

CLAIM DETERMINATION

Claim Number:	E19509-0001
Claimant:	Magellan Midstream Partners, L.P.
Type of Claimant:	RP
Type of Claim:	Defense to Liability, Act or Omission of a 3 rd Party
Claim Manager:	(b) (6), (b)
Amount Requested:	\$1,161,286.21
Action Taken:	Approved

EXECUTIVE SUMMARY:

On April 24, 2019, an 8” pipeline carrying diesel fuel ruptured and released diesel fuel into the Yellow Medicine River, a tributary to the Minnesota River, a navigable waterway of the United States.¹ The discharge of oil was reported to the U.S. Coast Guard (CG) National Response Center.² Magellan Midstream Partners, L.P. (“Magellan” or “Claimant”), owner and operator of the pipeline, responded and hired West Central Environmental Consultants, Bay West Inc., and Haz Mat Response to conduct the pollution removal activities.³ The U.S. Environmental Protection Agency (EPA) Federal On-Scene Coordinator (FOSC) also responded to provide oversight of the spill response and determined that Magellan was the party responsible for the oil spill.⁴ An investigation into the cause of the pipeline rupture conducted by the Lyon County Sheriff’s Department identified intentional gunfire as the cause of the pipeline failure.⁵ On August 27, 2019, the EPA FOSC determined that cleanup of the discharged diesel fuel was complete.⁶ Magellan submitted a claim for entitlement to a defense to liability, based on an act or omission of a third party⁷ to the CG National Pollution Funds Center (NPFC) and seek reimbursement of removal costs incurred under the defense in the amount of \$1,161,286.21.⁸ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that Magellan has demonstrated an entitlement to a defense to liability. Additionally, the NPFC has determined that \$1,122,617.64 of the requested \$1,161,286.21 is compensable and offers this amount as full and final compensation of this claim⁹ for its uncompensated removal costs and damages under the Oil Pollution Act (OPA).¹⁰

¹ U.S. EPA POLREP #2 (F) dated August 27, 2019.

² CG National Response Center Report # 1243669 dated April 24, 2019.

³ U.S. EPA POLREP #2 (F) dated August 27, 2019.

⁴ U.S. EPA POLREP #2 (F) dated August 27, 2019. *See also*, Notice of Federal Interest issued to Magellan Pipeline dated April 25, 2019.

⁵ Magellan claim submission dated March 16, 2020. *See also* Lyon County Sheriff’s Department Incident Report Narrative ICR# 19-6458.

⁶ U.S. EPA POLREP #2 (F) dated August 27, 2019.

⁷ 33 U.S.C. § 2703(a)(3).

⁸ Magellan claim submission dated March 16, 2020, with a sum certain of \$1,150,399.52. Magellan subsequently revised its sum certain to \$1,173,710.24 after discovering additional uncompensated removal costs not submitted within its original claim submission. *See* Magellan letter to the NPFC dated May 15, 2020. Magellan then revised its sum certain to \$1,169,595.55 after receiving a credit from a contractor whose costs constituted a portion of its claimed sum certain. *See*, email from Magellan to the NPFC dated August 20, 2020. Lastly, Magellan revised its sum certain to \$1,161,286.21 after identifying a mistake within their claimed uncompensated costs. *See*, email from Magellan to the NPFC dated August 28, 2020.

⁹ 33 CFR 136.115.

¹⁰ 33 U.S.C. § 2703(a).

