

CLAIM SUMMARY / DETERMINATION

Claim Number:	919001-0001
Claimant:	Morgan County (West Virginia) Commission
Type of Claimant:	County Government
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$128,828.48
Action Taken:	Denied

I. SUMMARY:

Between October 18, 2017 and November 4, 2017, approximately 240 gallons of heating oil leaked from a mobile home in Morgan County, West Virginia, which substantially threatened Warm Springs Run Creek, a navigable waterway of the United States. The spill was discovered by Morgan County officials on November 6, 2017 when the homeowner erroneously reported that the heating oil had been stolen. The United States Environmental Protection Agency Region 3 was the federal on-scene coordinator (FOSC). Morgan County determined that the homeowner, Ms. ██████████, was the responsible party (RP) for the incident. Morgan County hired a response contractor and provided daily oversight of response actions as directed by the FOSC. Response operations were complete in February, 2018. In July, 2018, the Morgan County Commission (“Commission” or “Claimant”) presented the RP an uncompensated removal costs claim for \$128,828.48. The RP responded to the Commission that she was on a fixed income and did not have the ability or means to pay. Having not received payment from the RP, the Commission submitted its uncompensated removal costs claim to National Pollution Funds Center (NPFC) for \$128,828.48 in October, 2018.¹

On various occasions after the incident, the Commission discussed whether to exonerate Ms. ██████████ for all response costs for this incident. The Commission notified the NPFC in late October, 2018 that it intended to move to exonerate Ms. ██████████ at a Commission meeting scheduled for November 7, 2018. While the decision to exonerate Ms. ██████████ rested entirely with the claimant, the NPFC, in the interest of transparency, notified the claimant on November 1, 2018 that the NPFC would not be able to pay its claim if the claimant could not demonstrate the ability to subrogate “all rights, claims and causes of action that the claimant has under any other law” to the United States.² On November 7, 2018, the Commission passed a motion to exonerate Ms. ██████████ for the costs associated with the incident in the amount of \$128,824.48.³

¹ A claimant must first present a claim for uncompensated removal costs to the RP. After ninety days, if the RP has not settled the claim, the claimant may present its claim to the NPFC. 33 CFR 136.103(c).

² The correspondence stated, in part, “[i]n order to be eligible to receive compensation from the Oil Spill Liability Trust Fund... [Morgan County] must demonstrate that it possesses the ability to subrogate ‘all rights, claims and causes of action that the claimant has under any other law’ to the United States... Specifically, Morgan County will be required to execute a release in which it attests that it has the ability to and will, assign, transfer, and subrogate to the United States all rights, claims, interest and causes of action that the Morgan County Commission has against any person... that may be liable for the amounts paid for which Morgan County Commission would be compensated under its claim. If Morgan County is unable to provide this assurance, then the NPFC would have to deny the claim”.

³ Morgan County Commission letter dated November 7, 2018.

The claimant's action to exonerate the RP necessarily implicates the provisions of 33 U.S.C. § 2712(f) and 33 U.S.C. § 2715. The law prohibits the NPFC from paying a claim unless the United States can acquire by subrogation *all* rights of the claimant to recover from the responsible party. Because the claimant has exonerated the RP, the NPFC cannot acquire the right to recover from the RP. As such, the NPFC must deny the claim.

II. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.⁴ 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.⁵ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁶ 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.

III. DISCUSSION:⁷

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.⁸ A responsible party's liability is strict, joint, and several.⁹ When enacting the Oil Pollution Act (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."¹⁰ OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred removal costs where the responsible party has failed to do so. Removal costs are defined as "the costs of

⁴ 33 CFR Part 136.

⁵ 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).

⁶ 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).

⁷ Whether this claim might have been otherwise meritorious is not the focus of this determination. The claimant's removal costs were not adjudicated because the claimant extinguished the rights the Fund would have had against the RP by subrogation when it exonerated the RP for the cost of the removal.

⁸ 33 U.S.C. § 2702(a).

⁹ See, H.R. Rep. No. 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

¹⁰ *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).

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.”¹¹ 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.”¹²

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.¹³ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.¹⁴ 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.¹⁵ OPA and its implementing regulations prescribe the conditions of payment, as well as restrictions on the types of costs appropriate for payment.

For example, and germane to this claim, OPA provides:

Payment 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.¹⁶ 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.¹⁷

OPA requires claimants to “preserve claims against [the responsible party] for clean-up costs.”¹⁸ As the lower court in *Kenan* explained that 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.¹⁹

¹¹ 33 U.S.C. § 2701(31).

¹² 33 U.S.C. § 2701(30).

¹³ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

¹⁴ 33 CFR Part 136.

¹⁵ 33 CFR 136.105.

¹⁶ 33 U.S.C. § 2712(f).

¹⁷ 33 U.S.C. § 2715(a).

¹⁸ *Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902, 904 (11th Cir. 2006).

¹⁹ *Kenan Transp. Co. v. U.S. Coast Guard*, 2006 WL 1455658 at *4 (N.D. Ga 2006). That Congress required a claimant to preserve all rights... is clear in the legislative history. The Senate bill had proposed that the Fund “acquire by subrogation the rights of claimants to which the Fund paid removal costs or damages and to recover those removal costs or damages from the responsible party.” The House bill proposed that reimbursement be conditioned on the Government “acquiring by subrogation all rights of the claimant or State to recover from the responsible party.” H.R. Court. Rep. No. 101-653, at 115-16 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 795. The conference rejected the Senate limitation to clean-up costs and damages and adopted, instead, the “all rights” version. *Id.* at *8 n.7.

Further, if the Fund pays compensation under OPA to any claimant it shall be subrogated to all rights, claims, and causes of actions the claimant has under any other law.²⁰ The plain language of Section 2712(f) uses the words “all rights” when describing what subrogation rights will be acquired by the government when a claimant is compensated by the Fund. The statute “clearly provides that a claimant must be able to supply the government with all of its subrogation rights against a responsible party. If the Fund pays a claim the government must have the ability to seek recourse against the responsible party.”²¹

When the Commission exonerated the RP from the costs associated with the oil spill it extinguished the rights the Fund would have had against the RP by subrogation. Since the Fund would not be able to seek recourse against the RP, it is prohibited by law from paying the claim.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the claim is denied.

Claim Supervisor: [REDACTED]

Date of Supervisor’s review: *3/6/19*

Supervisor Action: *Denial Approved*

²⁰ 33 U.S.C. § 2715(a).

²¹ *Rich Franklin Corp. v. U.S. Department of Homeland Security*, 2008 WL 337978 (D. Or. 2008).