and did not address the validity or compensability of the claims costs.

V. REQUEST FOR RECONSIDERATION

On December 27, 2017 the Claimant requested reconsideration of claim E1760-0003 via email to Mr. [REDACTED] with a copy to Ms. [REDACTED]. The Claimant argued that the NPFC made an error when it determined that the product was not an OPA oil. The Claimant stated that it disputes the NPFC's findings and offered that the TPH concentrations in the Lab Sample #LA30190 indicate that the hydrocarbons concentration was approximately 45% oil for Tank 2 and 67% oil for Tank 3 which meant that roughly half to two-thirds of each sample was in fact hydrocarbon and not water.¹¹ The Claimant originally requested a sum certain on reconsideration in the amount of \$229,460.¹² On April 24, 2018, the Claimant submitted a letter updating his sum certain on reconsideration to \$203,675.62.¹³ Finally, on May 1, 2018, the Claimant sent its final reconsideration sum certain amendment letter changing his overall sum certain on reconsideration to \$233,675.62.¹⁴

¹⁰ Mr. [REDACTED] also noted that the core samples analyses indicated the presence of drilling muds containing barium sulfate (barite), which is not a CERCLA hazardous substance. The analysis did not indicate the presence of petroleum or any products that are considered to fall under OPA 90/FWPCA.

¹¹ See, A&M reconsideration letter dated December 27, 2017.

¹² See, December 27, 2017 request for reconsideration letter to the NPFC.

¹³ See, April 24, 2018 Reconsideration sum certain amendment letter.

¹⁴ See, May 1, 2018 supplemental reconsideration sum certain amendment letter.

NPFC Role in Adjudication of Claims Against the OSLTF

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.¹⁵ 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 on reconsideration is issued to satisfy that requirement. It is based on the unique facts giving rise to this claim and should not be viewed as precedent controlling other NPFC 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. 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 evidence.

The NPFC's initial determination denying the claim, dated November 29, 2017, is hereby incorporated by reference. A request for reconsideration of an initial determination must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 C.F.R. 136.115(d). When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including new information provided by the claimant in support of its request for reconsideration. A claimant submitting a claim to the Fund has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a).

VI. ANALYSIS ON RECONSIDERATION

The Claimant asserts that it incurred uncompensated costs for the response to, oversight of, and removal of oil that discharged from Metairie's Tank No. 2. It argues that the NPFC erred when it determined that the discharge was not an OPA oil.

Whether the uncompensated costs were for the removal of oil as defined by OPA.

Oil" means "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) which is subject to the provisions of that Act." 33 U.S.C. § 2701(23).

¹⁵ 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"

As stated above an OPA oil includes oil of any kind but excludes substances specifically listed or designated as hazardous substances under CERCLA. The CERCLA exclusion is important because OPA oils may contain constituents listed as hazardous under CERCLA but may be naturally occurring at trace or naturally occurring levels. In order to determine if a discharge is an OPA oil, it should be sampled and analyzed prior to conducting removal actions, specifically if a claimant may seek reimbursement of its uncompensated removal costs from the Fund.¹⁶

Pertinent to the OPA definition of oil is the exclusion of CERCLA hazardous substances. (The petroleum exclusion.) In order to determine whether the petroleum exclusion applies, the substance should be analyzed to determine whether its levels of hazardous substances are consistent with the levels of hazardous substances typically found in petroleum products. If the material includes hazardous substances not naturally occurring in oil or includes hazardous substances at levels not naturally occurring in oil, the substance should not be a petroleum product and it should be covered by CERCLA.¹⁷

In order to determine if a substance is a CERCLA hazardous substance, and thus a petroleum exclusion substance, that substance must be analyzed. In the same vein in order to determine if a substance is an OPA oil and thus not a CERCLA hazardous substance, that substance must be sampled and analyzed to determine if any hazardous substances present are normally occurring in oil and the levels are consistent with the naturally-occurring hazardous substances in oil.