I. FACTUAL BACKGROUND:

A. The Oil Spill and Immediate Response Activities

On April 24, 2019, an 8” pipeline owned and operated by Magellan was ruptured and released diesel fuel into judicial drainage ditch #24 (drainage ditch).¹¹ The pipeline was exposed and crossed the drainage ditch approximately 725 feet downstream from Cottonwood Lake in Lyon County, MN. Diesel fuel from the pipeline sprayed onto the banks and into the moving waters within the drainage ditch and traveled approximately 10 miles into the Yellow Medicine River. The Yellow Medicine River is a tributary to the Minnesota River, which is a navigable waterway of the United States.¹²

A Magellan pipeline controller was immediately notified of the loss of pressure within the pipeline by its electronic monitoring system. Upon notification, the controller immediately initiated emergency response procedures, which included remotely shutting down the pipeline, closing automated valves and discharging personnel to close manual valves. NPFC notes that the quick action and due care exercised by Magellan resulted in only 93 barrels¹³ of the potential 798 barrels oil in the pipeline being released.¹⁴ Additionally, Magellan also timely immediately notified Federal, State and local authorities in the vicinity of the oil spill.¹⁵

Magellan hired West Central Environmental Consultants (WCEC), Bay West Inc., and Haz Mat Response to conduct the pollution removal activities which included booming off the Yellow Medicine River and oil recovery from the drainage ditch and the oiled banks and riprap lining the drainage ditch.¹⁶

US EPA personnel provided oversight of the oil spill response. The EPA FOSC accessed the Oil Spill Liability Trust Fund (OSLTF) and obtained Federal Project Number (FPN) E19509-0001 to fund their response.¹⁷

B. Recovery Operations

The Cottonwood Fire Department was first on-scene and installed a clamp over the damaged section of pipeline, which provided a temporary repair to the pipeline and stopped the release of diesel fuel into the drainage ditch.¹⁸

WCEC, Bay West Inc., and Haz Mat Response responded with personnel and equipment. The entrance to the Yellow Medicine River was boomed to prevent further discharge into the river and multiple containment and recovery areas were established along the 10-mile stretch of

¹¹ The pipeline is a Department of Transportation (DOT) regulated pipeline and is subject to DOT regulations for operations, maintenance and public awareness.

¹² U.S. EPA POLREP #2 (F) dated August 27, 2019. See also Magellan claim submission dated March 16, 2020.

¹³ One barrel of oil is equivalent to 42 gallons.

¹⁴ Letter to NPFC dated April 17, 2020, responses to questions 8-10.

¹⁵ Magellan claim submission to the NPFC dated March 16, 2020.

¹⁶ U.S. EPA POLREP #2 (F) dated August 27, 2019.

¹⁷ *Id.* See also, email from EPA FOSC to the NPFC dated March 24, 2020.

¹⁸ Magellan claim submission to the NPFC dated March 16, 2020.

the drainage ditch, which consisted of hard boom, sorbent boom and pads, vacuum trucks and skimmers. Approximately 140 tons of oil-contaminated soil was removed and approximately 78 barrels of diesel fuel were recovered from the surface of the drainage ditch.¹⁹ The EPA FOSSC determined cleanup was complete on August 27, 2019.²⁰

C. Responsible Party and the Claim

On March 16, 2020, Magellan submitted a claim for entitlement to a defense to liability, act or omission of a third party²¹ claim to the NPFC requesting compensation of removal costs incurred under the defense in the amount of \$1,161,286.21.²² During the review and adjudication of the claim, Magellan requested a tolling agreement for additional time to locate and provide additional information to support their claim. That request was approved and extended NPFC's deadline to respond to the claim to October 28, 2020.²³

II. DISCUSSION:

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.²⁴ 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.²⁵ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁶ 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. DETERMINATION PROCESS:

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.²⁷ A responsible party's liability is strict, joint, and several.²⁸ When enacting the Oil Pollution Act

¹⁹ U.S. EPA POLREP #2 (F) dated August 27, 2019.

²⁰ *Id.*

²¹ 33 U.S.C. § 2703(a)(3).

²² *See*, note 3, *supra*.

²³ Tolling agreement between Magellan Midstream Partners, L.P. and the NPFC dated July 17, 2020.

²⁴ 33 CFR Part 136.

²⁵ *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).

²⁶ *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).

²⁷ 33 U.S.C. § 2702(a).

²⁸ *See*, H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

(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.”²⁹ OPA was intended to cure these deficiencies in the law.

