

CLAIM SUMMARY / DETERMINATION

Claim Number:	J17021-0001
Claimant:	The Response Group
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$80,090.22

FACTS:

Oil Spill Incident:

On August 13, 2017, the M/V AKUTAN while in transit to Dutch Harbor, Alaska suffered a break in the main engines crank shaft, rendering the vessel unseaworthy. USCG Anchorage was notified, and upon investigation determined that the vessel owners, Klawock Oceanside Inc. had abandoned M/V AKUTAN and filed for bankruptcy, trying to absolve themselves of responsibility for the vessel & the oil onboard.¹ On August 13, 2017, a team comprised of USCG MSD Dutch Harbor personnel, ADEC personnel, a marine chemist and resolve salvage and towing personnel boarded the vessel and verifying an approximate 40,000 gallons of petroleum oil and oily water mixtures, which would cause significant harm to the environment as well as creating a severe economic impact onboard the vessel. The team determined the M/V AKUTAN's generator would lose power to operate within 3 days, causing the vessel to sink and releasing the oil into the Dutch Harbor, Alaska, a navigable waterway of the United States.²

The Claimant and its response actions performed:

On August 16, 2017, the USCG MSD Dutch Harbor designated M/V AKUTAN a significant threat to the environment and in response, contacted The Response Group (TRG), requesting them to oversee removal operations.³ TRG personnel began mobilization on August 17, 2017. TRG deployed personnel and equipment to the oil spill incident site, serving as spill managers in Dutch Harbor, Alaska from August 17, 2017 through August 28, 2017.

Specific to the oil spill removal performed in Dutch Harbor, Alaska, TRG removed five thousand gallons of oil from the bilge on August 18, 2017, one thousand two hundred gallons of oil from the bilge on August 19, 2017, four thousand two hundred gallons of oil from the bilge on August 20, 2017, four thousand nine hundred gallons of oil from the bilge on August 21, 2017 and fifteen thousand eight hundred gallons of oil from the bilge on August 22, 2017.

TRG left an estimated total of twenty three thousand three hundred and forty gallons of oil and oily water mixtures in fuel tank #1 and fuel tank #3. USCG MSD Dutch Harbor conducted assessments on all hull piping systems, determining that what was left on the M/V AKUTAN would not cause an imminent or substantial threat to the environment.⁴

¹ See, Bankruptcy Case #2:7-BK-13975.

² See, POLREP #1, dated August 17, 2017.

³ See, Email from MST3 ██████████ to TRG dated August 16, 2017.

⁴ See, POLREP #3, dated August 24, 2017.

Responsible Party:

The owner and operator of the F/V AKUTAN is Klawock Oceanside, Inc., a privately owned company. Klawock Oceanside, Inc. is the designated responsible party (RP) for the oil spill incident cited in this claim. Klawock Oceanside, Inc. filed for bankruptcy with Washington Western Bankruptcy Court on September 8, 2017. The file was dismissed on November 6, 2017.

The owners of Klawock Oceanside, Inc., Mr. [REDACTED] Jr. and Mrs. [REDACTED] filed for Chapter 7 bankruptcy on July 28, 2018.⁵ Klawock Oceanside, Inc. has administratively dissolved, effective June 16, 2018.⁶

The NPFC issued a Responsible Party Notification Letter to an Alaskan address associated with Klawock Oceanside, Inc on August, 2, 2018.⁷ On September 11, 2018, the NPFC received the letter back as undeliverable by the U.S. Postal Service.

The Claim:

The Response Group incurred a grand total of \$80,090.22 in oil pollution removal costs.⁸ It presented these costs to the USCG SILC as follows:

Invoice #15097 in the amount of \$80,090.22 on October 4, 2017;

On November 13, 2017, the USCG SILC issued a rejection of all costs submitted by TRG citing the basic ordering agreement (BOA) between TRG and the USCG had expired. TRG was unable to provide USCG SILC could not find an Authorization to Proceed for the work affiliated with the costs claimed, and referred TRG to the NPFC to file a claim for all costs.⁹

On August 2, 2018, TRG submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs for personnel, equipment and out of pocket expenses in the amount of \$80,090.22.¹⁰

On August 2, 2018, the NPFC notified TRG that the claim submission sent on October 4, 2017 to the US Coast Guard, and submitted on August 2, 2018 to the NPFC was never properly submitted to the RP for the F/V AKUTAN oil spill incident, who the NPFC clarified was the owner of the vessel, Klawock Oceanside Inc. As such, the NPFC informed TRG that they had to submit all costs to the RP. The NPFC explained that if the RP denied the costs, or 90 days passed since the RP received the claim, that the NPFC would move forward with the adjudication of the claim.

