

CLAIM DETERMINATION

Claim Number: B18003-0001
Claimant: Cape Waterman Inc. D/B/A Sea Tow Cape & Islands
Type of Claimant: OSRO
Type of Claim: Removal Costs
Claim Manager: [REDACTED]
Amount Requested: \$1,088,560.25
Action Taken: Offer in the amount of \$1,004,001.35

EXECUTIVE SUMMARY:

The vessel OCEAN KING discharged oil into Great Harbor, near Woods Hole, Massachusetts. Patriot Marine, LLC (“Patriot Marine” or “RP”) owned and operated the OCEAN KING is the responsible party (RP) as defined by the Oil Pollution Act of 1990.¹ Cape Waterman Inc. D/B/A Sea Tow Cape & Islands (“Sea Tow” or “claimant”), commenced cleanup operations on the water and surrounding shoreline. Sea Tow presented its uncompensated removal costs to the RP. Having not received payment from the RP after ninety days,² Sea Tow, through counsel,³ presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$1,088,560.25.⁴ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$1,004,001.35 of the requested \$1,088,560.25 is compensable and offers this amount as full and final compensation of this claim.⁵

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

At 1:14pm on January 21, 2018, the National Response Center received a report of an unknown sheen in the water and on the rocks in Great Harbor, a navigable waterway of the United States near Woods Hole, Massachusetts.⁶ Multiple sources reported various sheening and patches of black oil throughout the harbor, on the rocks and the adjacent shoreline throughout the day.⁷

Responsible Party

The USCG identified Patriot Marine as the responsible party for the incident.⁸ Patriot Marine owned the OCEAN KING at the time of the incident.⁹ The master of the OCEAN KING

¹ 33 U.S.C. § 2701(32).

² 33 CFR 136.103(c).

³ The Law Office of Arnold J. Cestari, Jr.

⁴ Sea Tow claim submission dated July 20, 2018.

⁵ 33 CFR 136.115.

⁶ NRC report #1202475

⁷ See, e.g., USCG Pollution Report (CG POLREP) 1; MassDEP Release Number 4-27039 dated January 21, 2018.

⁸ *Id.*

⁹ Abstract of Title (CG Form 1332) and Certificate of Documentation (CG Form 1270) for OCEAN KING, Official Number 259410.

admitted to the vessel breaking free from its moorings and running aground in Vineyard Sound at or around 8:30am on January 21, 2018.¹⁰ The master reported a “dime size hole in bottom of hole (sic)” as a result of the grounding.¹¹

During a town hall meeting on the incident, a local resident told the officials in attendance that he noticed black oil around the OCEAN KING at or around 9:30am on January 21.¹² The resident reported that he questioned the crew and the crew responded that the oil was “vegetable oil” from the ship’s hydraulic system.¹³ The resident stated he reported the incident to the city of Falmouth.¹⁴

City of Falmouth Natural Resources Officer ██████ reported that he had been called to the scene earlier that day in response to a report of a sheen from the vessel OCEAN KING and that OCEAN KING departed at or around 11:15am.¹⁵ Officer ██████ along with several members from other agencies responded to the 1:14pm NRC report later that afternoon. MassDEP reported sheening and black oil floating on the water in the harbor and on the shoreline and rocks near where OCEAN KING was moored.¹⁶ At 3:05 pm, MassDEP stated that rocks on the shoreline were stained with a black oily substance from the high tide mark down to about 1-1.5 feet below the high tide mark.¹⁷

The USCG took several oil samples from the water’s surface and several deceased oiled birds in the harbor. The USCG also took samples from several boats that were in the area at the time of the spill including the OCEAN KING. From the OCEAN KING, samples were taken from the bilge, bathroom sink and steering gear. The Coast Guard Marine Safety Laboratory compared the samples taken from each of the boats to the samples taken from the spill site. The Marine Safety Laboratory found that the samples taken from the OCEAN KING’s bilge and the sink were either “derived from, or related to through” a common source of petroleum oil as the samples taken from the water’s surface and the oiled birds¹⁸ and came to the scientific conclusion that they were a “match”. The Marine Safety Laboratory also concluded that none of the other samples taken from the other boats matched the oil taken from the water nor the birds.¹⁹

Recovery Operations

¹⁰ CG Form 2692, “Report of Marine Casualty, Commercial Diving Casualty, or OCS-related casualty” dated January 22, 2018.

