

CLAIM DETERMINATION ON RECONSIDERATION

Claim Number:	E14431-0001
Claimant:	Environmental Remediation Consultants, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$305,466.53
Action Taken:	Denied on Reconsideration

EXECUTIVE SUMMARY:

Environmental Remediation Consultants, Inc. (“ERC” or “Claimant”) requested reconsideration of NPFC’s original determination dated March 22, 2019 denying its claim for \$305,466.53 in uncompensated removal costs and approximately four years of accrued interest for an incident involving the spill of approximately 5,000 gallons of diesel in Candler, North Carolina. The responsible party for the incident is APAC-Atlantic, Inc. d/b/a Harrison Construction Company (“APAC” or “RP”). ERC entered into a service contract with APAC, which contained a provision which limited any dispute resolution to arbitration. The NPFC determined that because of this provision, the claimant was unable to provide all of its subrogation rights against the RP, thus prohibiting the NPFC by law, from paying the claim. As such, the NPFC denied the claim. The claimant timely sought reconsideration, provided its legal basis and submitted additional material to the NPFC for review.¹

Requests for reconsideration are reviewed de novo. NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by ERC and the relevant statutes and regulations. Upon reconsideration, the NPFC has determined that the claim must be denied.

I. CLAIM HISTORY:

On October 4, 2018, ERC submitted a claim and supporting documents seeking \$305,466.53 of uncompensated removal costs and accrued interest.² Within those documents was ERC’s contract with the responsible party in which the parties agreed to resolve all disputes by arbitration.³ In its initial determination, the NPFC notified ERC that it found that the arbitration clause in ERC’s contract prevented the claimant from being able to provide all of its subrogation

¹ ERC’s reconsideration request and the supplemental materials were received by the NPFC via email on April 20, 2019. A paper copy was received by the NPFC on May 8, 2019.

² Optional OSLTF Claim Form dated September 20, 2018.

³ “All claims, disputes, and other matters in question arising out of, or relating to, this Contract or any subcontract made or purchase order issued pursuant to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association that are in effect as of the time demand for arbitration is made.” Form 2013-1 Time and Materials Rate Schedule - Reimbursement Terms and Conditions for Time and Materials Contracts document – Provision 9.

rights against the RP, so the NPFC was prohibited by law from paying the claim and as such, the claim was denied.⁴ The NPFC's initial determination is hereby incorporated by reference.⁵

II. REQUEST FOR RECONSIDERATION:

The regulations implementing the Oil Pollution Act of 1990 (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.⁶ The claimant has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.⁷ 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 final written decision by the NPFC constitutes final agency action.⁸

On April 20, 2019, the Claimant timely requested reconsideration of the NPFC's initial determination.⁹ In support of its request for reconsideration the Claimant provided a letter asserting that OPA's plain language means that the claimant only has to provide all rights that it currently has, not rights it may have previously possessed but no longer has. The claimant contends that it currently retains the right to arbitration and that would be the right it would subrogate to the Oil Spill Liability Trust Fund ("OSLTF" or "Fund").

ERC disputes NPFC's legal analysis, stating that ERC has not released any part of its claim as was done in the *Kenan Transport* and *Rick Franklin* cases which the NPFC cited in its initial determination. To supplement this argument, the claimant provided an email from an attorney stating to ERC that ERC's arbitration clause¹⁰ is merely a forum selection clause and not a release of any claims.¹¹ ERC also provided a definition of "subrogation" from an online legal dictionary.¹² The claimant also cited a D.C. Circuit case arguing that the Fund does not have the authority to define the term "all rights."¹³

In addition to this argument and materials provided in support of it, the Claimant also provided a package of documentation that had been evidently mailed by ERC but not received by the NPFC prior to the NPFC's initial determination. The materials were purportedly damaged in transit and had been returned by the U.S. Postal Service at some point after the NPFC had issued the initial determination to ERC. The material contained the same argument as presented on

⁴ 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).

⁵ NPFC Claim Determination dated March 22, 2019.

⁶ 33 CFR 136.115(d).

⁷ 33 CFR 136.105(a).

⁸ *Id.*

⁹ ERC reconsideration request emailed to NPFC April 20, 2019.

¹⁰ The pertinent language in the clause collectively reads "all claims, disputes and other matters ... arising out of or related to this contract ... or breach thereof, shall be decided by arbitration ... in Sevierville, Sevier County, Tennessee." Form 2013-1 Time and Materials Rate Schedule - Reimbursement Terms and Conditions for Time and Materials Contracts document – Provision 9.

¹¹ Email from J. [REDACTED], Esq. to ERC dated April 30, 2019.

¹² This definition appears to be taken from the website: <https://uslegal.com/>.

¹³ *Water Quality Insurance Syndicate v. United States*, 225 F.Supp.3d 41 (D.C. Cir. 2016).

reconsideration - that the arbitration agreement did not waive any claims, but only limited the forum for collection. The package also contained documents related to the response and costs claimed. The NPFC reviewed this material. After review, the NPFC identified these documents as duplicates of the documents previously provided under separate cover with the initial claim submission. They have been reconsidered by the NPFC.