In this case the contents of Tank No. 2 were sampled and analyzed. Initially, Mr. [REDACTED] based on his analysis, determined that the sample, while it contained production water it also contained hazardous substances that are not naturally occurring in oil. On that basis the NPFC denied the claim.

Whether the Claimant has established on reconsideration that the substance discharged from tank No. 2 is an OPA oil.

In support of its request for reconsideration, Mr. [REDACTED] points to the previously provided sample report/results for Sample # SGS LA30190 and states that his interpretation of the sample analysis reveals oil. With the Claimant's argument and the scientific evidence available in the administrative records for two other Metairie claims (Claim Nos. E17607-0001- Oil Mop LLC and E17607-0002 – Enhanced Environmental & Energy Services) the NPFC relied heavily on the scientific evidence in those claims. Counsel for the OMI claim and identified as claim # E17607-0001, provided an affidavit by [REDACTED], PhD. Dr. [REDACTED] specializes in environmental and analytical chemistry, which includes organic analyses using gas chromatography/mass spectrometry and data interpretation and the application of analytical techniques and chemical principles to oil spill responses. His specialization includes an in-depth knowledge and expertise of the compounds and

¹⁶ The Fund is available for payment of claims for uncompensated removal costs. 33 USC 2712(a)(4). Removal costs mean the cost of removal incurred after the discharge or substantial threat of a discharge of oil. 33 USC 2701(31).

¹⁷ See *Nixon-Egli Equipment Co., v. John A. Alexander Co.*, 949 F.Supp. 1435, fn 7 (C.D. Ca. 1996), (CERCLA's petroleum exclusion did not apply to drilling by-products involved in that case (cuttings and drilling mud) because they contained elevated lead levels.)

constituents in petroleum and crude oils and their normal concentration levels in petroleum and crude oil.

He reviewed the analysis for Tank No. 2 and opined that TPH-GRO, TPH-DRO and TPH-ORO are a standardized grouping of hydrocarbon or petroleum compounds. He noted that in the samples reviewed these compounds comprised about 0.45 of the entire sample.

Dr. [REDACTED] states that there were trace elements of 1,1 Biphenyl, 2-Methylnaphthalene, Naphthalene and Pheanthrene, common constituents of petroleum or crude oil. Collectively, these compounds comprise about 0.00163 of the entire sample. These concentrations are trace amounts and do not exceed levels that naturally occur in petroleum, crude oil or crude oil sludge. There were also trace elements (0.007) of heavy metals – barium, chromium, copper, lead, mercury, nickel and zinc. He states that these trace elements do not exceed levels that naturally occur in petroleum or crude oil. Finally, the compound chloride was also a trace element that is usually associated with the production of crude oil and the chloride was produced with the crude oil and mixed with the crude oil during the production process.

Finally, he notes that the compound identified as bis(2-Ethylhexyl)phthalate is an exception. It is a laboratory contaminant may have been introduced by the sampling and handling process.

The NPFC forwarded Dr. [REDACTED]'s affidavit to Mr. [REDACTED] for his review and opinion. In a Memorandum dated January 2018, Mr. [REDACTED] concurred with Dr. [REDACTED]'s conclusion that the compounds or constituents identified in the various Technical Reports associated with the sampling were common constituents or compounds of petroleum or crude oil and were natural or indigenous to petroleum or crude oil. Further, the concentration levels of the identified compounds or constituents in the various reports did not exceed levels that naturally occur in petroleum or crude oil. Thus, Mr. [REDACTED] considers the contents of the discharge to be an oil or oil-like substance under OPA 90 and the FWPCA.

The NPFC reviewed all the evidence in the record. It determines that Dr. [REDACTED]'s Affidavit and Mr. [REDACTED]'s January 2018 Memorandum are credible and convincing evidence that the discharge in Tank No. 2 is an OPA oil. Based on this determination, the NPFC will adjudicate the A&M removal costs claim in accordance with OPA and the Claims Regulations.