Notwithstanding the above, under limited circumstances the Oil Spill Liability Trust Fund, administered by the NPFC, may reimburse a responsible party for its uncompensated removal costs and damages when the responsible party establishes an entitlement to a defense to liability under 33 U.S.C. § 2703.

Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that a defense under 33 U.S.C. § 2703 applies before the OSLTF can reimburse removal costs or damages. Consistent with this statutory requirement, the OSLTF’s claims regulations also require all claimants to carry the burden of proving an entitlement to reimbursement.³⁰ Therefore, as with any other claimant, a responsible party must prove an entitlement under the OPA before receiving reimbursement from the OSLTF. If a responsible party fails to introduce evidence in support of any of the elements necessary to establish entitlement to compensation from the OSLTF, or fails to establish each of the elements by a preponderance of the credible evidence, the NPFC must deny the claim.³¹

The third-party defense under the OPA is “narrowly construed.”³² A defendant must demonstrate that “the release or threatened release was caused solely by an unrelated third party.”³³ In order to prevail on its defense, Magellan must establish by a preponderance of the

²⁹ *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.).

³⁰ See, 33 CFR 136.105(a)(“The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.”); and 33 CFR 136.105(e)(6)(Requiring that each claim include evidence to support the claim).

³¹ OPA’s legislative history makes it clear that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708. As explained in the House Conference Report on OPA:

Section 1008 of the House bill allows a responsible party..., or a guarantor for that responsible party... to assert a claim for removal costs and damages *only if the responsible party... can show that the responsible party...has a defense to liability, or is entitled to a limitation of liability.*

H.R. Conf. Rep. 101-653 at 110 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 788 (emphasis added). See also, *Apex*, 208 F.Supp.2d 642 (claimant failed to carry its burden of proof with respect to the “act of God” defense); *International Marine Carriers v. OSLTF*, 903 F.Supp. 1097 (S.D. Tex. 1994) (claimant must show elements of a third party defense by a preponderance of the evidence); *Water Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009) (holding that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708).

³² *Xiamen Ocean Shipping Co. v. United States*, 2012 WL 12882375, *7 (D. Haw. 2012). See also, *Int'l Marine Carriers v. Oil Spill Liability Trust Fund*, 903 F.Supp. 1097, 1105 (S.D. Tex. 1994).

³³ *United States v. A & N Cleaners & Launderers, Inc.*, 854 F.Supp. 229, 239 (S.D.N.Y. 1994); see, *Shore Realty Corp.*, 759 F.2d 1032, 1044-45 & n. 17; *United States v. Stringfellow*, 661 F.Supp. 1053, 1061 (C.D. Cal. 1987) (third-party defense applies “only where a totally unrelated third party is the sole cause of the release or threatened release of a hazardous substance”).

evidence that the discharge of oil and the resulting damages or removal costs were caused solely by an act or omission of a third party³⁴ and that it

(a) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances and

(b) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.³⁵

The claimant has satisfied its burden on each of these statutory requirements.

A. “... evidence that the discharge of oil and the resulting damages or removal costs were caused solely by an act or omission of a third party”

The Lyon County Sheriff’s Department responded and conducted an investigation into the cause of the incident. Its investigation determined that intentional gunfire was the cause of the pipeline failure and identified two suspects who were subsequently arrested, charged, and convicted of criminal damage to property in the first degree.³⁶ In addition, the United States Attorney’s Office for the District of Minnesota filed an information against both suspects in federal court.

The NPFC asked Magellan if the person responsible for shooting their pipeline was a current or former employee of Magellan or if Magellan had any previous interactions with that individual. Magellan responded that the individual responsible for shooting their pipeline was not a current or former employee and that prior to the events of April 24, 2019, Magellan had no interaction or contact with the person responsible for shooting its pipeline.³⁷

The NPFC finds that Magellan has met its burden under this portion of the statute in that the damages to Magellan’s pipeline were caused solely by an act or omission of a third party.

