

CLAIM SUMMARY / DETERMINATION

Claim Number:	H18001-0001
Claimant:	RESOLVE Magone Marine Services, Inc.
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	████████████████████
Amount Requested:	\$916,686.39

FACTS:

Oil Spill Incident:

This claim arises from an oil spill incident that occurred on October 10, 2017, involving both the substantial threat of discharge and actual discharge of oil from the F/V PACIFIC PARADISE when it grounded near Kaimana Beach, Honolulu, Hawaii and subsequently caught fire during salvage operations. Upon the initial grounding, the deck boss tried to maneuver the vessel from the reef, without success. He then notified United States Coast Guard Sector Honolulu of the incident, reporting that the vessel was taking on water and that the vessel was carrying an estimated 4,500 gallons of diesel fuel.¹ In response, Sector Honolulu launched small boat CG45627 and air asset R6608 to the scene. All crew safely evacuated the vessel. One crew member reported a through-hole puncture on the starboard side shell plate of the engine room, and that he was able to stop the leak by jamming rags into the crack.²

The USCG Sector Honolulu, acting as the Federal On Scene Coordinator (FOSC), determined the vessel a substantial threat of discharge of oil, opened the OSLTF, and stood up a Unified Command, which included various federal and local stake holders, as well as the vessel interests.³ The vessel owner hired Cates Marine Service, LLC to conduct an initial assessment, and to coordinate a fuel removal and salvage plan. On October 14, 2017, as contractors were attempting to tow the vessel off the reef, a dewatering pump on the vessel caught fire, which resulted in substantial damage to the vessel. The fire was extinguished by HFD helicopter using aerial water drops. However, the vessel discharged red dye diesel (estimated to be less than 200 gallons) into surrounding waters from the vicinity of its starboard side. During the subsequent weeks, contractors continued to attempt to tow the vessel, but to no avail.

Due to the fire, additional tow attempts, and turbulent sea conditions, the vessel's situation materially degraded. By late October, the vessel had come to rest on its starboard side, in 14 feet of water, with the stern deck and cabin beginning to ripple from the impact of the surf.⁴ It was assumed that all major internal compartments were fully flooded and wave conditions prevented responders from accessing the starboard side. Accordingly, the Unified Command solicited new fuel removal and salvage proposals.

The Claimant and its response actions performed:

¹ See, POLREP #22 dated December 8, 2017.

² See, Executive Summary created by U.S. Coast Guard MSSE3 and emailed to the NPFC dated May 11, 2018.

³ See, POLREP #1 dated October 12, 2017.

⁴ PolRep 9.

On November 8, 2017, in coordination with and approval of the Unified Command, the vessel owner hired Resolve Magone Marine (Resolve) to take over the previously unsuccessful removal operations.⁵ Resolve prepared a new plan, which focused on refloating the vessel and lightering as much oil and oily waste as possible. The plan required extensive patching and welding of fire damaged areas; dewatering of the various internal compartments; and the onsite fabrication and installation of a specialized foam to facilitate refloating. In addition, four mooring anchors were drilled into the sea bed to provide stability for the vessel during the operations. From November 8th until December 7, 2017, Resolve worked to successfully refloat the vessel. The vessel was then towed 13nm offshore to the EPA disposal site and sunk.⁶

Responsible Party:

The owner and operator of the F/V PACIFIC PARADISE is TWOL, LLC, a limited liability corporation registered in Hawaii. The principals of the corporation are Mr. [REDACTED] and Mr. [REDACTED].⁷

The Claim:

Resolve incurred a grand total of \$1,964,191.17 in oil pollution removal costs.⁸ It presented these costs to TWOL, LLC as follows:

Invoice #103296 in the amount of \$332,224.00 on November 22, 2017;
Invoice #103335 in the amount of \$492,615.64 on November 30, 2017; and
Invoice #103446 in the amount of \$1,139,351.53 on January 13, 2018.

