

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	G19007-0001
<b>Claimant:</b>	Towboat Marine LLC
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)(b) (6)
<b>Amount Requested:</b>	\$8,601.93
<b>Action Taken:</b>	Offer in the amount of \$7,001.93

### EXECUTIVE SUMMARY:

On June 22, 2019, the twenty foot pleasure craft *AMISH OUTLAW* (OH 4813 FE), was found hard aground at Kelleys Island, causing a discharge of oil into Lake Erie, a navigable waterway of the United States.<sup>1</sup> In accordance with the Oil Pollution Act of 1990, (b) (6)(b) (6)(b) (6) II was identified as the responsible party (“RP”) for the incident.<sup>2</sup>

At the time of the incident, the RP was unable to be reached so Towboat Marine LLC (“claimant” or “Towboat Marine”) provided a quote for response services to the Coast Guard Marine Safety Unit Toledo Duty Response Team (“MSU Toledo”) for the removal of the pollution source from the waterway.<sup>3</sup>

The Federal On Scene Coordinator (FOSC) accepted the engagement of Towboat Marine and opened a Federal Project Number (FPN) to handle response costs. The Coast Guard Response Team witnessed the removal of the vessel from the water.<sup>4</sup> Towboat Marine presented its invoice and supporting documentation to Mr. (b) (6)(b) (6)(b) (6) II via certified next day delivery and via regular mail on January 15, 2020.<sup>5</sup> On January 22, 2020, (b) (6)(b) (6) NPFC Lead Claims Manager, called and spoke with the RP who confirmed receipt of the Towboat invoice and denied payment.<sup>6</sup>

Towboat Marine LLC presented its uncompensated costs claim to the National Pollution Funds Center (NPFC) for \$8,601.93 on September 25, 2019.<sup>7</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$7,001.93 of the requested \$8,601.93 is compensable and offers this amount as full and final compensation of this claim.<sup>8</sup>

<sup>1</sup> USCG SITREP dated June 22, 2019.

<sup>2</sup> United States Coast Guard Notice of Federal Interest (NOFI) dated June 24, 2019.

<sup>3</sup> USCG SITREP dated June 22, 2019.

<sup>4</sup> USCG SITREP dated June 22, 2019.

<sup>5</sup> Email from Mr. (b) (6)(b) (6) to NPFC dated January 15, 2020 with delivery confirmation information for the presentment of costs to the RP.

<sup>6</sup> January 22, 2020 email from (b) (6)(b) (6) to (b) (6)(b) (6), NPFC Claims Manager providing a phone record summary of the discussion with the RP.

<sup>7</sup> Updated NPFC OSLTF Claim Form with sum certain was later provided by email on October 19, 2019.

<sup>8</sup> 33 CFR 136.115.

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

### ***Incident***

On June 22, 2019 the United States Coast Guard (USCG) Sector Detroit Command Center (SCCD) received a report of a 20 foot pleasure craft hard aground at Kelleys Island East State Park campground #89. The owner had waded to shore prior to notification being made. SCCD notified Marine Safety Unit (MSU) Toledo Command Duty Officer (CDO), and District 9 Command Center (D9CC), and the National Response Center (NRC) via report #1249726.<sup>9</sup>

At the time of the incident, the RP was unable to be reached and in order to remove the pollution source in a timely manner so the Federal On Scene Coordinator (FOSC) opened a Federal Project Number (FPN) # G19007 in order access funding to handle response actions. The FOSC requested a quote for response services from Towboat Marine, LLC. The FOSC witnessed the removal of the vessel from the waterway.<sup>10</sup>

### ***Responsible Party***

(b) (6)(b) (6)(b) (6) II is the owner of the pleasure craft AMISH OUTLAW.<sup>11</sup> Mr. (b) (6) (b) (6) II is the responsible party and is liable under OPA.<sup>12</sup> The FOSC issued a Notice of Federal Interest (NOFI) to Mr. (b) (6)(b) (6)(b) (6) II.<sup>13</sup> A Notice of Federal Interest notifies the owner and/or operator of vessels or facilities that their vessel or facility was identified as the source of a discharge or substantial threat of a discharge of oil to navigable waters of the United States and the incident triggers certain responsibilities under the Federal Water Pollution Control Act (Clean Water Act (CWA)).

