

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	916007-0002
<b>Claimant:</b>	E.R.R., LLC
<b>Type of Claimant:</b>	Corporate
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$135,000.00
<b>Action Taken:</b>	Denied

### I. SUMMARY:

On May 13, 2015, United States Coast Guard Sector New Orleans Incident Management Division (CG IMD) received a report of an unknown sheen and heavy fuel oil odor coming from the Chevron Oronite dock at Mile Marker 72 on the Lower Mississippi River). The incident was reported to the National Response Center (NRC) via report # 1116353, which indicated that the spill was reported by an employee at Port Ship Services located at 999 Hwy 23 in Belle Chasse, LA 70037.<sup>1</sup>

CG IMD personnel conducted a shoreline assessment from the Chevron dock up river of the spill to the dock at Port Ship Services. During that same time, a Coast Guard aerial survey observed a heavy oil-sheen on the shoreline from the Evergreen Resource Recovery facility (Evergreen or later changed to E.R.R., LLC<sup>2</sup>) located near Mile Marker 74 just north of Port Ship Services. CG IMD personnel estimated approximately nine barrels of waste oil had contaminated approximately one mile of shoreline along the Lower Mississippi River.<sup>3</sup>

CG IMD deployed to Evergreen and questioned Evergreen personnel and its Person-In-Charge (PIC) of the facility and learned that on May 12, 2015, the night before the incident, Evergreen had been off-loading oily water from the barge DBL 118 when the Evergreen PIC and Captain from the tug OMAHA (tending the DBL 118) had observed an oily sheen on the water in the vicinity of the transfer area. A statement from Evergreen confirmed that all transfer lines and connections between Evergreen and the DBL 118 were checked for integrity and possible leaks before and during the transfer and no abnormalities were reported. The sheen was not reported to the NRC by the Evergreen PIC or by the Captain of the OMAHA.<sup>4</sup>

The CG IMD ruled out the tug OMAHA as a possible source of discharge because the vessel didn't carry the type of oil that was discharged into the waterway. However, they did obtain spill samples of the oil impacting the waterway and adjoining shoreline, a source sample from Evergreen's 3" transfer hose, and a source sample from Evergreen's facility storage tank. Samples from the DBL 118 were not obtained. The samples were submitted to the USCG Marine Safety Laboratory (CG MSL) for analysis. On July 17, 2015, the IMD received CG MSL report #15-222 which identified the spill sample obtained from the Lower Mississippi

<sup>1</sup> NRC Report # 1116353, opened 5/13/2015. The NPFC notes that Evergreen (E.R.R.), which was later identified as the responsible party, did not notify the NRC as required by 33 CFR 153.203.

<sup>2</sup> Louisiana Notification of Change Form (NOC-1) dated December 20, 2016, name change effective September 01, 2014.

<sup>3</sup> Statement from PO ██████████, FOSCR, to the NPFC, sent via email on 12/10/2015.

<sup>4</sup> *Id.*

River and source sample from Evergreen's storage tank as a common source. As such, Evergreen was identified as the responsible party (RP) for this oil spill.<sup>5</sup>

On December 20, 2016, Evergreen Resource Recovery, LLC (the RP) submitted paperwork to officially change its name to become E.R.R, LLC (the Claimant), retroactive to September 1, 2014 (and prior to the oil spill).<sup>6</sup>

With its claim submission, E.R.R., LLC claims that, during the course of the removal activities, the Oil Spill Response Organization (OSRO) hired for cleanup and removal activities, Oil Mop Environmental Services (OMI), rented parking space, storage space, and personnel muster areas, and a deck barge from it. While it invoiced and was subsequently sent a check by OMI for the rental, the Claimant states that it failed to cash the check (due to an administrative error on its part). The Claimant asserts that, at that point, OMI refused to reissue payment to E.R.R., LLC for services rendered as a result of the oil spill.<sup>7</sup> E.R.R. is litigating this matter in the State of Louisiana in Division B of the 25th Judicial District Court for the Parish of Plaquemines (Case Number 62-944).

## **II. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.<sup>8</sup> As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant's claim against the OSLTF.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.<sup>9</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>10</sup> If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and finds facts and makes its determination based on the preponderance of the credible evidence.

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<sup>5</sup> USCG MSL Case Report # 15-222, dated 7/22/2015.

<sup>6</sup> Louisiana DEQ Notification of Change Form for E.R.R., LLC, dated 12/20/2016.

<sup>7</sup> Claim Submission Cover letter, submitted with the claim on 2/11/2019.

<sup>8</sup> 33 CFR Part 136.

<sup>9</sup> See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2011 WL 5187292, (E.D. La. 2011), "[T]he Fifth Circuit specifically recognized that an agency has discretion to credit one expert's report over another when experts express conflicting views." citing *Medina County v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010).

<sup>10</sup> See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them).

### **III. DISCUSSION:**<sup>11</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.<sup>12</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>13</sup> The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.<sup>14</sup> OPA and its implementing regulations prescribe the conditions of payment, as well as restrictions on the types of costs appropriate for payment.

Upon review of the claim submission and based on the evidence either presented to or obtained by this office, it appears that E.R.R. LLC is in litigation on this matter in the State of Louisiana Case Number 62-944 in Division B of the 25th Judicial District Court for the Parish of Plaquemines. The Oil Pollution Act provides that no claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.<sup>15</sup> As such, the NPFC cannot approve or certify this claim while the matter is in litigation.

The NPFC has also determined that, in accordance with the Oil Pollution Act of 1990 and based on its definition of a responsible party, E.R.R. LLC is the responsible party for this incident. Under the Oil Pollution Act, the responsible party for a facility from which oil is discharged may assert a claim for removal costs and damages only if the responsible party demonstrates that (1) the responsible party is entitled to a defense to liability; or (2) the responsible party is entitled to a limitation of liability, which it has failed to do.<sup>16</sup> Notwithstanding that this matter is in litigation, in order for E.R.R. LLC to assert this claim, it must present a defense or limitation of liability as noted above.

### **VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the claim is denied.

Claim Supervisor: [REDACTED] [REDACTED]

Date of Supervisor's review: *5/17/19*

Supervisor Action: *Denial approved*

<sup>11</sup> Whether this claim might have been otherwise meritorious is not the focus of this determination. The claimant's removal costs were not adjudicated because of the claimant's litigation status and its role as the Responsible Party (RP) for this incident.

<sup>12</sup> See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>13</sup> 33 CFR Part 136.

<sup>14</sup> 33 CFR 136.105.

<sup>15</sup> 33 U.S.C. § 2713.

<sup>16</sup> 33 U.S.C. § 2708.