

CLAIM SUMMARY / DETERMINATION on RECONSIDERATION

Claim Number:	919017-0001
Claimant:	Ken's Booming & Boat Service, Inc.
Type of Claimant:	Oil Spill Removal Organization
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)(b) (6)
Amount Requested:	\$111,432.34
Action Taken:	Offer in the amount of \$32,232.15

EXECUTIVE SUMMARY:

On October 17, 2017, Ken's Booming & Boat Service, Inc. (Ken's or Claimant) responded to a call from the New York City Department of Corrections (NYDOC) to cleanup an oil spill into the East River, a navigable waterway of the United States. The spill was the result of a fuel oil transfer initiated at the Vernon C. Bain Center (VCBC), a NYDOC corrections facility.¹ United States Coast Guard Sector New York, in its capacity as the Federal On Scene Coordinator (FOSC), received the notification and determined that NYDOC was the responsible party as defined by the Oil Pollution Act of 1990 (OPA)² and issued it verbal Notice of Federal Interest (NOFI)³. Additionally, the FOSC determined that the New York Department of Environmental Conservation (NYDEC), in its capacity as the State On Scene Coordinator (SOSC), would have lead jurisdiction on the cleanup and no further Coast Guard action was required.⁴

Ken's presented its claim for \$111,432.34 in uncompensated removal costs to the National Pollution Funds Center (NPFC) on February 21, 2019.^{5,6} The NPFC thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that \$32,232.15 of the \$111,432.34 was compensable as full and final compensation of Ken's claim.⁷ On October 14, 2019, the NPFC received Ken's timely request for reconsideration. Ken's did not provide any additional support for its position with its request.⁸

Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by Ken's, information it obtained independently, and the applicable law and regulations. Upon reconsideration, the NPFC concludes that the facts established by this record reaffirm the NPFC's determination to reimburse Ken's \$32,232.15 for uncompensated removal costs incurred as a result of the oil spill incident as outlined in the original determination and below.

I. CLAIM HISTORY:

On February 21, 2019, Ken's Booming & Boat Service, Inc. presented an uncompensated removal costs claim to the NPFC for \$111,432.34. The NPFC thoroughly reviewed the original claim, all information provided by Ken's or obtained independently, the relevant statutes and

¹ Incident Description Report Email from (b) (6)(b) (6) to (b) (6), Page 1, Paragraph 1, dated October 18, 2017.

² 33 U.S.C. § 2701(32).

³ United States Coast Guard SITREP dated October 17, 2017.

⁴ United States Coast Guard SITREP dated October 17, 2017, page 2 entry dated October 20, 2017.

⁵ Optional OSLTF Claim Form signed by (b) (6)(b) (6)(b) (6), dated February 19, 2019.

⁶ 33 CFR 136.103(b)(3).

⁷ NPFC determination issued to Ken's Booming & Boat Service, Inc., dated August 15, 2019.

⁸ Letter from (b) (6) to the NPFC dated October 14, 2019, requesting reconsideration of the NPFC's initial August 15, 2019 determination.

regulations, and ultimately determined that \$32,232.15 of the \$111,432.34 was compensable and denied the remainder of the claimed costs.⁹ The NPFC's initial determination is hereby incorporated by reference.

II. REQUEST FOR RECONSIDERATION:

The regulations implementing 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. The claimant has the burden of providing all evidence, information, and documentation deemed necessary by the NPFC to support the claim.¹⁰ When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final.¹¹

On October 14, 2019, the claimant timely requested reconsideration of the NPFC's initial determination.¹² In its request for reconsideration, the claimant asserts that it was not informed at any time by the State On Scene Coordinator (SOSC) that the spill response was deemed complete and that the New York City Department of Corrections (NYDOC) personnel informed it of the need for additional cleanup of fuel oil that was located inside the bilge of the Vernon C. Bain Correctional Center, and that it was instructed not to remove boom placed around the prison barge until completion of the bilge cleanup.¹³ Ken's also stated that NYDOC deemed the "internal facility response" an emergency because it posed health and safety risks for the prison inmates. Lastly, Ken's restated its opinion that its cleanup of the bilge was necessary to eliminate the real and substantial risk of discharge of oil into the East River.¹⁴

III. ANALYSIS OF THE REQUEST FOR RECONSIDERATION:

In its original determination, the NPFC determined that the facility response was not an OPA incident and thus it could not pay for this portion of the claim; to wit:

On October 20, 2017, the SOSC performed an inspection of the shoreline and facility from the waterway and determined that no further pollution existed. Later the same day, Ken's stated that NYDOC personnel aboard the facility informed them that additional oil spill cleanup was required inside the barge due to the presence of fuel oil in the bilge area as a result of the spill.¹⁵

From October 20, 2017 through October 30, 2017, Ken's provided personnel, spill materials and vacuum truck services in order to remove the fuel contained within the bilge area of the barge.

⁹ NPFC determination issued to Ken's Booming & Boat Service, Inc., dated August 15, 2019.