On September 30, 2019, following receipt of Towboat Marine's claim submission, the NPFC sent a Responsible Party Notification Letter via certified mail to Mr. (b) (6)<sup>14</sup>

### ***Recovery Operations***

On June 22, 2019, Kelleys Island Fire Department arrived on scene to deploy boom and absorbent pads to soak up the gasoline.<sup>15</sup> MSU Toledo decided to use Towboat Marine (claimant) for vessel removal after requesting and receiving a quote. The MSU Toledo CDO arrived on scene and observed Towboat Marine removing the vessel from the water.<sup>16</sup> The RP arrived at USCG Station Marblehead nine hours after the initial notification was made to the Coast Guard. During a discussion with the FOSC, the RP informed the Coast Guard that he

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<sup>9</sup> USCG SITREP dated June 22, 2019.

<sup>10</sup> USCG SITREP dated June 22, 2019, page 2 of 2.

<sup>11</sup> USCG Vessel Critical Profile dated October 7, 2019, page 1 of 3.

<sup>12</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>13</sup> Notice of Federal Interest to (b) (6)(b) (6)(b) (6) II dated June 24, 2019.

<sup>14</sup> NPFC RP Notification Letter to (b) (6)(b) (6)(b) (6) II dated September 30, 2019.

<sup>15</sup> USCG SITREP 201 page 1 of 2 re June 22, 2019 incident.

<sup>16</sup> USCG SITREP 201 page 2 of 2 re June 22, 2019 incident.

would pay the bill for Towboat Marine's services and based on that agreement, the FOSC cancelled the FPN.<sup>17</sup>

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

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>18</sup> require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from NPFC.<sup>19</sup>

Towboat Marine indicated in its initial claim submission to the NPFC that it had presented a claim to the RP on June 25, 2019.<sup>20</sup> During the adjudication of the claim, the supporting documentation did not substantiate that proper presentment had in fact occurred as stated on the OSLTF claim form. Upon examination of the Towboat invoice, the NPFC noticed that the invoice was issued to the NPFC and was dated September 23, 2019. In light of the conflicting information, the NPFC contacted Towboat Marine via telephone on January 15, 2020 and spoke with Mr. (b) (6)(b) (6). When asked about question #5 on the OSLTF claim form, Mr. (b) (6) stated that he had not in fact sent any written demand for payment to the RP but rather spoke to the RP via telephone and made several verbal demands for payment.<sup>21</sup>

During the NPFC's conversation with Mr. (b) (6) of Towboat Marine, he was advised to send an invoice to the RP via a trackable means so the NPFC had evidence that the invoice was issued to the RP. On January 15, 2020, Mr. (b) (6) emailed a copy of the tracking information to the NPFC for the invoice he sent to the RP. The tracking information indicated that delivery was scheduled for January 16, 2020, by 3pm. On January 21, 2020, the NPFC obtained a copy of the delivery information from the USPS online system. The tracking update indicated that a notice was left.<sup>22</sup>

On January 21, 2020, the NPFC called the RP and left a message for him to return the call regarding the June 2019 oil spill incident.<sup>23</sup> On January 22, 2020, Mr. (b) (6) (RP) returned the NPFC's call as requested. He confirmed that he received the delivery notice but does not have a means of transportation to pick up the certified mail. He also confirmed that he did receive a copy of the invoice from Towboat via regular mail and is aware of the charges. During the course of the conversation, Mr. (b) (6) stated he will not pay the invoice as he has no financial means due to being disabled with no job. The NPFC advised him that adjudication of the claim would move forward and he acknowledged his understanding. The NPFC offered to email him a copy of the phone log summarizing the call but he declined.<sup>24</sup>

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<sup>17</sup> USCG SITREP 201 page 2 of 2 re June 22, 2019 incident.

<sup>18</sup> 33 U.S.C. § 2701 *et seq.*

<sup>19</sup> 33 CFR 136.103.

<sup>20</sup> OSLTF Claim Form dated September 9, 2019, question # 5.

<sup>21</sup> January 15, 2020 phone log between the claimant and the NPFC.

<sup>22</sup> See USPS Tracking Confirmation dated January 21, 2020.

<sup>23</sup> January 21, 2020 NPFC call log email summary.

<sup>24</sup> January 22, 2020 NPFC call log email summary with Mr. (b) (6).

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

When an RP has not settled a claim after 90 days, a claimant may elect to present its claim to the NPFC.<sup>25</sup> On September 25, 2019, the NPFC received a claim for uncompensated removal costs from Towboat Marine LLC dated September 9, 2019.

### **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>26</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>27</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>28</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>29</sup> An RP's liability is strict, joint, and several.<sup>30</sup> When enacting 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."<sup>31</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

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<sup>25</sup> 33 CFR 136.103.

<sup>26</sup> 33 CFR Part 136.

<sup>27</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>28</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>29</sup> 33 U.S.C. § 2702(a).

