

CLAIM SUMMARY / DETERMINATION

Claim Number:	920022-0001
Claimant:	Intercontinental Terminal Company, LLC
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	(b), (b) (6)
Amount Requested:	\$62,201.68
Action Taken:	Offer in the amount of \$58,234.68

EXECUTIVE SUMMARY:

On April 24, 2020 at approximately 1045 local time, the United States Coast Guard (USCG) Sector Houston/Galveston Incident Management Division (IMD) received notification that an oil sheen was observed at the Intercontinental Terminal located in Deer Park, Texas and visible in the Houston Ship Channel, a navigable waterway of the United States.¹ Pollution Response Team personnel from Sector Houston/Galveston arrived on scene at about noon along with a State On Scene Coordinator (SOSC) from the Texas General Land Office (TGLO).² The incident was reported to the National Response Center (NRC) by a crew member of the tank vessel STENA PERFORMANCE while docked at the ITC terminal.³ The Pollution Investigator, MSTC (b), (b) (6), in his capacity as the Federal On-Scene Coordinator's Representative (FOSCR) performed a joint investigation with TGLO and determined that the T/V STENA PERFORMANCE, while moored at the ITC terminal performing cargo transfer ops, was determined to be a potential Responsible Party (RP) for the incident.⁴

In accordance with the Oil Pollution Act of 1990, the owner of the T/V STENA PERFORMANCE was identified as a potential Responsible Party (RP) for the incident as was the terminal owner, Intercontinental Terminal Company, LLC (ITC).⁵ ITC took the lead to handle response efforts until such time as a definitive RP could be identified; they hired US Ecology/NRC Gulf Environmental Services (NRC) to perform oil pollution response activities in order to minimize potential vessel delays as they were expecting two vessels inbound for the terminal.⁶ NRC presented its invoices to ITC who paid the costs.⁷ The Claimant then presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$62,201.68.⁸ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$58,234.68 of the requested \$62,201.68 is compensable and offers this amount as full and final compensation of this claim.

¹ USCG MISLE Case # 1215545 dated April 24, 2020.

² FOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

³ NRC Report # 1275998 dated April 24, 2020.

⁴ FOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

⁵ USCG Notice of Federal Interest (NOFI) dated April 24, 2020 was issued to both ITC and the operator of the T/V STENA PERFORMANCE.

⁶ FOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

⁷ Email from Claimant providing proof of payment for the US Ecology/NRC invoicing dated April 29, 2020.

⁸ 33 CFR 136.103(c).

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On April 24, 2020 at approximately 1045 local time, the United States Coast Guard (USCG) Sector Houston/Galveston Incident Management Division (IMD) received notification that an oil sheen was observed at the Intercontinental Terminal located in Deer Park, Texas and visible in the Houston Ship Channel, a navigable waterway of the United States.⁹ Pollution Response Team personnel from Sector Houston/Galveston arrived on scene at about noon along with a State On Scene Coordinator (SOSC) from the Texas General Land Office (TGLO).¹⁰ The incident was reported to the National Response Center (NRC) by a crew member of the tank vessel STENA PERFORMANCE while docked at the ITC terminal.¹¹ The Pollution Investigator, MSTC (b), (b) (6), in his capacity as the Federal On-Scene Coordinator's Representative (FOSCR) performed a joint investigation with TGLO and determined that the T/V STENA PERFORMANCE while moored at the ITC terminal performing cargo transfer ops, was determined to be a potential Responsible Party (RP) for the incident.¹²

Responsible Party

The FOSCR determined that there was an actual discharge of oil requiring on-site oil spill response.¹³ ITC agreed to hire its facility Oil Spill Response Organization (OSRO) in order to mitigate the effects to the environment and to avoid any vessel delays as a result of a federally funded pollution response.¹⁴

After being contacted by ITC, NRC arrived on-scene as the Oil Spill Response Organization (OSRO) on April 24, 2020 to provide emergency clean-up and containment services for the ITC terminal.¹⁵ NRC boomed the area surrounding the barge at dock #7 and commenced cleanup and removal activities. NRC placed absorbent padding, cleaned the side of the affected barge and transported all petroleum contaminated debris for proper disposal.¹⁶

NRC demobilized on April 27, 2020.¹⁷

Recovery Operations

In accordance with the Oil Pollution Act of 1990, the owner of the dock facility, ITC, where a dark discoloration of oil on surface waters was seen, was originally identified as a potential Responsible Party (RP) for the incident.¹⁸ The sheen was discovered around the T/V STENA PERFORMANCE that was performing cargo transfer operations at dock #7 of the ITC

⁹ USCG MISLE Case # 1215545 dated April 24, 2020.

¹⁰ FOOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

¹¹ NRC Report # 1275998 dated April 24, 2020.

¹² FOOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

¹³ FOOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

¹⁴ FOOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

¹⁵ Pacific Strike Team SITREP Update #4 and Solar Environmental Oil Spill Report.

¹⁶ Pacific Strike Team SITREPS Updates #9 and #11 and Solar Environmental Oil Spill Report.

¹⁷ NRC daily field logs and invoicing.