¹⁰ 33 CFR 136.105(a).

¹¹ 33 CFR 136.105(a).

¹² Email from (b) (6)(b) (6) with attachment letter from (b) (6) to the NPFC dated October 14, 2019, requesting reconsideration of the NPFC's initial August 15, 2019 determination.

¹³ The NPFC notes that because it was unclear when Ken's was notified by the SOSC that the boom could be removed, it approved Ken's claimed amount for the boom that remained in the water for the entirety of both the waterborne and facility responses. See, NPFC's initial August 15, 2019 determination.

¹⁴ Letter from (b) (6) of Ken's to the NPFC dated October 14, 2019, requesting reconsideration of the NPFC's initial August 15, 2019 determination.

¹⁵ Ken's letter to NPFC dated May 23, 2019.

The NPFC denies [this portion of the claim] because the internal facility response was not an OPA compensable incident. There was no actual discharge of oil, nor was there a substantial threat of the discharge of oil, into a navigable waterway of the United States. On the date of the waterborne incident, the SOSC also inspected the facility and noted in his report that upon inspection of the engine room and containment area, that the product had been contained.¹⁶ The SOSC provided direction to mitigate and cleanup up the waterborne event, only.¹⁷ Nothing in the SOSC's report indicates that this spill met the definition of an OPA incident nor did the SOSC direct any cleanup activities aboard the facility. Nor is there any evidence in the record that the SOSC directed or coordinated the response aboard the facility. Further, the NPFC independently reviewed the facts and circumstances surrounding the internal facility spill and did not consider it an OPA incident.¹⁸

The regulations implementing 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.¹⁹

In its request for reconsideration, Ken's did not submit any new supporting documentation to substantiate its request. Three days after receiving the claimant's reconsideration request, in an effort to assist the claimant, NPFC advised the claimant of the information it could provide in order to substantiate its assertions and in turn, likely succeed, upon reconsideration. The NPFC noted that the claimant would have to provide evidence that the SOSC determined the incident to be an OPA event in that it posed a substantial threat of discharge into a navigable waterway of the United States, in this case, the East River. Then, if the SOSC were to so determine, the NPFC advised, as with all other claims in accordance with the regulations, the claimant would also need to provide evidence that its actions were consistent with the National Contingency Plan. The NPFC concluded its letter by providing the contact information of the SOSC to facilitate Ken's interaction with him. The NPFC has independently contacted the SOSC on multiple occasions and, on each occasion, the SOSC has maintained that the facility incident was not an OPA incident, as it did not pose a substantial threat to the navigable waterway.

Ken's responded to the NPFC's letter on October 31, 2019. That letter merely reasserted the claimant's position in its request for reconsideration that the internal facility response posed a "...very real and substantial threat..." of discharge into a navigable waterway of the United States, while providing pictures of the facility. However, the claimant's assertions are not evidence and claimant has provided nothing further on this issue. The claimant did not provide any evidence that the SOSC had determined the event to be an OPA incident.

Further, the NPFC understands Ken's position that the New York City Department of Corrections sought Ken's assistance with the facility incident. While this may constitute a contractual obligation between the two parties, it has no bearing on whether the claimant's work is OPA-compensable. In order for the costs incurred by the claimant to be OPA-compensable,

¹⁶ NYSDEC Spill Report Form for Spill Number 1706950 from (b) (6), page 3, paragraph 5, last updated March 13, 2018.

¹⁷ NYSDEC Spill Report Form for Spill Number 1706950 from (b) (6), page 3, last updated March 13, 2018.

¹⁸ NPFC determination issued to Ken's Booming & Boat Service, Inc., dated August 15, 2019

¹⁹ 33 CFR 136.115(d).

the event must be an OPA incident under the statute.²⁰ In this case, there is no evidence that the facility incident was an OPA incident and thus the NPFC is not authorized to compensate the claimant.

IV. CONCLUSION:

The NPFC reviewed Ken's original claim submission, its request for reconsideration, all additional information provided by the claimant and additional information acquired independently. The NPFC concludes that claimant has failed to meet its burden under the regulations. The facts of this case do not support the reimbursement of the previously denied amount of \$79,200.19 in uncompensated removal costs under OPA because Ken's has not demonstrated that the internal facility response work has been determined by the SOSOC to be an OPA incident. As such, under the governing law and regulations, the NPFC is not authorized to compensate the claimant.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the NPFC hereby determines it will uphold its original offer to pay \$32,232.15 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 919017-0001.

AMOUNT: \$32,232,15²¹

Claim Supervisor: (b) (6)(b) (6)(b) (6)

Date of Supervisor's review: *12/11/19*

Supervisor Action: *Partial offer on reconsideration approved*

²⁰ 33 U.S.C. § 2701, *et seq.* Whether an event is an OPA incident is a threshold question on whether a claim can be paid by the NPFC.

²¹ *See*, NPFC Summary of Costs spreadsheet from the initial August 15, 2019 NPFC Claim Determination.