Adjudication of the claimed removal costs

The Fund is available to the President for the payment of claims in accordance with section 2713 for uncompensated removal costs determined to be consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. § 2712(a)(4). The Claims Regulations provide that 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;” and (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 C.F.R. 136.203(c).

Further, the amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that are 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 C.F.R. 136.205.

It is the claimant's burden to show that the claimed costs were for actions to prevent mitigate the effects of the incident and that the costs were reasonable. Claimant must show that the costs were reasonable and uncompensated.

Upon initial review of the underlying removal costs presented on reconsideration, the NPFC noted inconsistencies between the field logs and the invoices and sought additional information. In a letter dated March 12, 2018 the NPFC stated that due to the changes Claimant should amend the invoices and attach revised daily field logs to correctly represent the costs and services that were provided on a daily basis. In that letter the NPFC advised the Claimant to re-present its claim to the RP and provide all supporting documentation, including invoices and field logs. It also provided that the Claimant should provide its claim to the RP via a method of delivery that could be tracked for verification of the date of the presentment to the RP no later than May 15, 2018 and to submit a duplicate copy of the revised documentation to this office for adjudication of the claim on reconsideration.

Claimant presented its claim to the RP on April 7, 2018, which was received by the RP on April 10, 2018. The NPFC contacted the RP and its Counsel, Mr. [REDACTED], in a letter dated April 19, 2018 notifying them of the supplemental reconsideration documentation. It requested that the RP confirm their position on the claimed costs on reconsideration. It also provided the RP the opportunity to present information to be considered by the NPFC in its adjudication on reconsideration.¹⁸

On May 1, 2018, the NPFC contacted Mr. [REDACTED], RP Counsel, advising that the NPFC had not received a response to the reconsideration notification. RP Counsel replied via email attaching a letter that was dated April 25, 2018,¹⁹ confirming the RP's denial for any of the A&M Associates, Inc. costs.

Pursuant to 33 U.S.C. § 2713(c), the NPFC adjudicated the removal costs. The NPFC claims manager reviewed all cost documentation and determined that \$106,786.31 of the claimed costs are denied for the following reasons:

- Unpaid subcontractor costs and associated markup in the total amount of \$79,034.70;
- Reduced rates to be commensurate with industry standard (hand tools) in the total amount of \$1,475.00;
- Denied markup that was applied to a rate sheet item that doesn't warrant markup (IAP copies) in the total amount of \$133.40;
- SPCC costs denied as not OPA compensable response costs in the total amount of \$22,108.20;
- Unsubstantiated costs in the total amount of \$2,930.72;
- Excessive costs on invoice # 2017-001A in the total amount of \$300.00;
- Duplicate or inconsistent pricing on nets in the total amount of \$80.00;

¹⁸ See, April 19, 2018 NPFC Supplemental RP Notification Letter regarding reconsideration to RP Counsel, [REDACTED]

¹⁹

- Non – OPA compensable costs in the total amount of \$524.29; and
- Instances of using the wrong rate for per diem in the total amount of \$200.00.

One claimed cost, \$30,000.00 was paid to Oil Mop, LLC (OMI) as a down payment when it hired them as the primary response contractor for this incident. Because Oil Mop, LLC was also a claimant in this incident, the NPFC reviewed the Oil Mop claimed costs to ensure that it had not been reimbursed by A&M for the same costs. It had not. As evidence the NPFC incorporates the NPFC Summary of Costs spreadsheets for E17607-000 (Oil Mop, LLC claim).²⁰

Attached to this determination is the NPFC Summary of Costs, which identifies in detail both the offered costs (\$126,889.31) and the denied costs (\$106,786.31).

CONCLUSION

The NPFC will offer **\$126,889.31** in compensation for the OPA-reimbursable removal costs incurred by the Claimant and submitted to the NPFC under reconsideration for claim # E17607-0003.

AMOUNT: \$126,889.31

Claim Supervisor:



Date of Supervisor's review: 5/10/18

Supervisor Action: *Reconsideration Offer Approved*

²⁰ See, NPFC Summary of Costs spreadsheets for E17607-0001.