On September 11, 2018, the NPFC received back the RP notification letter sent to Klawock Oceanside, Inc., as undeliverable by the U.S. Postal Service. The NPFC did not send any further

⁵ See, Petition for Bankruptcy of [REDACTED] dated July 28, 2018.

⁶ See, Certificate of Involuntary Dissolution/Revocation dated June 16, 2018.

⁷ See, RP Notification Letter dated August 2, 2018.

⁸ See, The Response Group Invoice #15097 dated October 4, 2017.

⁹ See, Email from USCG SILC's [REDACTED] to TRG's [REDACTED] dated November 13, 2017.

¹⁰ See, OSLTF Claim Form dated July 27, 2018.

notification to Klawock Oceanside, Inc. in response to the company's file for Chapter 7 bankruptcy on July 28, 2018. As such, the NPFC moved forward with adjudication of the claim.

APPLICABLE LAW:

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.¹¹ 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 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:

¹¹ 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”

- (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 FOOSC to be consistent with the National Contingency Plan or were directed by the FOOSC.

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. MST3 [REDACTED] was the Federal On-Scene Coordinator’s Representative (FOOCR) from USCG MSD Dutch Harbor for this incident and he determined that the actions undertaken by The Response Group 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);¹²
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.

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 FOOSC to be consistent with

¹² *See*, Email from MST3 [REDACTED] to TRG’s [REDACTED], dated August 16, 2017.

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 The Response Group 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.

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 \$711.12, all of which were related to Invoice 15097, and are described as follows:

1. The costs related to Mileage in the amount of \$115.04.¹³ These items are denied because the NPFC was unable to find any supporting documentation for these costs. Specifically, no receipt documenting the costs was provided to the NPFC. It is impossible to substantiate these costs. Therefore, the NPFC has denied the unsupported \$115.04.
2. The costs related to Tips in the amount of \$10.00.¹⁴ The NPFC was unable to find any supporting documentation for these costs. Therefore, the NPFC has denied the unsupported \$10.00.
3. \$36.15, representing the AK Ship Grocery receipt dated August 22, 2017.¹⁵ All costs documented on the supporting receipt display non OPA compensable snacks and candies. Therefore, the NPFC has denied the \$36.15.
4. \$11.56, related to the Tesoro receipt dated August 20, 2017.¹⁶ Tesoro's receipt was in the amount of \$15.94, displaying \$4.38 in costs for OPA compensable products, and \$11.56 for non OPA compensable snacks and candies. Therefore, the NPFC has denied the \$11.56.
5. \$3.00, related to the Exchange receipt dated August 22, 2017.¹⁷ Exchange's receipt was in the amount of \$6.58, displaying \$3.58 in costs for OPA compensable products, and \$3.00 for non OPA compensable snacks and candies. Therefore, the NPFC has denied the \$3.00.

¹³ *Id.* at Line Items 112, 117, 137, 149 and 183.

¹⁴ *Id.* at Line Items 124 and 129.

¹⁵ *Id.* at Line Item 144.

¹⁶ *Id.* at Line Item 688.

¹⁷ *Id.* at Line Item 174.

6. \$3.00, related to Exchange receipt dated August 23, 2017.¹⁸ Exchange's receipt was in the amount of \$6.58, displaying \$3.58 in costs for OPA compensable products, and \$3.00 for non OPA compensable snacks and candies. Therefore, the NPFC has denied the \$3.00.
7. \$532.37, related to food or café charges included on hotel bills with no itemization of purchased items. There, the NPFC has denied the \$532.37.

Overall Denied Costs = \$711.12¹⁹

Based on the foregoing, the NPFC hereby determines that the OSLTF will pay \$79,379.10 as full compensation for the reimbursable removal costs incurred by The Response Group and submitted to the NPFC under claim # J17021-0001. All costs claimed are for charges paid for by The Response Group for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by The Response Group.

AMOUNT: \$79,379.10


Claim Supervisor: 
Date of Supervisor's review: <i>9/12/18</i>
Supervisor Action: <i>Approved</i>

¹⁸ *Id.* at Line Item 178.

¹⁹ See Claim J17021-0001 Summary of Costs for specifics regarding the amounts approved and denied by the NPFC.