III. ANALYSIS OF THE REQUEST FOR RECONSIDERATION:

The pertinent provisions of OPA state that: “[p]ayment of any claim or obligation by the Fund under this Act *shall be subject to* the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.¹⁴ Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.”¹⁵ Importantly here, the OPA also provides parties with the right to have their disputes resolved by a federal court.¹⁶

In its request for reconsideration, ERC urges the NPFC to interpret the statutory provisions at issue as only requiring subrogation of all rights the claimant has at the time of submission (or payment) of the claim. Such an interpretation, however, reads limiting words into the statute that would defeat the unambiguous Congressional intent to require a claimant to provide subrogation of “all rights.” The statute uses the phrase “all rights” without stating any temporal limitation. Furthermore, the word “all” is itself the quintessential word used to indicate an absence of limits. Because the statute does not place any temporal limits on the phrase “all rights,” the Congressional intent for a claimant to preserve “all” of its subrogation rights against a responsible party is clear. ERC’s interpretation of the statute, on the other hand, would write in an entire phrase to the words in the statute.

Furthermore, the limiting language suggested by ERC would eliminate the deterrent purpose of OPA by turning the Fund into an insurance policy for both oil spillers and companies that make business-driven or ill-advised litigation (or pre-litigation) decisions to release, or otherwise agree to limited rights against, those oil spillers. “The Act provides limited compensation when the party responsible for an oil spill is unavailable. It does not function as a private insurance company.”¹⁷

As the OSLTF’s trustee, the NPFC must decide how to best vindicate its subrogation rights against a responsible party, not the claimant. ERC’s interpretation would allow a claimant to make a business decision on whether to relinquish or otherwise curtail the rights to seek recovery from a discharger by contract, prior to a spill occurring. This interpretation is inconsistent with the plain language in OPA. ERC’s secondary position that the arbitration clause which states that all matters must be decided by arbitration in Sevierville, Tennessee is “merely a forum selection clause” simply exemplifies the precise issue at play. Congress did not intend for OSLTF claimants to be able to directly or indirectly decide, nor limit, the OSLTF’s right to have

¹⁴ 33 U.S.C. § 2712(f). Emphasis added, noting this language imposes a threshold requirement that must be satisfied before the Oil Spill Liability Trust Fund can be used to pay a claim.

¹⁵ 33 U.S.C. § 2715(a).

¹⁶ 33 U.S.C. §2717(b).

¹⁷ *Gatlin Oil Co. v. United States*, 169 F.3d 207, 213 (4th Cir. 1999).

its OPA controversies decided by a federal court. Congress intended that, subject to a very limited exception not implicated here,¹⁸ “the United States district courts **shall** have **exclusive original jurisdiction** over all controversies arising under [OPA] and that venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides.... [T]he Fund shall reside in the District of Columbia.”¹⁹

The rights provided by 33 U.S.C. § 2717 are important. The ability to have a controversy resolved by a federal court is not a trivial right. Although ERC had the absolute right to enter into an agreement to resolve all of its disputes by arbitration, ERC may not waive its right to sue the responsible party in federal court and remain eligible for OSLTF reimbursement. If the NPFC paid ERC’s claim, then under subrogation, the NPFC would be bound by the terms of the contract as ERC agreed to them. Or in other words, the NPFC would be forced to enforce its subrogation rights against the responsible party in an arbitration proceeding as opposed to a federal court as contemplated by OPA.

The NPFC has long held, and courts have long agreed, the proper interpretation of the term “all rights” in OPA means “all rights”, not merely all rights the claimant might have at the time of the claim.²⁰ The claimant’s arguments found in its request for reconsideration and in its additional materials are insufficient to persuade the NPFC to change its position. The plain language of 33 U.S.C. § 2712(f), and the history of OPA as a whole establish that the Fund is available to pay claims only where a claimant has protected all of its rights to recover against the responsible party. ERC’s proffered interpretation of OPA is inconsistent with the plain language of the statute, legislative history, previous judicial interpretation, and public policy. The NPFC must administer the statute as Congress wrote it, not as the claimant wishes it to be.

Because a claimant seeking compensation from the Fund under OPA must retain all rights of recovery against a responsible party permitting the NPFC to acquire them by subrogation, and the claimant has not demonstrated that it has done so, no part of this claim can be reimbursed by the OSLTF.

IV. CONCLUSION

Based on a comprehensive review of the record on reconsideration, the applicable law and regulations, and for the reasons outlined above, NPFC upholds its original determination to deny the claim.

¹⁸ Those cases which involve state and federal claims for removal costs or damages can brought together in a state forum rather than requiring plaintiffs to bring their OPA claims exclusively in federal court. *See*, 33 U.S.C. § 2717(c). *See, Tanguis v. M/V WESTCHESTER*, 153 F.Supp.2d 859 (E.D. La. 2001) for a more detailed discussion. *See also*, 33 U.S.C. § 2717(a)(also not implicated).

¹⁹ 33 U.S.C. § 2717(b) (emphasis added).

²⁰ *Kenan Transp. Co. v. U.S. Coast Guard*, 2006 WL 1455658 at *4, *4 n.7 (N.D. Ga. 2006). That Congress required a claimant to preserve all rights... is clear in the legislative history... Congress required broadly that the claimant assure all rights be acquired by the Government... Reimbursement is allowed only if claims... are preserved so they may be asserted by the Government as subrogee of the claims. That Congress would condition the payment of a claim in return for the claimant broadly protecting the Government's right to assert a broad set of claims... makes practical and legal sense. *Affirmed, Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902, 904 (11th Cir. 2006); *Accord., Rich Franklin Corp. v. U.S. Dep’t of Homeland Security*, 2008 WL 337978 (D. Or. 2008).

Claim Supervisor: [REDACTED]

Date of Supervisor's review: July 16, 2019

Supervisor Action: *Approved* [REDACTED]

Supervisor's Comments: