

CLAIM DETERMINATION

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| Claim Number: | 918040-0001 |
| Claimant: | Environmental Safety and Health Consulting Services, Inc. |
| Type of Claimant: | OSRO |
| Type of Claim: | Removal Costs |
| Claim Manager: | [REDACTED] |
| Amount Requested: | \$123,880.76 |
| Action Taken: | Offer in the amount of \$114,692.69 |

EXECUTIVE SUMMARY:

On June 2, 2016, Apollo Energy, LLC (Apollo or RP) notified the National Response Center of a discharge of approximately 20 barrels of crude oil from a storage tank located at its Happy Town Oil Field A-1 Facility in St. Martin, Louisiana which substantially threatened the Atchafalaya River System, a navigable waterway of the United States. Apollo identified Forefront Emergency Management, LP (Forefront) as the contracted Qualified Individual (QI).¹ Forefront made notifications to the Louisiana State Police HAZMAT Division, Louisiana Department of Environmental Quality (LDEQ) and the United States Fish and Wildlife Service (USF&W).² LDEQ was the State On-Scene Coordinator (SOSC). The RP hired Environmental Safety and Health Consulting Services, Inc. (ES&H or Claimant) to perform the cleanup and response operations. ES&H commenced operations on June 2, 2016.³

In September 2016 and January 2017, ES&H presented its uncompensated removal costs to the RP. In April, 2017, ES&H submitted another letter to the RP seeking payment for its uncompensated removal costs. Having not received payment from the RP,⁴ ES&H presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$123,880.76 on August 27, 2018.⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$114,692.69 of the requested \$123,880.76 is compensable and offers this amount as full and final compensation of this claim.⁶

I. INCIDENT, RESPONSIBLE PARTY, AND RECOVERY OPERATIONS:

Incident

On June 2, 2016, the United States Coast Guard National Response Center (NRC) received notification that an oil tank overflowed, discharging approximately 20 barrels of crude oil into a dyked area at the Happy Town Oil Field A-1 Facility in St. Martin, Louisiana, which

¹ Undated Forefront Spill Response Notification Form, Reporting Party section.

² Forefront EM ICS-214 Activity Log for Mr. [REDACTED], RPIC, dated June 2, 2016.

³ Undated Forefront Spill Response Notification Form, Incident Description section; Email from LDEQ to NPFC dated September 6, 2018; Forefront ICS-214 Activity Log for Mr. [REDACTED], RPIC, dated June 2, 2016.

⁴ A claimant must first present a claim for uncompensated removal costs to the RP. After ninety day, if the RP has not settled the claim, the claimant may present it claim to the NPFC. 33 CFR 136.103(c).

⁵ ES&H claim submission..

⁶ 33 CFR 136.115.

substantially threatened the Atchafalaya River System, a navigable waterway of the United States.⁷

Responsible Party

Apollo Energy is the owner of the Happy Town Oil Field A-1 Facility. The State of Louisiana identified Apollo Energy as the RP on June 2, 2016.⁸ In 2018, the NPFC issued a Responsible Party Notification Letter to Apollo Energy.⁹ The NPFC did not receive a response from the RP.

Recovery Operations

On June 2, 2016, the RP hired Environmental Safety and Health Consulting Services, Inc. (ES&H or Claimant) to perform response and cleanup operations.¹⁰ ES&H, the other relevant parties, and the SOSC agreed to a plan in which ES&H would recover all liquids within the containment berm, to excavate three to six inches of contaminated soil and remove the excavated material via roll off boxes, and transfer the roll off boxes to a facility in Mermentau, LA for disposal.¹¹ Response and cleanup operations were deemed complete by the SOSC on June 17, 2016.¹²

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)¹³ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.¹⁴

ES&H stated it submitted its request for compensation to the RP for \$123,880.76 via two separate invoices.¹⁵ ES&H also sent a final demand for payment letter to the RP dated April 17, 2017 outlining the ES&H invoices subject of the response they performed.¹⁶ The ES&H invoices were created in accordance with ES&H's Master Service Agreement with Apollo Energy Operating Company, LP dated June 9, 2011 and signed by both parties on August 1, 2011 and August 3, 2011, respectively.¹⁷ The RP has not settled the claim.

III. CLAIMANT AND NPFC:

⁷ National Response Center Report #1149482.

⁸ State of Louisiana Department of Natural Resources Office of Conservation Lease Facility Inspection Report dated June 2, 2016.

⁹ NPFC RP Notification Letter to Apollo Energy, LLC dated August 28, 2018.

¹⁰ Undated Forefront Emergency Management Spill Response Notification Form.

¹¹ Apollo Energy Incident Action Plan for Operational Period 1 prepared by Forefront dated June 2, 2016.