The F/V PACIFIC PARADISE carried pollution insurance in the amount of \$1 million and unwritten by Water Quality Insurance Syndicate (WQIS), as well as protection and indemnity insurance issued by Samsung Fire & Marine in the amount of \$500,000.00.⁹ TWOL, LLC made a grand total of \$1,047,504.77 in payments to Resolve, via funds from its insurers as follows:

\$175,000 paid on December 5, 2017;
\$53,777.07 paid on February 5, 2018; and
\$818,727.70 paid on March 1, 2018.¹⁰

On February 23, 2018, TWOL, LLC sent a letter to Resolve stating that, with payments already made to Cates Marine and other contractors, plus the three payments above, all insurance coverage

⁵ See Bimco Wreckhire contractual agreement dated November 8, 2017.

⁶ See, Executive Summary created by MSSE3 and emailed to the NPFC dated May 11, 2018.

⁷ See, Letter from Mr. [REDACTED], Counsel for RP, via a letter dated October 20, 2017 in response to the NPFC's RP Notification Letter dated October 19, 2017, whereby he identifies the principal owners of TWOL, LLC.

⁸ See RESOLVE Invoice #103296 dated November 22, 2017, Invoice #103335 dated November 30, 2017 and Invoice #103446 dated January 13, 2018.

⁹ See Letter from TWOL, LLC to RESOLVE dated February 23, 2018.

¹⁰ See Letter from TWOL, LLC to RESOLVE dated February 23, 2018; See also Paradise Bank Incoming Wire Notice's dated December 5, 2017, February 5, 2018 and March 1, 2018.

was exhausted. It confirmed that it would have no ability to pay the remaining outstanding amount of \$916,686.39.¹¹

On May 9, 2018, Resolve submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs for personnel, subcontractor costs, and out of pocket expenses in the amount of \$916,686.39.¹²

The NPFC adjudicates the claim as follows.

APPLICABLE LAW:

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.¹³ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining the basis for a denial, if any. This determination is issued to satisfy that requirement.

The Oil Pollution Act of 1990 (OPA) provides a mechanism for compensating parties who have incurred removal cost where the responsible party has failed to do so. 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). The term “remove” or “removal” means “containment and removal of oil [...] from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.” *Id.* at §2701(30).

Under 33 U.S.C. § 2712 (a)(4), 2713, and 33 C.F.R. Part 136, 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. It is within the statutory scheme of the OPA, and attendant regulations that provide a procedure for submission, consideration, and payment of cleanup expenses by the Oil Spill Liability Fund (the “OSLTF”) 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).

In accordance with 33 U.S.C. §2713(e), the NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims. 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

¹¹ See No Funds Remaining Letter from TWOL, LLC to RESOLVE dated February 23, 2018.

¹² See OSLTF Claim Form dated May 1, 2018.

¹³ 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”

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. 33 CFR §136.201, *et. seq.*

The OSLTF claims regulations specifically address what a claimant must show in order to obtain reimbursement for removal costs. Before the OSLTF reimbursement can be authorized, the claimant must show:

- (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.

Id. at §136.203. Moreover, only “uncompensated, reasonable removal costs” are allowed. *Id.* at §136.205.

Because this determination is a settlement offer under 33 C.F.R. § 136.115 (b), the claimant has 60 days in which to accept; 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. *See, Smith Property Holdings*, 311 F.Supp.2d at 83. Moreover, this settlement offer is based upon the unique facts giving rise to this claim and should not be viewed as precedent controlling other claims determinations.

DETERMINATION OF LOSS:

A. Overview:

1. LCDR ██████████ was the Operations Section Chief and Federal On-Scene Coordinator’s Representative (FOSCR) from Sector Honolulu for this incident and he determined that the actions undertaken by RESOLVE were consistent with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C § 2702(b)(1)(B) and 2712(a)(4);¹⁴
2. This incident involved the discharge and ongoing substantial threat of discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs;
4. The claim was submitted within the six year period to file claims. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of the removal costs presented were for actions in accordance with NCP and the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR §§ 136.203, and 136.205.

¹⁴ *See*, Federal Project Number H18001 opened by Sector Honolulu.

B. Analysis:

The NPFC reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC to be consistent with the NCP or were directed by the FOSC; and (4) whether the costs were adequately documented and reasonable.

