

CLAIM SUMMARY / DETERMINATION

Claim Number:	M19022-0001
Claimant:	International Ship Repair & Marine Services, Inc.
Type of Claimant:	Corporation
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	(b) (6), (b)
Amount Requested:	\$282,301.50
Action Taken:	Denial

EXECUTIVE SUMMARY:

The barge B NO 285 arrived at berth in the Port of Tampa, August 18, 2018.¹ On May 30, 2019, USCG Sector St. Petersburg, Florida personnel visited the barge B NO 285 at International Ship Repair & Marine Services, Inc.'s (ISR or Claimant) berth 206, to ascertain the type and quantity of petroleum products on board. Considering outstanding prior-to-carriage-of-cargo deficiencies, questioned structural integrity, and potential for severe weather impacts during the Atlantic hurricane season, the USCG Federal On-Scene Coordinator (FOSC) deemed the vessel a substantial threat of discharge.² On May 31, 2019, the USCG Captain of the Port issued Administrative Order 003-19 instructing B No. 285 Corp. to remove all oil from the vessel by June 14, 2019.³ The responsible party failed to meet the objectives within the prescribed timeline as directed in Administrative order, so the USCG issued a Notice of Federal Assumption on June 16, 2019.⁴ Removal operations commenced June 20, 2019. On June 30, the USCG instructed Port of Tampa security to leave the gates to the berth 206 unlocked for access due to the environmental response. Removal operations were complete on September 20, 2019.⁵

As of November 18, 2019, the vessel still remained at the berth.⁶ For the reasons discussed below, the NPFC denies the claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On May 30, 2019, after USCG Sector St. Petersburg visited the barge B NO 285, and considering outstanding prior-to-carriage-of-cargo deficiencies, questioned structural integrity, and the potential for severe weather impacts during the Atlantic hurricane season, the USCG FOSC deemed the vessel a substantial threat of discharge while it sat at berth.

Responsible Party

The owner and operator of the vessel are B No 285 Corp and Bouchard Transportation Co. Inc.⁷ (Bouchard).

¹ Tampa Bay Pilots Arrival Card dated August 18, 2018.

² CG POLREP 1.

³ Administrative Order 003-19 dated May 31, 2019.

⁴ CG POLREP 46 and Final.

⁵ CG POLREP 46 and Final.

⁶ Email from LTJG (b) (6) to NPFC dated November 18, 2019.

Recovery Operations

When the RP failed to meet the objectives and timeline as directed in the Coast Guard Administrative Order 003-19, the Sector issued a Notice of Federal Assumption to the RP June 16, 2019. The Sector hired Clean Harbors Environmental Services and Moran Environmental Recovery, LLC under BOA contract on June 18, 2019. Removal operations commenced June 20, 2019 and were completed September 20, 2019. All of the petroleum products removed from the barge were sent for disposal October 15, 2019.⁸

II. CLAIMANT AND RP:

Via letter dated November 11, 2019, ISR presented its claimed costs to Bouchard with invoices attached. Via letter dated November 6, 2019, ISR presented its claimed costs to Bouchard's COFR Guarantor, Water Quality Insurance Syndicate (WQIS). WQIS denied ISR's claim via letter dated November 15, 2019. Claimant was in negotiations with Bouchard to settle the claim,⁹ but has not notified the NPFC of any such settlement.

III. CLAIMANT AND NPFC:

On October 22, 2019, ISR submitted an email to the NPFC attaching its claim form and an invoice for \$282,301.50 that had been sent to the USCG in Tampa. ISR was seeking payment for berthing income of the B NO 285 at its terminal berth 206 from June 30, 2019 to September 30, 2019 (93 days). They charged the CG for the time the barge was at the berth while the CG performed its environmental response (removal operations). CG Sector Tampa referred ISR to the NPFC for the costs. The NPFC determined that the claim had not been presented to either the RP or its guarantor since the documentation provided only showed that it had been sent to the CG in Tampa. By letter attached to an email the NPFC notified the claimant that it had to properly present its claim to the RP and its guarantor first.¹⁰ The claim was denied by WQIS on November 15, 2019, and more than 90 days have passed without payment by the RP to the claimant. Therefore, the claim has been properly presented as required under OPA.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹¹ 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

⁷ CG POLREP 1.

⁸ CG Administrative Order 003-19 dated May 31, 2019.

⁹ Letter from Claimant to NPFC dated December 18, 2019; and Email from Claimant to NPFC dated January 13, 2020.

¹⁰ Email from NPFC to Claimant dated October 24, 2019, with letter attached.

¹¹ 33 CFR Part 136.

the facts of the claim.¹² The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹³ 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.¹⁴ An RP's liability is strict, joint, and several.¹⁵ 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 victims' recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills."¹⁶ OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred a loss of profits or earning capacity where the responsible party has failed to do so. Loss of profits and earning capacity are defined as, "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant."¹⁷

The NPFC is authorized to pay claims for uncompensated damages that result from the discharge or substantial threat of the discharge of oil into navigable waters of the United States.¹⁸ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.¹⁹ 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.²⁰

In April and May of 2018, CG Sector Houston/Galveston inspectors cited the barge with at least six deficiencies, including severe wastage, scaling and questionable structural integrity, among others.²¹ On August 9, 2018, CG Sector Houston/Galveston issued the B NO 285 a Notice to Proceed to the Port of Tampa, so that the barge could undergo repairs of the

¹² 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)).

