

CLAIM DETERMINATION

Claim Number:	919010-0001
Claimant:	Above and Below Marine Services
Type of Claimant:	Private
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$8,400.00
Action Taken:	Denial

EXECUTIVE SUMMARY:

On September 6, 2017, the vessel NAUTI NYMPH 51 while docked at the Compass Point Marina in St. Thomas, Virgin Islands is reported to have discharged oil into Benner Bay, a navigable waterway of the US. The incident was discovered in the aftermath of Hurricane Irma.¹

[REDACTED] d/b/a Above and Below Marine Services (“Above and Below” or “claimant”) raised the vessel and deployed boom in order to contain the spill.² East End Watersports, Ltd. (“East End” or “RP”), is the listed owner of the vessel and responsible party (RP) as defined by the Oil Pollution Act of 1990.³ Above and Below presented its uncompensated removal costs to the RP. Having not received payment from the RP after ninety days,⁴ Above and Below presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$8,400.00.⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that this claim must be denied in full because no proof of Federal On Scene Coordinator (FOSC) oversight and monitoring of the removal actions responsible for the costs provided by the claimant could be substantiated.⁶

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On September 6, 2017, Hurricane Irma made official landfall in the U.S. Virgin Islands as a Category 5. Extreme winds and heavy rainfall ravaged parts of the U.S. Virgin Islands, particularly St. Thomas and St. John.⁷ On September 20, 2017, as the U.S. Virgin Islands continued to recover from Hurricane Irma, the core of Hurricane Maria passed just south of the U.S. Virgin Islands on its way to Puerto Rico. Maria's outer eyewall devastated St. Croix with

¹ Above and Below claim submission undated and received December 20, 2018.

² OSLTF Claim Form under Description of Actions taken to minimize or avoid damage.

³ 33 U.S.C. § 2701(32).

⁴ 33 CFR 136.103(c).

⁵ Above and Below Marine Services claim submission received December 20, 2018.

⁶ 33 CFR 136.203.

⁷ Written testimony of FEMA Federal Coordinating Officer [REDACTED] for a House Committee on Oversight and Government Reform, Subcommittee on Interior, Energy and Environment hearing titled “The Historic 2017 Hurricane Season: Impacts on the U.S. Virgin Islands” dated March 12, 2018.

powerful winds and heavy rainfall, damaging the communications and power grid, destroying homes, and downing trees.⁸

On September 6, 2017, Claimant states the vessel, NAUTI NYMPH 51, was at the docks of Compass Point Marina in St. Thomas, US Virgin Islands when Hurricane Irma struck. The claimant asserts that in the confusion after the storm, the vessel rolled to port and was mostly submerged and the vessel was leaking oil from the tanks and engine into Benner Bay, a navigable waterway of the United States.⁹

Responsible Party

The owner and operator of the vessel NAUTI NYMPH is East End Watersports, Ltd., which has Mr. [REDACTED] listed as the company owner.¹⁰ As such, it is the responsible party for the incident.

On December 21 2018, the NPFC issued a Responsible Party Notification Letter to East End Watersports, Ltd.¹¹ On February 12, 2019, the RP had a phone conversation with the NPFC affirming its status as the owner of the vessel and asserting that the claimant, Above and Below, removed the NAUTI NYMPH 51 without its permission or authorization and is guilty of stealing the vessel and relocating it without the RP's consent.¹²

Recovery Operations

Claimant asserts that on September 14, 2017, it was advised by the United States Coast Guard (USCG) to remove the vessel from the water. It further states it raised and removed the NAUTI NYMPH 51 from the Compass Point Marina and towed the vessel to safe storage on land.¹³

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)¹⁴ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.¹⁵

On October 11, 2018, Above and Below submitted its request for compensation to the RP for \$8,400.00.¹⁶ This submission included an invoice for labor and equipment, and salvage costs associated with the NAUTI NYMPH 51.¹⁷

⁸ Preliminary Damage Assessment Report, FEMA-4340-DR-VI (Expedited) dated September 20, 2017.

⁹ OSLTF claim form, item #4 explanation of how the oil impacted the water.

¹⁰ Government of the United States Virgin Islands registration of vessel dated February 17, 2012.

¹¹ NPFC RP Notification Letter to East End Watersports, Ltd. dated December 21, 2018.

¹² Phone Conversation with [REDACTED] dated February 12, 2019.

¹³ OSLTF Claim Form under Description of Actions taken to minimize or avoid damage.

