

CLAIM DETERMINATION on RECONSIDERATION

Claim Number:	919001-0001
Claimant:	Morgan County (West Virginia) Commission
Type of Claimant:	County Government
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$128,828.48
Action Taken:	Offer in the amount of \$126,255.78

EXECUTIVE SUMMARY:

Morgan County Commission (“Commission” or “Claimant”) requested reconsideration of NPFC’s original claim determination dated March 6, 2019 denying its request for \$128,828.48 in uncompensated removal costs for an incident involving the spill of approximately 240 gallons of home heating oil in Berkley Springs, West Virginia.¹ The responsible party (RP) for the incident was Ms. [REDACTED]. On November 7, 2018, the Commission exonerated Ms. [REDACTED] for all response costs related to the incident.² When the Commission exonerated the RP from the costs associated with the oil spill, it extinguished rights the Fund would have had against the RP by subrogation. Since the claimant was unable to provide all of its subrogation rights against the RP, the NPFC is prohibited by law from paying the claim and as such, the claim was denied.³ The claimant timely sought reconsideration and provided additional material to the NPFC to include a letter that revoked and rescinded the exoneration provided to Ms. [REDACTED].⁴ In its reconsideration request, the claimant states that it now has the “ability to, and will assign... and subrogate to the United States all rights... that has against [Ms. [REDACTED]].”⁵

Requests for reconsideration are considered de novo. NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by Morgan County and the relevant statutes and regulations. Upon reconsideration, the NPFC has determined that \$126,255.78 is compensable and offers that amount to the claimant.

I. CLAIM HISTORY:

On October 4, 2018, Morgan County Commission submitted a claim and supporting document to for \$128,828.48 of uncompensated removal costs.⁶ While the claim was being

¹ Morgan County OSLTF Claim Form dated October 4, 2018.

² Morgan County letter dated November 7, 2018.

³ See, 33 U.S.C. 2712(f). See also, 33 U.S.C. 2715(a). Accord, *Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902, 904 (11th Cir. 2006); *Rick Franklin Corp. v U.S. Dep’t of Homeland Security*, 2008 WL 337978 (D. Or. 2008).

⁴ 2019 04 01 Letter from Morgan County Commission to NPFC requesting reconsideration of the NPFC’s initial denial determination dated March 6, 2019 with an attached letter to Ms. [REDACTED] dated March 13, 2019 rescinding the exoneration they previously granted.

⁵ *Id.*

⁶ Optional OSLTF Claim Form dated October 4, 2018; NRC Report # 1195588; USEPA Region III FOSC coordination letter dated October 2, 2018; Geoprobe Reports; State Reports; Miller invoicing with supporting

adjudicated, the Commission exonerated Ms. [REDACTED] for all response costs related to the incident.⁷ By doing so, the Commission extinguished rights the Fund would have had against the RP by subrogation. Since the claimant was unable to provide all of its subrogation rights against the RP, the NPFC was prohibited by law from paying the claim and as such, the claim was denied.⁸ The NPFC's initial determination is hereby incorporated by reference.⁹

II. REQUEST FOR RECONSIDERATION:

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim.¹⁰ The claimant has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.¹¹ 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. The written decision by the NPFC is final.¹²

On April 1, 2019, the Claimant timely requested reconsideration of the NPFC's initial determination.¹³ In support of its request for reconsideration, the Claimant, *inter alia*, provided a letter explaining that it had exonerated Ms. [REDACTED] based on a misunderstanding of its obligations under the statutes and regulations governing claims under the Oil Pollution Act (OPA). The letter explained that March 13, 2019, Morgan County voted unanimously to rescind the exoneration for Ms. [REDACTED] and issued a letter to Ms. [REDACTED] notifying her of its decision.¹⁴ The claimant provided this letter to the NPFC.¹⁵ As a courtesy, the NPFC sent a letter via certified mail to Ms. [REDACTED] that captured the history of the claim and notified her that, as the responsible party, she may be financially responsible for this incident.¹⁶ Ms. [REDACTED] acknowledged receipt of the letter on April 17, 2019.¹⁷

a. ANALYSIS OF THE REQUEST FOR RECONSIDERATION:

The NPFC has reviewed the reconsideration request and documentation provided by the claimant. In particular, the NPFC has determined that the Commission's decision to rescind the exoneration previously provided to Ms. [REDACTED] is sufficient evidence that it now retains all rights of recovery against her and, as such, can subrogate those rights to the United States in

documentation and third party receipts, proofs of payment, photos, Miller rate schedule and Morgan County documentation in support of its agency charges.

⁷ Morgan County letter dated November 7, 2018.

⁸ See, 33 U.S.C. 2712(f). See also, 33 U.S.C. 2715(a). Accord, *Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902, 904 (11th Cir. 2006); *Rick Franklin Corp. v U.S. Dep't of Homeland Security*, 2008 WL 337978 (D. Or. 2008).

⁹ 2019 03 06 NPFC Claim Determination to Morgan County Commission.

¹⁰ 33 C.F.R. 136.115(d).

¹¹ 33 C.F.R. 136.105(a).

¹² *Id.*

¹³ Morgan County Claim Submission dated October 4, 2018.

¹⁴ 2019 03 13 Letter from Morgan County to Ms. [REDACTED] rescinding exoneration.