¹³ 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).

¹⁴ 33 U.S.C. § 2702(a).

¹⁵ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

¹⁶ *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).

¹⁷ 33 U.S.C. § 2702(b)(2)(E).

¹⁸ See generally, 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

¹⁹ 33 CFR Part 136.

²⁰ 33 CFR 136.105.

²¹ Three CG 835Vs dated April 27, 2018, May 3, 2018 and May 4, 2018.

deficiencies identified by the CG.²² The barge arrived at the ISR berth in the Port of Tampa, August 18, 2018.²³ In March 2019, the vessel remained at the berth without a valid Certificate of Inspection or International Load Line Certificate. The Coast Guard Captain of the Port (COTP) issued an order to the vessel because of these deficiencies.²⁴

On May 30, 2019, USCG Sector St. Petersburg Incident Management Division personnel visited the barge B NO 285. Seeing the vessel and considering outstanding prior-to-carriage-of-cargo deficiencies, questioned structural integrity, and the potential for severe weather impacts during the Atlantic hurricane season, the USCG FOOSC deemed the vessel a substantial threat of discharge while it sat at berth.²⁵ On May 31, 2019, the USCG Captain of the Port issued Administrative Order 003-19 instructing B No. 285 Corp. to remove all oil from the vessel by June 14, 2019.²⁶ The RP failed to comply with the Administrative Order by the deadline.²⁷ The Coast Guard took over the response and hired OSROs to removal all petroleum from the barge. The removal operation began June 20, 2019 and ended on September 20, 2019. The barge remained at the dock through at least March 25, 2020.²⁸

For a claim for damages, including loss of profits or earning capacity, the claimant must demonstrate that its damages were caused by the discharge or substantial discharge of oil into navigable waters of the United States.²⁹ ISR seeks lost berthing income that it alleges are owed to it because the Coast Guard performed an environmental response to the B NO 285 at its berth from June through September 2019. ISR alleges that the losses are due to the oil pollution incident. The NPFC disagrees.

The vessel arrived at the berth in August of 2018, with many deficiencies that required repairs before the vessel would be allowed to move within the port and/or leave the port.³⁰ Bouchard brought the vessel to ISR's berth for repairs. In May 2019, when the CG determined that the vessel posed a substantial threat of discharging oil as it remained at berth with outstanding deficiencies and repairs.

The B NO 285 was held at ISR and remains there in accordance with a Captain of the Port Order that prohibits moving the barge within the port or from leaving the port until Bouchard complies with the Order.³¹

The vessel remains at the berth in March 2020.³² Within the period from August 2018 to the present, the CG did perform a several-month removal response to mitigate a substantial threat of an oil discharge to a navigable water of the United States. The vessel was not taken to the berth for this removal response. The vessel was already at the berth before the pollution incident and it

²² CG Permit to Proceed to Another Port for Repairs, Form CG-948 dated August 9, 2018.

²³ Tampa Bay Pilots Arrival Card dated August 18, 2018.

²⁴ COTP Order 19-009 dated March 20, 2019.

²⁵ CG POLREP 1.

²⁶ Administrative Order 003-19 dated May 31, 2019.

²⁷ CG POLREP 46 and Final.

²⁸ Email from LTJG (b) to NPFC dated March 25, 2020.

²⁹ 33 CFR Part 136. (b)

³⁰ CG Permit to Proceed to Another Port for Repairs, Form CG-948 dated August 9, 2018.

³¹ COTP Order 19-009 dated March 20, 2019. The deficiencies referenced in the Order were identified in CG 835Vs issued by CG inspectors in the Port of Houston in April and May 2018.

³² Email from LTJG (b) to NPFC dated March 25, 2020.

remains there well after the incident response was complete. The berthing income claimed did not accrue to ISR because of the oil pollution incident.

The cause for the berthing income loss is Bouchard's failure to pay ISR under their contract for berthing.³³ The barge was not at the berth for the claimed loss period because of the oil response. The oil response was performed at the berth because that was the location of the vessel when the threat was identified. The oil response was not the reason the vessel was at the berth, nor why it remains at the berth as of March 25, 2020. Therefore, the claimant has not demonstrated that it lost profits as a result of the OPA oil-pollution incident.

The claim must be denied.

Additionally, the claim cannot be paid because the claimant seeks the same costs in court against Bouchard.³⁴

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, ISR's request for lost income is denied.

Claim Supervisor:	(b) (6), (b)	(b) (6), (b)(b) (6), (b)(b) (6), (b) (b) (6), (b)(b) (6), (b)(b) (6), (b)
Date of Supervisor's review:	May 1, 2020	
Supervisor Action:	<i>Denial Approved</i>	
Supervisor's Comments:		

³³ Confidential Settlement Agreement and Mutual Release dated May 15, 2019.

³⁴ Letter from Claimant to NPFC dated December 18, 2019.