B. “... evidence that the responsible party exercised due care and took precautions against foreseeable acts”

Due care has been described by the courts as being “derived not only from statutory standards, but also from the dictates of reasonableness and prudence under the given circumstances of a case.”³⁸ As a result, Magellan was required to take reasonable precautions to prevent both intentional and accidental spills in light of all the relevant facts and circumstances.

³⁴ 33 U.S.C. § 2703(a)(3).

³⁵ *Id.* See also, “[The statute] ... requires a showing that the responsible party exercised due care with respect to the spilled oil and that it took precautions against the foreseeable acts or omissions of the third party to whom it is attempting to shift liability.” *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 752 (5th Cir. 2011).

³⁶ Lyon County Sheriff’s Department Incident Report Narrative ICR# 19-6458. See also, State of Minnesota Lyon County Register of Actions Case #42-CR-19-686.

³⁷ Letter to the NPFC dated April 17, 2020, response to question 11.

³⁸ *Baby Oil, Inc. v. United States*, 938 F. Supp. 2d 640, 646 (E.D. La. 2013) (citing *Coumou v. United States*, 107 F.3d 290, 295–96 (5th Cir. 1997), *withdrawn and superseded in part on reh’g by Coumou v. United States*, 114 F.3d 64 (5th Cir. 1997)).

When interpreting OPA’s predecessor statute, the U.S. Court of Claims held that “... a claimant cannot recover, even if a vandal or third party immediately caused the spill, if the claimant does not prove that reasonable action had been taken to prevent or forestall such intervention by the third party.”³⁹

At the outset, the NPFC notes that immediately upon notification of a reduction of pressure within the affected pipeline, the Magellan pipeline controller immediately initiated its emergency response procedures, which included shutting down the pipeline, remotely closing automated valves and discharging personnel to close manual valves.⁴⁰ These timely actions greatly reduced the drain down volume of the pipeline and decreased the potential for a larger oil spill. These actions also activated the Cottonwood Fire Department whose timely repair of the pipeline greatly reduced the amount of diesel fuel that was discharged into the drainage ditch.

In addition, the NPFC asked Magellan to provide other evidence that it exercised due care and took precautions against foreseeable acts. Magellan responded by providing proof of a public awareness program within Lyon County. Specifically, Magellan distributed approximately 400 pipeline safety brochures to residents and businesses located on or near Magellan’s right of way in an effort to enhance public safety and environmental protection through increased public awareness. These brochures detailed “how to identify a pipeline in your area”; “how to identify a leak within the pipeline”; and emergency preparedness guidance with directions to follow in the event of an emergency involving its pipeline.⁴¹ The Cottonwood Fire Department received Magellan’s pipeline safety brochure. Its timely and effective response to clamp the damaged pipeline prevented the continued discharge of diesel fuel into the drainage ditch. The NPFC believes that Magellan’s outreach program is, at least, partially responsible for the efficacy of the fire department’s response.

Magellan also provided maintenance and inspection records of the affected pipeline which documented the structural integrity of the pipeline prior to the incident.⁴² It also provided evidence that it had marked this pipeline with a highly visible pipeline marker.⁴³ Finally, Magellan provided evidence that it regularly conducts overflights of its 11,000 miles of pipeline and that it specifically conducted overflights of this pipeline on eight occasions in the four months prior to the incident.⁴⁴

In sum, Magellan’s community outreach, inspection and maintenance programs, and its planning for, and execution of, its immediate response efforts represent noteworthy examples of its due care and its reasonable precautions taken to prevent both intentional and accidental releases of oil.

As such, the NPFC finds that Magellan has met its burden under this portion of the statute in that they exercised due care with respect to the oil concerned and took precautions against

³⁹ *Union Petroleum Corp. v. United States*, 228 Ct. Cl. 54, 73, 651 F.2d 734, 745 (1981) (citing *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. United States*, 216 Ct. Cl. 155, 159, 575 F.2d 839, 841 (1978)). *Cf.*, *United States v. HVI Cat Canyon*, 314 F.Supp.3d 1049 (C.D.Cal. 2018)

⁴⁰ *Id.*

⁴¹ Letter to NPFC dated April 17, 2020, response to question 12.

