

CLAIM SUMMARY / DETERMINATION

Claim Number:	H15009-0001
Claimant:	Solar Environmental Services Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$182,047.00
Action Taken:	Offer in the amount of \$174,347.00

EXECUTIVE SUMMARY:

On May 22, 2015 at approximately 0720 local time, the United States Coast Guard (USCG) Marine Safety Detachment (MSD) American Samoa observed the Taiwanese Commercial Fishing Vessel (CFV) SEA HAWK No. 68 hard aground on the reef east of Avatelle Passage that is approximately 700 yards from shore in Pago Pago Bay, a navigable waterway of the United States. The MSD personnel immediately responded and witnessed the deployment of the vessel's life raft along and a call to abandon ship by the crew.¹ MSD personnel notified Sector Honolulu which reported the incident to the National Response Center (NRC).² MSD American Samoa, in its capacity as the Federal On-Scene Coordinator's Representative (FOSCR) determined that there was a substantial threat of discharge of oil requiring on-site oil spill response and a subsequent salvage operation.³

In accordance with the Oil Pollution Act of 1990, the owner of the CFV SEA HAWK No. 68 was identified as the Responsible Party (RP) for the incident.⁴ Tri-Marine International (Tri-Marine) Ltd is identified as the RP's Agent.⁵ The RP hired Solar Environmental Services Inc. ("Solar" or "Claimant") to perform oil pollution response and salvage activities.⁶ Solar presented its invoices to the RP.⁷ The RP did not respond to the claimant. The claimant then presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$182,047.00.⁸ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$174,347.00 of the requested \$182,047.00 is compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RECOVERY OPERATIONS, AND RESPONSIBLE PARTY:

United States Coast Guard (USCG) Sector Honolulu Command Center received a call from Marine Safety Detachment (MSD) American Samoa stating that on May 22, 2015, the CFV SEA

¹ USCG POLREP One dated May 27, 2015.

² National Response Center Report # 1117300 dated May 22, 2015.

³ USCG POLREP One, Section 1(a), dated May 27, 2015.

⁴ *Id.*

⁵ Tri-Marine provided a written financial guarantee to cover response costs. See, Tri Marine International Ltd Letter of Financial Guarantee, undated. See also, NPFC OSLTF Claim Form, question 6, dated July 24, 2019.

⁶ USCG POLREP One, Section 1(a), dated May 27, 2015.

⁷ Email from Claimant providing proof of presentment dated August 22, 2019.

⁸ 33 CFR 136.103(c).

HAWK 68 grounded on an exposed reef east of Pago Pago International Airport.⁹ After the vessel grounded, it rolled onto its side and settled on the reef with the port side downward. The crew abandoned ship using the vessel's inflatable life raft. The FOSCR reported that the twenty-two crewmembers abandoned ship and safely reached the shore.¹⁰ The FOSCR determined that there was a substantial threat of discharge of oil requiring on-site oil spill response and a subsequent salvage operation.¹¹ Sector Honolulu requested the Coast Guard Pacific Strike Team (PST) provide FOSCR assistance, contractor monitoring, site safety and salvage plan review since this incident occurred in a remote, environmentally and culturally sensitive region. A Federal Project Number (FPN) was opened and both MSD American Samoa and the Pacific Strike Team (PST) were involved in the response to the incident.¹²

After being contacted by Tri-Marine, Solar arrived on-scene as the Oil Spill Response Organization (OSRO) on May 22, 2015 to provide emergency clean-up and containment services for the CFV SEA HAWK No. 68.¹³ Solar boomed the vessel and shoreline, and commenced clean-up and removal activities. Solar placed absorbent padding, cleared loose debris from the vessel and transported it to shore, identified locations of tanks and checked for additional contaminants (diesel, oil, etc.), and removed and disposed of it as necessary.¹⁴

On June 5, 2015, the Pacific Strike team demobilized from the site.¹⁵ Solar demobilized on June 6, 2015.¹⁶

Responsible Parties

In accordance with the Oil Pollution Act of 1990, the owner of the CFV SEA HAWK No. 68 is identified as the Responsible Party (RP) for the incident.¹⁷ On August 16, 2019, the NPFC issued a Responsible Party Notification Letter to Mr. (b) (6).¹⁸ A Responsible Party Notification letter notifies the owners and/or operators that a claim was presented to the National Pollution Funds Center (NPFC) seeking reimbursement of uncompensated removal costs incurred as a result of response services performed that resulted from a vessel or facility that was identified as the source of a discharge or substantial threat of a discharge of oil to navigable waters of the United States.

II. CLAIMANT and RP:

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)¹⁹ require all claims for removal costs or damages must be presented to the RP

⁹ USCG National Strike Force Pacific Strike Team Incident Summary Report # NSF 032-15.

¹⁰ USCG POLREP One dated May 27, 2015.

¹¹ USCG POLREP One, Section 1(a), dated May 27, 2015.

¹² USCG National Strike Force Pacific Strike Team Incident Summary Report # NSF 032-15.

¹³ Pacific Strike Team SITREP Update #4 and Solar Environmental Oil Spill Report.

