

CLAIM DETERMINATION

<b>Claim Number:</b>	919025-0001
<b>Claimant:</b>	Atlantic Coast Marine Group
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$27,738.49
<b>Action Taken:</b>	Offer in the amount of \$26,304.77

**EXECUTIVE SUMMARY:**

On May 25, 2018, a 43' Viking Sportfish vessel, THUNDERFISH, caught fire and discharged oil into the intracoastal waterway of Adams Creek, North Carolina, a navigable waterway of the US.<sup>1</sup> [REDACTED] ("RP"), is the owner and operator of the vessel and is the responsible party (RP) as defined by the Oil Pollution Act of 1990.<sup>2</sup> Atlantic Coast Marine Group ("ACMG" or "claimant"), commenced cleanup operations on the water after being hired by the RP.<sup>3</sup> In June 2018 and October 2018, ACMG presented its uncompensated removal costs to the RP.<sup>4</sup> Having not received payment from the RP after ninety days,<sup>5</sup> ACMG presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$27,738.49 on June 12, 2019.<sup>6</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$26,304.77 of the requested \$27,738.49 is compensable and offers this amount as full and final compensation of this claim.<sup>7</sup>

**I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

***Incident***

On May 25, 2018, the vessel, THUNDERFISH, caught fire and sank discharging oil into the waterway. Approximately 40 gallons of product was recovered along with contaminated water.<sup>8</sup> Marine Safety Detachment (MSD) Fort Macon was notified by Sector North Carolina about the incident. Beaufort Fire department, Towboat US/ACMG salvage company responded and was able to extinguish the fire and tow the vessel out of the channel to the western descending bank of Adams Creek.<sup>9</sup>

***Responsible Party***

[REDACTED] is the owner of the vessel THUNDERFISH and was designated the responsible party (RP) for the oil spill incident.<sup>10</sup>

The NPFC issued a Responsible Party (RP) Notification letter dated June 18, 2019 to Mr. [REDACTED] to the last known address obtained from the USCG Notice of Federal Interest dated May 25, 2018 and

<sup>1</sup> OSLTF Claim submission letter dated August 3, 2019.

<sup>2</sup> 33 U.S.C. § 2701(32).

<sup>3</sup> June 21, 2019 email from MST1 [REDACTED] to the NPFC.

<sup>4</sup> Invoice # 2018-H525 dated October 9, 2018 and Invoice # 2018-H525 dated June 5, 2018.

<sup>5</sup> 33 CFR 136.103(c).

<sup>6</sup> ACMG claim submission dated August 3, 2019.

<sup>7</sup> 33 CFR 136.115.

<sup>8</sup> June 21, 2019 email from MST1 [REDACTED], in his capacity as the Federal On Scene Coordinator's Representative (FOSCR).

<sup>9</sup> Coast Guard MISLE Activity Number 6473384.

<sup>10</sup> USCG Notice of Federal Interest dated May 25, 2018 and issued to [REDACTED].

signed by the RP.<sup>11</sup> US Postal Service confirmed receipt of the letter on July 5, 2019 through certified mail. To date, the NPFC has not received a response from the RP.

### ***Recovery Operations***

On May 25, 2018, the vessel, THUNDERFISH, caught fire, partially sank and discharged approximately 40 gallons of diesel fuel on the surface of Adams Creek, a navigable waterway of the US.<sup>12</sup> MSD Fort Macon was notified of a boat fire with four people on board. Firefighters and commercial companies responded to the fire and good samaritans transported vessel occupants to a nearby marina. USCG Sector North Carolina was the Federal On-Scene Coordinator (FOSC) and oversaw the response and removal operations.<sup>13</sup> On May 25, 2018 at 22:49, USCG issued a Notice of Federal Interest (NOFI) to RP. RP then hired ACMG for oil spill removal and recovery of vessel. Plans to salvage the vessel were delayed until the end of Memorial Weekend due to high vessel traffic.<sup>14</sup>

On May 25, 2018, containment boom and absorbent material were deployed and crews worked to control the pollution. ACMG utilized a boom, a skimmer, and deployed sorbent material. On May 26, 2018, approximately 40 gallons of diesel was recovered. On May 27 and May 28, 2018, the absorbent material was changed and response crews placed absorbent material within the hole of the vessel as it became saturated. On May 30, 2018, vessel salvage operations commenced and upon completion, response crews demobilized. The Coast Guard deemed the response complete on May 30, 2018 when the vessel was salvaged and hauled out of the waterway.<sup>15</sup>

### **II. CLAIMANT AND RP:**

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>16</sup> require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.<sup>17</sup>

The claimant initially presented its costs to the RP via ACMG Invoice # 2018-H525 in the amount of \$27,254.77 dated June 5, 2018. A second invoice was presented to the RP via ACMG Invoice # 2018-H525 in the total revised amount of \$27,738.49 dated October 9, 2018 which included interest charges due to non-payment. The RP filed a claim with his insurance and was denied because the policy did not have liability coverage for the removal of the boat from the water or the fuel spill cleanup.<sup>18</sup> To date, the RP has not settled the claim.

### **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.<sup>19</sup> On June 12, 2019, the NPFC received a claim for uncompensated removal costs from Atlantic Coast Marine Group dated June 3, 2019. The claim included the invoices for ACMG, labor, equipment, and supplies costs totaling \$27,254.77 in the first invoice dated June 5, 201 and a , second

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<sup>11</sup> May 25, 2018 USCG Notice of Federal Interest signed by RP.

<sup>12</sup> June 21, 2019 email from MST1 [REDACTED] to NPFC.

<sup>13</sup> The FOSC's representative is MST1 [REDACTED] as identified in the USCG Notice of Federal Interest dated May 25, 2018.

<sup>14</sup> June 21, 2019 email from MST1 [REDACTED], FOSCR, to NPFC.

<sup>15</sup> Email from MST1 [REDACTED], CGMSD Fort Macon to [REDACTED] dated June 21, 2019.

<sup>16</sup> 33 U.S.C. § 2701 *et seq.*

<sup>17</sup> 33 CFR 136.103.

<sup>18</sup> Claim Denial Letter from Unitrin Auto and Home Insurance Company to Mr. [REDACTED] dated June 7, 2018.

<sup>19</sup> 33 CFR 136.103.

revised invoice dated October 9, 2018 was provided which included interest charges in the amount of \$483.72. The total amount claimed is \$27,738.49.<sup>20</sup>

#### **IV. DETERMINATION PROCESS:**

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

#### **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.<sup>24</sup> A responsible party's liability is strict, joint, and several.<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> 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."<sup>28</sup>

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<sup>20</sup> ACMG claim submission.

<sup>21</sup> 33 CFR Part 136.

<sup>22</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>23</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).

<sup>24</sup> 33 U.S.C. § 2702(a).

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

<sup>26</sup> *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.).

<sup>27</sup> 33 U.S.C. § 2701(31).

<sup>28</sup> 33 U.S.C. § 2701(30).

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

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.<sup>32</sup>

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

The amount of compensable removal costs is \$26,304.77 while \$1,433.72 was deemed non-compensable for the following reasons:<sup>33</sup>

1. ACMG's invoice number 2018-H525 charged Pads and 5 x 10 Boom incorrectly and the rate schedule does not support the rates utilized. The NPFC has adjusted the rate to coincide with the rate schedule pricing.
2. ACMG's invoice 2018-H525 dated October 9, 2018 charges interest in the amount of \$483.72 until October 23, 2018. OPA contains no authority that allows the Fund to be available to pay interest on uncompensated claims for removal costs.

**Overall Denied Costs** = \$1,433.72<sup>34</sup>

## **VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above ACMG's request for uncompensated removal costs in the amount of \$27,738.49 is approved in the amount of \$26,304.77.

Because this determination is a settlement offer<sup>35</sup>, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.<sup>36</sup> The NPFC reserves the right to revoke a settlement offer

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

<sup>30</sup> 33 CFR Part 136.

<sup>31</sup> 33 CFR 136.105.

<sup>32</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>33</sup> Enclosure 3 to this determination provides a detailed analysis of these costs.

<sup>34</sup> Enclosure 3 to this determination provides a detailed analysis of the amounts approved and denied by the NPFC.

<sup>35</sup> 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

at any time prior to acceptance.<sup>37</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *7/25/19*

Supervisor Action: *Offer Approved*

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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).

<sup>36</sup> 33 CFR §136.115(b).

<sup>37</sup> *Id.*