

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	919027-0001
<b>Claimant:</b>	Watchtower Defense
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$161,862.60
<b>Action Taken:</b>	Denial

### **EXECUTIVE SUMMARY:**

On September 21, 2018, a flash flood in Dry Devil's River flooded the town of Sonora, Texas. It caused chemical containers to be washed out of an oilfield chemical supplier's property, spreading containers and spilling chemicals around the area and into the dry river bed. The party responsible for the containers and chemicals involved is PetroPlus Chemical LLC. PetroPlus hired Watchtower Defense to recover the containers and clean up any chemicals discharged. The record is not clear when the costs were presented to the responsible party, but the claimant provided a final invoice dated March 7, 2019 for \$586,317.23, less payments received of \$424,454.63, resulting in a final amount due of \$161,862.60. PetroPlus' insurer paid the \$424,454.63 prior to this final invoice. The claimant states that it has not been paid the balance claimed and seeks reimbursement of \$161,862.60 from the OSLTF. The NPFC has determined that the costs were not incurred in response to an oil pollution incident as defined by the Oil Pollution Act of 1990. The NPFC has determined that the claim must be denied.

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

#### ***Incident***

On September 21, 2018, a flash flood in Dry Devil's River impacted the town of Sonora, Texas.<sup>1</sup> The flooding impacted the PetroPlus Chemical LLC facility. Chemical containers, including totes and drums, washed out of the PetroPlus facility and went downstream.

#### ***Responsible Party***

PetroPlus Chemical LLC (PetroPlus) is an oilfield chemical supplier located in Sonora, Texas.

#### ***Recovery Operations***

PetroPlus hired Watchtower Defense (Watchtower) to recover and remove the containers that had washed offsite and to remediate any impacted areas as well.<sup>2</sup> On October 3, 2018, ██████████ of Watchtower stated that all product, containers and recoverable fluids had been recovered.<sup>3</sup> TCEQ responded and investigated the area through October 1, 2018. Watchtower

<sup>1</sup> Texas Commission on Environmental Quality Investigation Report for investigation #1518450

<sup>2</sup> Texas Commission on Environmental Quality Investigation Report for investigation #1518450

<sup>3</sup> Texas Commission on Environmental Quality Investigation Report for investigation #1518450

states that it worked on the response for months to get the river in its pre-incident condition.<sup>4</sup> There is no record of the presence of a Federal On Scene Coordinator (FOSC).

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

The claimant is Watchtower Defense, Inc. a response contractor located in Texas. The claimant appears to have provided eight invoices to PetroPlus beginning September 28, 2018 through a final invoice dated March 7, 2019 for a total cost of \$586,317.23, less payments received of \$424,454.63, resulting in a final amount due of \$161,862.60. As of the date of the claim letter, the claimant states that it has not been paid in full by the responsible party, but had only received a partial payment totaling \$424,454.63 from PetroPlus' insurer.

## **III. CLAIMANT AND NPFC:**

After not receiving full payment for the balance of costs of its services for over 90 days, Watchtower presented its costs to the NPFC. On July 3, 2019, the NPFC received the claimant's submission seeking reimbursement of the \$161,862.60 for alleged uncompensated removal costs.

## **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>5</sup> As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its decision. This determination is issued to satisfy that requirement.

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>6</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>7</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 makes its determination based on the preponderance of the credible evidence.

## **V. DISCUSSION:**

An RP 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>8</sup> An RP's liability is strict, joint, and several.<sup>9</sup> When enacting OPA, Congress "explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required

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<sup>4</sup> Claim cover letter dated June 26, 2019

<sup>5</sup> 33 CFR Part 136.

<sup>6</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>7</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>8</sup> 33 U.S.C. § 2702(a).

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

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>10</sup> 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 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>11</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>12</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>13</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>14</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>15</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>16</sup>

Under OPA, the incident must have involved oil. Oil does not include hazardous substances listed under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601).<sup>17</sup>

In this claim, the NPFC has determined that the claimed costs are not the result of an OPA incident. Dry Devil's River is not a navigable water of the United States.<sup>18</sup> The incident involved hazardous chemicals and the claimant did not demonstrate that it responded to the

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<sup>10</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>11</sup> 33 U.S.C. § 2701(31).

<sup>12</sup> 33 U.S.C. § 2701(30).

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

<sup>14</sup> 33 CFR Part 136.

<sup>15</sup> 33 CFR 136.105.

<sup>16</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>17</sup> 33 U.S.C. 2701 (23)

<sup>18</sup> It was described as typically dry by the TCEQ investigator. Email from TCEQ to NPFC dated July 18, 2019.

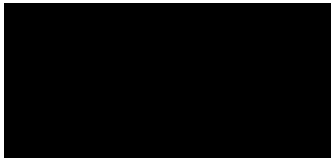
discharge or substantial threat of the discharge of oil into or upon the navigable waters of the United States.<sup>19</sup> Further, the claimant's actions were not directed by or coordinated with an FOSC. Because the OSLTF may only be used to reimburse costs incurred due to an oil discharge or substantial threat of an oil discharge to navigable waters of the United States, the NPFC is precluded from authorizing payment to the claimant.

**VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Watchtower Defense's request for uncompensated removal costs is denied.

Should the Claimant decide to request reconsideration of this denial Watchtower must demonstrate that its claimed costs were the result of an OPA incident (i.e. involved a navigable water of the U.S. and a discharge or substantial threat of a discharge of oil into a navigable water) and were either directed by an FOSC or determined to by an FOSC to have been performed in accordance with the NCP.

Claim Supervisor:



Date of Supervisor's review: *9/4/19*

Supervisor Action: *Denial Approved*

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<sup>19</sup> Email from TCEQ to NPFC dated July 18, 2019 and Claimant's claim cover letter dated June 26, 2019.