¹² Email from Mr. [REDACTED] (SOSC) to the NPFC dated September 6, 2018.

¹³ 33 U.S.C. § 2701 *et seq.*

¹⁴ 33 CFR 136.103.

¹⁵ ES&H Invoice #1-43847 dated September 29, 2016 for \$118,852.69; ES&H Invoice #1-45007 dated January 4, 2017 for \$5,028.07.

¹⁶ ES&H demand letter to Apollo Energy, LLC dated April 17, 2017.

¹⁷ ES&H/Apollo Energy Master Service Agreement dated June 9, 2011.

When an RP has not settled a claim after ninety days of receipt, a claimant may elect to present its claim to the NPFC.¹⁸ On August 27, 2018, the NPFC received a claim for uncompensated removal costs from ES&H. The claim included ES&H invoices for its labor, equipment and third party costs totaling \$123,880.76.¹⁹

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁰ 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.²¹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²² 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.

V. DISCUSSION:

On August 28, 2018, ES&H submitted a claim to the National Pollution Funds Center (NPFC) for reimbursement of its uncompensated removal costs for personnel, equipment and associated expenses for \$123,880.76.²³

A responsible party is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.²⁴ A responsible party's liability is strict, joint, and several.²⁵ When enacting OPA, Congress "explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills."²⁶ OPA was intended to cure these deficiencies in the law.

¹⁸ 33 CFR 136.103.

¹⁹ Original claim submission.

²⁰ 33 CFR Part 136.

²¹ 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).

²² 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).

²³ Original claim submission.

²⁴ 33 U.S.C. § 2702(a).

²⁵ See, H.R. Rep. No. 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²⁶ *Apex Oil Co., Inc. v. United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002)(citing S. Rep. No. 101-94 (1989), reprinted in 1990 U.S.C.C.A.N. 722).

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.”²⁷ 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.”²⁸

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.²⁹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁰ 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.³¹

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

- (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 directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.³²
- (d) That the removal costs were uncompensated and reasonable.³³

The NPFC analyzed each of these factors and determined the majority of the costs incurred by ES&H and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined that the costs invoiced were billed in accordance with the contracted rates between the parties, including all third party services.³⁴ All costs approved for payment were verified as being invoiced at the appropriate rate sheet pricing, including but not limited to, all third party expenses. All approved costs were supported by adequate documentation which included invoices and proofs of payment.

The amount of compensable costs is \$114,692.69 while \$9,188.07 was deemed non-compensable for the following reasons:

²⁷ 33 U.S.C. § 2701(31).

²⁸ 33 U.S.C. § 2701(30).

²⁹ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³⁰ 33 CFR Part 136.

³¹ 33 CFR 136.105.

³² There was not a FOSC assigned to this incident. To ensure that ES&H met its burden with respect to this factor, the NPFC coordinated with the regional office of the U.S. Environmental Protection Agency which would have been the FOSC for this incident if one were assigned. After analyzing the spill and the actions taken by ES&H, the EPA opined that the actions taken were consistent with the National Contingency Plan. We agree.

³³ 33 CFR 136.203; 33 CFR 136.205.

³⁴ ES&H Emergency Response Rate Schedule, January 1, 2016.

1. ES&H Invoice #1-43847 for \$4,160.00 seeks to recover costs for the rental of roll off boxes between June 18, 2016 and September 29, 2016.³⁵ The SOSC deemed the cleanup complete on June 17, 2016. These expenses were incurred after the cleanup was deemed complete and are, therefore, not compensable.
2. ES&H Invoice #1-45007 for \$5,028.07 seeks to recover costs for the rental of roll off boxes between September 30, 2016 and December 19, 2016 and “disposal costs” for roll off boxes.³⁶ The SOSC deemed the cleanup complete on June 17, 2016. The rental expenses were incurred after the cleanup was deemed complete and are, therefore, not compensable. The disposal costs for the roll off boxes are denied because it is impossible to discern which, if any, of these disposal costs were incurred before the cleanup was deemed complete.

Overall Denied Costs = \$9,188.07³⁷

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, ES&H’s request for uncompensated removal costs in the amount of \$123,880.76 is approved in the amount of \$114,692.69.

Because this determination is a settlement offer³⁸, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.³⁹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁰ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: 

Date of Supervisor’s review: 2/15/2019

Supervisor Action: Offer Approved.

³⁵ Enclosure 3 - Invoice #1-43847, Line Item 241.

³⁶ Enclosure 3 - Invoice #1-45007.

³⁷ Enclosure 3 provides a detailed analysis of the amounts approved and denied by the NPFC.

³⁸ Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the compensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person. 33 CFR §136.115(a).

³⁹ 33 CFR §136.115(b).

⁴⁰ *Id.*