¹¹ *Id.* One must assume the master meant “bottom of ‘hull’” not “bottom of hole” based on the totality of the circumstances.

¹² <http://www.fctv.org/v3/vod/oil-spill-community-forum> (last visited December 13, 2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ MassDEP Release Number 4-27039 dated January 21, 2018.

¹⁶ *Id.*

¹⁷ *Id.* This data demonstrates that oil had to be present in the water before high tide for it to be able to reach the rocks at the high tide mark. High tide was observed to be at 11:06am. The OCEAN KING arrived in the harbor sometime that morning after having run aground and suffering a puncture to its hull; and departed the area at or around 11:15am.

¹⁸ USCG Marine Safety Laboratory Samples Analyses 18-048 and 18-049 dated January 26, 2018; and Sample Analysis 18-050 dated February 2, 2018.

¹⁹ *Id.*

U.S. Coast Guard Sector Southeastern New England was the Federal On-Scene Coordinator (FOSC) and oversaw the response and removal operations. The Coast Guard authorized Sea Tow to supervise cleanup and containment of the spill.²⁰ The Massachusetts Contingency Plan (MCP) requires the use of a Licensed Site Professional (LSP) to evaluate and oversee remedial activities.²¹ On January 21, 2018, Sea Tow retained the services of CHES to act as the LSP and to assist with containment and cleanup and act as the Licensed Site Professional as set forth in the MCP.²² Both absorbent and hard boom were deployed to contain the spill and absorbent boom and pads were used to remove the oil and other contaminants from the water and shoreline.²³

The Federal On-Scene Coordinator issued a Notice of Federal Interest to Patriot Marine on January 22, 2018.²⁴ MassDEP issued a Notice of Responsibility to Patriot Marine on February 8, 2018.²⁵ While Patriot Marine stated in a February 14, 2018 letter to the claimant that it accepted responsibility for the oil spill incident,²⁶ on February 9, 2018 the Coast Guard was forced to issue an Administrative Order to Patriot Marine to dispose of the waste materials associated with the spill.²⁷ Additionally, since Patriot Marine did not comply with that Administrative Order, the Coast Guard assumed partial control of response activities as outlined in a Notice of Federal Assumption dated February 12, 2018. The Coast Guard deemed the response complete on February 15, 2018.²⁸

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²⁹ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.³⁰

Sea Tow stated it submitted its request for compensation to the RP for \$1,093,603.00³¹ on March 30, 2018.³² This submission combined all costs for Sea Tow and CHES's labor, equipment and the LSP charge and included time and material invoices, a 2018 Rate Sheet, all Daily Job Calculation Worksheets and the CHES daily time and material invoices.

²⁰ CG POLREP 1; MassDEP Release Number 4-27039 dated January 21, 2018.

²¹ Massachusetts Contingency Plan, 310 CMR 40.

²² Immediate Response Action Plan prepared by Clean Harbors Environmental Services, Inc. for Sea Tow dated March 22, 2018.

²³ *Id.*

²⁴ USCG Notice of Federal Interest.

²⁵ Massachusetts Department of Environmental Protection Notice of Responsibility.

²⁶ Letter from Mr. [REDACTED], counsel for Patriot Marine, to the Law Office of Mr. [REDACTED], counsel for Sea Tow, which reads in part: “[I]n accordance with the Oil Pollution Act of 1990 (33 USC 2714(c)), Patriot Marine LLC, owner and operator of the Tug OCEAN KING, has voluntarily accepted responsibility for an accidental discharge of bilge water and oil into Great Harbor on January 21, 2018”.

²⁷ USCG Administrative Order.

²⁸ CG POLREP 1.

²⁹ 33 U.S.C. § 2701 *et seq.*

³⁰ 33 CFR 136.103.

³¹ Sea Tow Invoice dated March 30, 2018.

³² Sea Tow claim submission.

A supplemental invoice from CHES in the amount of \$2,623.50 was received by Sea Tow and submitted to the RP on April 2, 2018.³³ On July 3, 2018, Sea Tow provided the RP an adjustment of -\$7,666.25 to its labor costs. The total amount claimed after applying the credit is \$1,088,560.25.³⁴ 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.³⁵ On July 30, 2018, the NPFC received a claim for uncompensated removal costs from Sea Tow dated July 20, 2018. The claim included an invoice for Sea Tow and CHES labor, equipment and LSP costs totaling \$1,093,603.00, a supplemental invoice from CHES in the amount of \$2,623.50 and an adjustment of -\$7,666.25 to Sea Tow's labor costs. The total amount claimed is \$1,088,560.25.³⁶

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁷ 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.³⁸ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³⁹ 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.⁴⁰ A responsible party's liability is strict, joint, and several.⁴¹ 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

³³ *Id.*

³⁴ *Id.*

³⁵ 33 CFR 136.103.

³⁶ Sea Tow claim submission.

³⁷ 33 CFR Part 136.

³⁸ *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).

³⁹ *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).

⁴⁰ 33 U.S.C. § 2702(a).

⁴¹ *See*, H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

substantial burdens to victim's recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills."⁴² 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."⁴³ 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."⁴⁴

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.⁴⁵ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁶ 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.⁴⁷

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.⁴⁸

The NPFC analyzed each of these factors and determined the majority of the costs incurred by Sea Tow 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.

⁴² *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.).

⁴³ 33 U.S.C. § 2701(31).

⁴⁴ 33 U.S.C. § 2701(30).

⁴⁵ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁶ 33 CFR Part 136.

⁴⁷ 33 CFR 136.105.

⁴⁸ 33 CFR 136.203; 33 CFR 136.205.

The amount of compensable costs is \$1,004,001.35 while \$84,558.90 was deemed non-compensable for the following reasons:⁴⁹

1. The costs related to Sea Tow's personnel and marine equipment, were denied because (1) the daily records did not support the hours specified and/or the rate schedule did not support the rates utilized, (2) the documentation provided by Sea Tow did not support payment for equipment that was on standby because there was no evidence that the FOSC directed this standby equipment to be on-scene nor was this decision coordinated with the FOSC. Since some of the amounts claimed have been denied it is necessary to reduce Sea Tow's 20% administrative markup on the denied Sea Tow costs accordingly. As a result, the total Sea Tow denied costs are \$73,879.25.
2. The costs related to Clean Harbor Environmental Services, Inc. (CHES) Invoices were denied because the daily records either failed to identify or did not provide adequate support for the hours and costs specified. Total Clean Harbors denied costs are \$7,529.50.
3. Since some of the amounts related to CHES have been denied it is necessary to reduce Sea Tow's 20% administrative markup on the denied CHES costs accordingly. As a result, the total Sea Tow denied administrative costs as they relate to CHES are \$3,150.15.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Sea Tow's request for uncompensated removal costs in the amount of \$1,088,560.25 is approved in the amount of \$1,004,001.35.

Because this determination is a settlement offer⁵⁰, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.⁵¹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵² Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

⁴⁹ Enclosure 3 to this determination provides a detailed analysis of these costs.

⁵⁰ 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).

⁵¹ 33 CFR §136.115(b).

⁵² *Id.*



Claim Supervisor: 

Date of Supervisor's review: *12/18/19*

Supervisor Action: *Initial Offer approved*