⁴² Letter to NPFC dated April 17, 2020, responses to questions 4 and 5.

⁴³ Magellan claim submission dated March 16, 2020.

⁴⁴ Letter to NPFC dated April 17, 2020, response to question 12.

foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts of omissions.

IV. OSLTF COMPENSIBLE RESPONSE COSTS

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁵ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁶ 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.⁴⁷

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.⁴⁸

In this case, Magellan submitted a claim for entitlement to a defense to liability, act or omission of a third party to the NPFC and seek reimbursement of removal costs incurred under the defense in the amount of \$1,161,286.21.⁴⁹

The NPFC analyzed each of these factors and determined the majority of the costs incurred by the claimants 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. All approved costs were supported by adequate documentation, which included invoices, proofs of payment, and/or FOSC statements.

The amount of compensable costs is \$1,122,617.64 while \$38,668.57 was deemed not compensable for the following reasons:

1. Charges in the amount of \$21,984.84 for personnel and equipment costs incurred by Kane Logistics and personnel costs incurred by Magellan that lacked sufficient documentation to support personnel and/or equipment on-scene during the response to the oil spill;
2. Charges in the amount of \$7,158.20 for costs incurred by Pinnacle Engineering, Enerpipe Pipeline Specialists, and M&H Energy Service that were in excess of their

⁴⁵ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁶ 33 CFR Part 136.

⁴⁷ 33 CFR 136.105.

⁴⁸ 33 CFR 136.203; 33 CFR 136.205.

⁴⁹ See note 3, *supra*.

- published rate schedule;
3. Charges in the amount of \$2,748.31 for administrative costs incurred by Pinnacle Engineering which are not OPA compensable removal actions;
 4. Charges in the amount of \$1,892.60 for costs incurred by Pinnacle Engineering, Vollan Oil, and Bay West for services that were not on their published rate schedule;
 5. Charges totaling \$827.92 for denied mark-up costs. Specifically, \$472.30 for WCEC mark-up costs mistakenly claimed and not incurred by Magellan as OPA compensable removal costs and charges in the amount of \$355.62 for mark-up costs charged by M&H on costs that were denied by the NPFC;
 6. Charges in the amount of \$791.13 for costs incurred by Haz-Mat Response and Jack's Oil for the repair/replacement of items damaged during the response that were not properly justified by Magellan;
 7. Charges in the amount of \$160.70 for an airline credit received by the The Response Group and submitted as an uncompensated removal costs.
 8. Charges in the amount of \$1,146.53 for costs incurred by M&H Energy Services for plane tickets purchased two days in advance of the oil spill;
 9. Numerous charges totaling \$1,733.34 for receipts that lacked itemization, contained differences between invoiced amounts and claimed amounts, billing rate errors and rounding errors;
 10. The claimant has received \$225.00 in restitution directly related to this incident to date based on the criminal charges filed in this case. As such, this amount is deducted from the amount of uncompensated removal costs approved for reimbursement by the NPFC.⁵⁰

Overall Denied Costs: **\$38,668.57**⁵¹

V. CONCLUSION

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the claimant's request for a defense to liability, based on an act or omission of a third party is approved and its request for uncompensated removal costs is approved in the amount of **\$1,122,617.64**.

⁵⁰ The claimant has been made aware that any future amounts received in restitution for this incident are payable to the Oil Spill Liability Trust Fund. Details for those payments have been provided in separate correspondence.

⁵¹ Enclosure 3 provides a detailed accounting of the amounts denied.

This determination is a settlement offer;⁵² the claimants have 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁵³ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵⁴ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

(b) (6), (b)(b) (6), (b)(b) (6), (b)
(b) (6), (b)(b) (6), (b)(b) (6), (b)
(b) (6), (b)(b) (6), (b)(b) (6), (b)

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

Date of Supervisor's review: *October 23, 2020*

Supervisor Action: *Claim Approved*

⁵² 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).

⁵³ 33 CFR § 136.115(b).

⁵⁴ *Id.*