¹⁴ Pacific Strike Team SITREPS Updates #9 and #11 and Solar Environmental Oil Spill Report.

¹⁵ USCG National Strike Force Pacific Strike Team Incident Summary Report # NSF 032-15.

¹⁶ Solar Environmental Oil Spill Report.

¹⁷ USCG POLREP One, Section 1(a), dated May 27, 2015.

¹⁸ NPFC RP Notification Letter sent to Mr. (b) (6) via electronic mail.

¹⁹ 33 U.S.C. § 2701 *et seq.*

before seeking compensation from the NPFC.²⁰ When an RP denies a claim or has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.²¹

III. CLAIMANT AND NPFC:

At the time Solar initially submitted its claim to the NPFC, the NPFC determined that Solar had yet to establish proper presentment of costs to the RP. On August 21, 2019, the NPFC provided Solar the mailing address for the RP and informed Solar that proper presentment of all costs must be made before NPFC could adjudicate the claim.²² In August 2019, Solar presented its claim via four invoices containing a date range of May 22, 2015 through June 6, 2015.²³ After ninety days had elapsed without a response from the RP, the NPFC began to adjudicate the claim for \$182,407.00.²⁴

Solar submitted a description of the costs and subtracted out the previous payments by the RP:²⁵

1. \$225,305.00 for Solar personnel, equipment and material costs;
2. \$13,847.00 for Moon Divers costs;
3. \$11,600.00 for additional Pasefika Emergency Response costs;
4. \$3,700.00 for additional Marine Patrol costs.

Subtotal: \$254,452.00

Less \$52,405.00 (RP payment via his agent, Tri-Marine - Check # 4331)
Less \$20,000.00 (RP payment - Wire Transfer)

Total claimed costs: \$182,047.00

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁶ 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

²⁰ 33 CFR 136.103.

²¹ *Id.*

²² NPFC email dated August 21, 2019 to Solar regarding proper presentment of costs to the RP.

²³ DHL Shipment Receipt dated August 22, 2019. Note that the invoices totaled \$254,452.00; however, the RP had previously paid the claimant a total of \$72,405.00 towards these costs. There is no evidence in the record from the RP, its agent, or the claimant that these payments constituted a settlement offer by the RP. Further, the RP's agent (Tri-Marine) indicated that it believed the RP understood that it remained financially responsible for the remainder of the costs (i.e., \$182,047.00). *See*, email from (b) (6), Tri Marine, to NPFC dated May 11, 2020 confirming its position and referencing a letter from Tri Marine to EPA Region 9, dated April 14, 2016 (pp. 11-13) stating this conclusion, *on file* with the NPFC. Thus, the NPFC is adjudicating the claim for \$182,047.00, accordingly.

²⁴ 33 CFR 136.103.

²⁵ Solar Cost Summary, page 5 of 25; Solar invoice # 15120-OS dated June 8, 2015.

²⁶ 33 CFR Part 136.

evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.²⁷ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁸ 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.²⁹ An RP's liability is strict, joint, and several.³⁰ 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."³¹ 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."³² 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."³³

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁴ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁵ 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.³⁶

²⁷ See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2001 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).

²⁸ 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).

²⁹ 33 U.S.C. § 2702(a).

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

³¹ *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).

³² 33 U.S.C. § 2701(31).

³³ 33 U.S.C. § 2701(30).

³⁴ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³⁵ 33 CFR Part 136.

³⁶ 33 CFR 136.105.

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.³⁷

The NPFC analyzed each of these factors and determined the majority of the costs incurred by Solar 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.³⁸ All approved costs were supported by adequate documentation which included invoices, proofs of payment, and/or FOSCR statements.

The amount of compensable costs is \$174,347.00 while \$7,700.00 was deemed not compensable for the following reasons:

1. The Claimant invoiced for two instances of boom replacement at \$2,000.00 each.³⁹ The NPFC requested receipts and supporting documentation for this cost but did not receive it from the Claimant.⁴⁰ Therefore, \$4,000.00 in Solar Environmental costs are denied as not supported by the record.
2. The NPFC requested either proof of payment or an affirmation statement from the Claimant for its third-party invoice for the additional Marine Patrol costs.⁴¹ The NPFC did not receive this documentation and as such, \$3,700.00 in claimed additional Marine Patrol costs are denied.

Overall Denied Costs = \$7,700.00⁴²

VI. 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 **\$174,347.00**.

³⁷ 33 CFR 136.203; 33 CFR 136.205.

³⁸ Solar 2015 Rate Sheet.

³⁹ On May 23, 2015 and June 6, 2015 respectively.

⁴⁰ Email to Solar Environmental dated January 31, 2020.

⁴¹ *Id.*

⁴² *See*, Enclosure 3 Summary of Costs spreadsheet.

This determination is a settlement offer,⁴³ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁴⁴ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁵ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: (b) (6)

(b) (6)

Date of Supervisor's review: *5/13/2020*

Supervisor Action: Offer Approved: *Approved*

⁴³ 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).

⁴⁴ 33 CFR 136.115(b).

⁴⁵ *Id.*