¹⁴ 33 U.S.C. § 2701 *et seq.*

¹⁵ 33 CFR 136.103.

¹⁶ Above and Below Marine Services letter to Mr. [REDACTED] and East End Water Sports dated October 11, 2018.

¹⁷ Above and Below Marine Services Invoice 1030 dated September 15, 2017.

The RP stated to the NPFC that no request or approval of the raising, removal or relocation of NAUTI NYMPH 51 was made or given and has denied payment of the costs submitted by Above and Below.¹⁸

III. CLAIMANT AND NPFC:

When an RP has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.¹⁹ On December 20, 2018, the NPFC received an undated claim for uncompensated removal costs from Above and Below. The costs presented to the NPFC in the amount of \$8,400.00 matched those submitted to the RP on October 11 2018, but did not meet the mandatory 90 day presentment time period provided to the RP to settle the claim. As such, on December 20, 2018, the NPFC issued a letter to Above and Below notifying them that the submission was received and identified as a pre-claim # PRE-00015305 and would remain in pre-claim status until the RP's 90 day presentment time period had lapsed or an official response from the RP was provided.²⁰ On January 18, 2019, the NPFC transferred the pre-claim submission into a claim and assigned it to a Claims Manager for review.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²¹ 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.²² The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²³ 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:

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

¹⁸ Phone Conversation with [REDACTED] dated February 12, 2019.

¹⁹ 33 CFR 136.103.

²⁰ Above and Below acknowledgement letter dated December 21, 2018.

²¹ 33 CFR Part 136.

²² 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).

²³ 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).

²⁴ 33 U.S.C. § 2702(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.

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.
- (d) That the removal costs were uncompensated and reasonable.³²

Upon adjudication of the claim, the NPFC contacted MST1 [REDACTED] at the Marine Safety Detachment (MSD) St. Thomas in an attempt to obtain information regarding the Claimant's assertion that he was advised by the USCG to remove the vessel in question.³³ MST1 [REDACTED] reached out to LCDR [REDACTED] who has since transferred to another Coast Guard unit and asked for her input regarding the response. LCDR [REDACTED] replied on January 29, 2019

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.).

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 33 CFR 136.203; 33 CFR 136.205.

³³ January 29, 2019 email to MST1 [REDACTED] from NPFC Claims Manager, [REDACTED].

and clearly stated that she, nor any other Coast Guard member, was involved in salvage. She also stated that she never approved or received any request(s) for approval of vessel salvage at the Compass Point Marina location.³⁴

Because the NPFC is only authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan combined with the fact that the actions taken must have been necessary to prevent, minimize, or mitigate the effects of the incident and that the actions taken were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan, the Claimant has failed to demonstrate these factors and all others.

Additionally, it is important to note that the claimant provided a written statement on its OSLTF Claim....”We were advised on September 14, 2017 by the USCG to remove the vessel from the water.” In light of the fact that this office contacted the Coast Guard unit charged with that area of responsibility and response actions during the period in question, and they have confirmed no requests were made or approvals given to salvage vessels at the Compass Point Marina, the claim is denied. Under 33 C.F.R. 136.9, persons submitting false claims or making false statements in connection with claims under this part may be subject to prosecution under Federal law, including but not limited to 18 U.S.C. 287 and 1001. In addition, persons submitting written documentation in support of claims under this part which they know, or should know, is false or omits a material fact may be subject to a civil penalty for each claim.

VI. CONCLUSION:

The NPFC denies the claim because (1) the Claimant has failed to obtain FOSC coordination for the salvage and response actions performed; 33 CFR 136.203 & 33 CFR 136.205 and (2) the Claimant has made a false statement in connection with his claim submissions to the NPFC in order to obtain funds for an alleged salvage requested by the United States Coast Guard.

Under 33 C.F.R. 136.9, persons submitting false claims or making false statements in connection with claims under this part may be subject to prosecution under Federal law, including but not limited to 18 U.S.C. 287 and 1001. In addition, persons submitting written documentation in support of claims under this part which they know, or should know, is false or omits a material fact may be subject to a civil penalty for each claim. The NPFC considered all of the documentation submitted by the Claimant.

Should the Claimant decide to request reconsideration of this denial, documented evidence from the United States Coast Guard demonstrating their request and coordination must be provided.

<p>Claim Supervisor: [REDACTED]</p> <p>Date of Supervisor’s review: <i>5/13/19</i></p> <p>Supervisor Action: <i>Denial approved</i></p>

³⁴ January 29, 2019 email from LCDR [REDACTED].