<sup>30</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>31</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).

incident.”<sup>32</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>33</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>34</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>35</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>36</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.<sup>37</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>38</sup>

Upon review and adjudication of the claim submission, the NPFC made several requests for additional information to the FOSC, the Claimant, and the RP. In summary, the NPFC requested information from the FOSC as it pertained to the response actions undertaken by Towboat Marine and its quote to the FOSC in order to abate the incident.<sup>39</sup> The FOSC responded via email on November 25, 2019 and the NPFC spoke with MSTC (b) (6), in her capacity as the FOSC representative on November 26, 2019. The FOSC coordinated the actions undertaken by the claimant and stated that the actions undertaken to remove the vessel from the water has been determined to be consistent with the National Contingency Plan (NCP).

The NPFC obtained the FOSC case file identified as MISLE case # 1177438 dated June 22, 2019. The NPFC also obtained information from the NPFC Case Management Division that the FPN opened to pay the contractor was closed on July 10, 2019 because the RP informed the FOSC that he would pay the contractor costs.<sup>40</sup>

The NPFC obtained a copy of the claimant’s rate schedule in support of the costs claimed; a copy of the subcontractor invoice and documentation; proof of payment for the subcontractor

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<sup>32</sup> 33 U.S.C. § 2701(31).

<sup>33</sup> 33 U.S.C. § 2701(30).

<sup>34</sup> See generally, 33 U.S.C. § (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>35</sup> 33 CFR Part 136.

<sup>36</sup> 33 CFR 136.105.

<sup>37</sup> In conjunction with the FOSC WV DEP oversaw the work as well.

<sup>38</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>39</sup> November 22, 2019 email to the FOSC requesting response information.

<sup>40</sup> USCG Message dated July 10, 2019 cancelling FPN # G19007.

costs; and proof of presentment to the RP. The NPFC adjudicated the costs claimed and has determined that the majority of the costs claimed are OPA compensable and have been coordinated with the FOSC and determined to be consistent with the NCP. The NPFC has determined that the approved invoiced costs were billed in accordance with the rate schedule in place at the time services were rendered and were within the estimate provided to the FOSC prior to the commencement of services. The NPFC determined that the claimant demonstrated proper presentment of costs to the RP as evidenced by the RP's admission of receipt of the invoicing in the amount of \$8,601.93.<sup>41</sup>

Based on the supporting documentation and information provided and/or obtained from various sources, the NPFC has determined which of the costs invoiced were billed in accordance with the quoted rates between the parties. All costs approved for payment by the NPFC were verified as being invoiced at the appropriate pricing, including but not limited to, any approved third party or out of pocket expenses. All approved costs are supported by adequate documentation which include invoices/quotes, proofs of payment, and were properly coordinated with the FOSC and determined to be reasonable, necessary and consistent with the NCP.

The amount of compensable costs is \$7,001.93, while \$1,600.00<sup>42</sup> was deemed not compensable for the following reasons:

1. \$75.00 for the three tubes of Pig Putty. The Towboat Marine rate schedule indicates cost plus 25% is the total cost, but a receipt was not provided for the amount claimed therefore it is denied;
2. \$1,200.00 for work performed and materials used on June 24, 2019. FOSC documentation indicates the response ended and the threat was mitigated on June 22, 2019 when the vessel was actually removed from the water. These costs were incurred after the threat of discharge was mitigated and as such, are deemed not OPA compensable;
3. \$50.00 for Don's Towing & Recovery LLC storage fees for two days. These costs were incurred after the threat of discharge was mitigated and as such, are deemed not OPA compensable;
4. \$210.00 for Don's Towing & Recovery LLC cleaning the fuel from the bed of the flatbed truck after the vessel was removed from the water and transported to Towboat's facility of choice. These costs were incurred after the threat of discharge was mitigated and as such, are deemed not OPA compensable; and
5. \$65.00 of markup applied to the subcontractor invoicing is denied based on the denied costs for Don's Towing & Recovery LLC.

**Overall Denied Costs** = \$1,600.00<sup>43</sup>

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<sup>41</sup> January 22, 2020 NPFC call log email summary with Mr. [REDACTED].

<sup>42</sup> Enclosure (1) NPFC Summary of Costs spreadsheet.

<sup>43</sup> Enclosure 1 Summary of Costs spreadsheet.

**VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Towboat Marine LLC's request for uncompensated removal costs is approved in the amount of **\$7,100.93**.

This determination is a settlement offer,<sup>44</sup> and the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>45</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>46</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

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

Date of Supervisor's review: *1/29/2020*

Supervisor Action: *Offer Approved*

Supervisor's Comments:

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<sup>44</sup> 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 to 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).

<sup>45</sup> 33 CFR 136.115(b).

<sup>46</sup> *Id.*