The NPFC has determined that the majority of the costs incurred by Resolve and submitted herein are OPA compensable based on the supporting documentation provided. The NPFC has determined that the costs invoiced were in accordance with the contracted rates between the parties including all subcontractors and third party services that were in effect at the time services were rendered.

The NPFC issued three requests for information to Resolve during the adjudication, to which Resolve responded in a timely manner. The NPFC also contacted Mr. [REDACTED] of WQIS on May 14, 2018 and requested copies of payments made, information relative to all Resolve costs presented, a copy of their audit supporting any payments they made and requested an explanation of why any costs not paid were denied. WQIS responded to the NPFC’s requests on May 30, 2018 at which time it provided a copy of its payment(s), a copy of its full audit while also explaining that any costs not paid, despite the fact that a complete audit was performed, was merely because they could only pay up to the \$1M policy limit. Upon adjudication of the claim, the NPFC incorporated the Insurance audit as part of its Summary of Costs which identifies which line items were paid along with what remained uncompensated for consideration by the NPFC.¹⁵

All costs approved for payment were verified as being invoiced at the appropriate rate sheet pricing and for third party or out of pocket expenses. The NPFC determined only those costs that were supported by invoices, proofs of payment and appropriate supporting documentation could be payable. Additionally, the NPFC confirmed the response activity as documented by the Unified Command by either independent evidence provided directly to NPFC claims or via Coast Guard Pollution Reports.

All amounts were deemed OPA compensable with the exception of \$14,336.22, all of which were related to Invoice 103446, and are described as follows:

1. The costs related to Murphy’s Bar & Grill in the amount of \$523.00.¹⁶ This item is denied because the NPFC cannot verify if the charges were incurred as the result of oil pollution removal and whether said costs were reasonable. Specifically, the receipt documenting the charge fails to itemize any of the items purchased. It is impossible to determine whether these costs were the result of oil pollution removal and whether said costs were reasonable. Therefore, the NPFC has denied the unsupported \$523.00, along with \$130.75, representing Resolve’s 25% mark up.

¹⁵ See, NPFC Summary of Costs spreadsheets identified as Enclosure (1) to this Determination Package.

¹⁶ *Id.* at Line Items 1006-1008.

2. \$566.52, representing a portion of Penco's invoice #22239.¹⁷ The NPFC was able to find supporting documentation for all but \$566.52 in Penco charges. Therefore, the NPFC has denied the unsupported \$566.52, along with \$141.63, representing Resolve's 25% mark up.
3. \$604.89, representing a portion of Cate's Invoice #1001.¹⁸ The NPFC was able to find supporting documentation for all but \$604.89 in Cate's charges. Therefore, the NPFC has denied the \$604.89, along with \$151.22, representing Resolve's 25% mark up.
4. \$125.00, representing a one day hotel charge for [REDACTED].¹⁹ There was no date or other documentation provided to support this charge. Therefore, the NPFC has denied the unsupported \$125.00, along with \$31.25, representing Resolve's mark up.
5. \$1.00²⁰ related to American Marine's Invoice #7716. American Marine's Invoice was in the amount of \$261,626.21, a \$1.00 less than what Resolve has submitted for reimbursement herein. Accordingly, \$1.00 is denied.
6. Finally, \$12,060.96, representing a total amount of Resolve's (non-third party) unsubstantiated costs. The NPFC was unable to find supporting documentation for this amount and therefore denies it in its entirety.

Overall Denied Costs = \$14,336.22²¹

Based on the foregoing, the NPFC hereby determines that the OSLTF will pay \$902,350.17 as full compensation for the reimbursable removal costs incurred by Resolve and submitted to the NPFC under claim # H18001-0001.

AMOUNT: \$902,350.17

Claim Supervisor: [REDACTED]

Date of Supervisor's review: 7/6/2018

Supervisor Action: Approved.

¹⁷ *Id.* at Line Items 256-257.

¹⁸ *Id.* at Line Items 883.

¹⁹ *Id.* at Line Item 922-923.

²⁰ *Id.* at Line Item 688.

²¹ See Claim H18001-0001 Summary of Costs for specifics regarding the amounts approved and denied by the NPFC.