¹⁵ *Id.*

¹⁶ NPFC RP Notification letter dated April 9, 2019.

¹⁷ Signed U.S. Postal Service domestic return receipt dated April 17, 2019.

accordance with OPA.¹⁸ Since it has now preserved all of its rights against the responsible party, the Commission is now eligible to seek recovery of its uncompensated removal costs for the incident.¹⁹

b. ANALYSIS OF THE COMPENSABLE REMOVABLE COSTS

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.²⁰ A responsible party's liability is strict, joint, and several.²¹ 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."²² OPA was intended to cure these deficiencies in the law.

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."²³ 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."²⁴

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.²⁵ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁶ 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.²⁷

The Oil Spill Liability Trust Fund is available to the President for the payment of claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan (NCP).²⁸ OPA defines "removal costs" as "the costs of removal that are incurred after a

¹⁸ This decision is contingent on the NPFC receiving the release agreement found at the end of this determination attesting to this ability properly executed by the claimant.

¹⁹ See, 33 U.S.C. 2712(f). See also, 33 U.S.C. 2715(a). *Accord, Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902, 904 (11th Cir. 2006); *Rick Franklin Corp. v U.S. Dep't of Homeland Security*, 2008 WL 337978 (D. Or. 2008).

²⁰ 33 U.S.C. § 2702(a).

²¹ See, H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

²² *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).

²³ 33 U.S.C. § 2701(31).

²⁴ 33 U.S.C. § 2701(30).

²⁵ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁶ 33 CFR Part 136.

²⁷ 33 CFR 136.105.

²⁸ 33 U.S.C. § 2712(a)(4).

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 such an incident.”²⁹

The regulations implementing OPA are found at 33 CFR Part 136. In relevant part, those regulations state the NPFC is only permitted to compensate claimants for “**reasonable** removal costs of actions taken...”³⁰ The regulations further require that a claimant bear the burden of providing all evidence, information, and documentation deemed necessary by the NPFC to establish 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...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 Federal On-Scene Coordinator (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 Morgan County 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 \$126,255.78 while \$2,572.70 was deemed non-compensable for the following reasons:³⁵

1. Miller invoice # 17-292 charged for personnel time for both a Project Manager and a Foreman. The daily field log shows that each of these employees worked on Sunday from 8:00am to 10:30am. Miller’s rate schedule allows a double time rate to be charged for this work since it is not within the normal work week. Miller invoiced these positions at the double time rate but they inadvertently also doubled the number of hours worked. This is not permitted within the terms of the rate schedule. As such,

²⁹ 33 U.S.C. § 2701(31).

³⁰ 33 CFR 136.205 (emphasis added).

³¹ 33 CFR 136.105; 33 CFR 136.203.

³² The NPFC coordinated with the U.S. Environmental Protection Agency Federal On Scene Coordinator (FOSC), Mr. [REDACTED] who was the FOSC for this incident. After analyzing the spill and the actions taken by Morgan County and its response contractor, Miller Environmental, on October 25, 2018, the EPA FOSC opined in an email to the NPFC that the actions taken were consistent with the National Contingency Plan. We agree.

³³ 33 CFR 136.203; 33 CFR 136.205.

³⁴ Miller Environmental Labor and Equipment Rate Schedule, October 16, 2015.

³⁵ Enclosure 3 to this determination provides a detailed analysis of these costs.


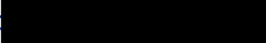
the NPFC adjusted the costs accordingly and allowed 2.5 hours per employee. NPFC denies the overcharge of \$615.00.³⁶

2. Miller invoice # 17-316 charged for personnel, materials and equipment for Thursday November 16, 2017 in the total amount of \$443.49 when Miller in fact also billed this same date of service under Miller invoice # 17-292. These costs are denied in the amount of \$443.49 because the NPFC approved these costs under invoice # 17-292.³⁷
3. Miller invoice # 18-037 invoiced seven (7) instances of a Photoionization Meter (PID) at \$155.00 each instance when the Miller rate schedule states the price is \$150.00 each. The NPFC denied a total of \$35.00 for overcharges of PID pricing.³⁸
4. Miller incorrectly charged Morgan County for the disposal of solid waste. Miller invoice #18-037 indicates Miller charged Morgan County \$50.30 per ton (plus an additional 20% markup in accordance its rate sheet). However Miller's subcontractor, Waste Management only charged Miller \$41.55 per ton. Although Morgan County paid Miller, under OPA it can only be compensated for \$41.55 per ton (plus the additional 20% markup). Therefore the NPFC denied the \$1433.23 in overcharges.³⁹
5. The NPFC denies \$46.00 in food charges that were not supported by receipts.

Overall Denied Costs = \$2,572.70⁴⁰

III. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Morgan County's request for uncompensated removal costs in the amount of \$128,828.48 is approved in the amount of \$126,255.78.


Claim Supervisor: 
Date of Supervisor's Review: <i>4/29/19</i>
Supervisor Action: <i>Offer on Reconsideration Approved</i>

³⁶ *Id.* at Invoice # 17-292.

³⁷ *Id.* at Invoice # 17-316.

³⁸ *Id.* at Invoice # 18-037.

³⁹ *Id.*

⁴⁰ This amount is adjusted by \$.02 based on rounding errors in the documentation provided. Enclosure 3 to this determination provides a detailed analysis of the amounts approved and denied by the NPFC.