¹⁸ USCG Notice of Federal Interest (NOFI) dated April 24, 2020 was issued to ITC as a potential RP.

facility. The FOSCR also issued a Notice of Federal Interest (NOFI) to the operator of the vessel on April 24, 2020 as an added potential Responsible Party (RP) for the incident.¹⁹ Ultimately the FOSCR and the SOSOC performed a joint investigation and determined that because they could not identify a path of discharge, and that no RP could be identified and therefore declared the incident a mystery spill.²⁰

II. CLAIMANT AND NPFC:

ITC presented its uncompensated costs claim to the National Pollution Funds Center (NPFC) for \$62,201.68.²¹

ITC's claim consisted of US Ecology/NRC Gulf Environmental Service invoice # 237986 dated April 29, 2020 for response work performed from April 24, 2020 through April 27, 2020:²²

Total claimed costs: \$62,201.68

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²³ 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.²⁴ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁵ 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.

IV. DISCUSSION:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁶ The NPFC has promulgated a comprehensive set

¹⁹ USCG Notice of Federal Interest (NOFI) dated April 24, 2020 was issued to the operator of the T/V STENA PERFORMANCE as a potential RP.

²⁰ FOSC statement to NPFC from MSTC (b), (b) (6) dated May 17, 2020.

²¹ 33 CFR 136.103(c).

²² See, Enclosure (3) for a detailed breakdown of claimed costs.

²³ 33 CFR Part 136.

²⁴ 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)).

²⁵ 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).

²⁶ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁷ 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.²⁸

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.²⁹

The NPFC analyzed each of these factors and determined the majority of the costs incurred by ITC and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined all approved costs invoiced at the appropriate rate sheet pricing were billed in accordance with the rate schedule provided.³⁰ All approved costs were supported by adequate documentation which included the invoice, proof of payment, daily field log description of duties performed and/or FOSCR statement.

The amount of compensable costs is \$58,234.68 while \$3,967.00 was deemed not compensable for the following reasons:

1. The US Ecology/NRC invoiced for six instances of double billing whereby on April 25, 2020 three employees were billed for two shifts each that overlapped the initial shift that constituted double billing in the total amount of \$2,920.50.³¹ The NPFC has identified the personnel and shift hours that overlapped for each person and shift.³² Therefore, \$2,920.50 in US Ecology/NRC costs are denied as double billing.
2. The US Ecology/NRC invoiced for 7 personnel on April 24, 2020 at 1 hour of ST and 9 hours of OT and one person with 2 hours of OT. According to the rat sheet, normal ST hours are from 8am to 4pm and any hours outside of that Mon-Fri would constitute OT. Based on the rate sheet, the NPFC has adjusted the approved hours at 1 hr ST and 8 hrs of OT for seven people and there is 1 hour of ST and one hour of OT for the last person. As such, the NPFC has denied \$244.50 in improper billing.³³
3. The US Ecology/NRC invoiced for a pressure washer up to 3,000 psi at a day rate of \$649.00 when the NRC rate schedule identifies the costs as \$210.00 vice \$649.00

²⁷ 33 CFR Part 136.

²⁸ 33 CFR 136.105.

²⁹ 33 CFR 136.203; 33 CFR 136.205.

³⁰ NRC Service Agreement dated March 22, 2019 and associated rate sheet from January 2019.

³¹ See, Enclosure 3 Summary of Costs spreadsheet via lines # 32, 33, 34, 36, 37, and 38.

³² See, Enclosure 3 Summary of Costs spreadsheet.

³³ See, Enclosure 3 Summary of Costs spreadsheet via lines # 3 through 10.

invoiced and as such, the NPFC denied \$439.00 of costs that exceed the rate sheet pricing.³⁴

4. The US Ecology/NRC invoiced for an equipment utility trailer on April 27, 2020 at a rate of \$108.00 per day. The rate sheet allows for \$105.00 a day therefore \$3.00 is denied as the cost exceeds the allowable rate (see page 2 of 6 of the rate sheet).
5. The US Ecology/NRC invoiced for disposal at cost plus 20% administrative markup in the total amount of \$360.00. The NRC rate schedule does not list pricing for third party disposal services therefore the Claimant must provide a copy of the third party disposal invoice demonstrating the amount charged and paid for the disposal.³⁵ Additionally, the NRC rate schedule identifies the third party administrative markup as 17% vice the 20% invoiced to the Claimant.³⁶

Overall Denied Costs = \$3,967.00³⁷

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Solar' request for uncompensated removal costs is approved in the amount of **\$58,234.68**.

This determination is a settlement offer,³⁸ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁰ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: (b), (b) (6) (b), (b) (6)
Date of Supervisor's review: <i>11/4/2020</i>
Supervisor Action: <i>Offer Approved</i>

³⁴ See, Enclosure 3 Summary of Costs spreadsheet via line #51.

³⁵ US Ecology/NRC invoice # 237986 dated April 29, 2020 supporting documentation.

³⁶ NRC rate schedule, Second Amendment to NRC Master Agreement, page 1 of 24, item #2.

³⁷ See, Enclosure 3 Summary of Costs spreadsheet.

³⁸ 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 uncompensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign 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).

³⁹ 33 CFR 136.115(b).

⁴⁰ *Id.*