

CLAIM SUMMARY / DETERMINATION

Claim Number:	N20005-0001
Claimant:	Bryant Industrial Services, LLC
Type of Claimant:	Private
Type of Claim:	Removal Costs
Claim Manager:	(b), (b) (6)
Amount Requested:	\$62,719.12
Action Taken:	Offer in the amount of \$62,168.09

EXECUTIVE SUMMARY:

On October 25, 2019 at approximately 2339 local time, the San Padre Island Police Department reported that San Padre Island EMS were dispatched to the United States Coast Guard (USCG) South San Padre Island small boat station in reference to four (4) patients that had been pulled from the water by the Coast Guard and were transported to the Coast Guard's San Padre Island station. The Police Report states that Coast Guard personnel relayed that the four men were the crew to a shrimping vessel that had begun to sink at the jetties/entrance to the Brownsville Ship Channel, a navigable waterway of the United States.¹ Marine Safety Detachment (MSD) Brownsville reported the incident to the National Response Center (NRC) via report # 1262214 on October 26, 2019 at 00:00 local time.²

On October 26, 2019, USCG Sector Corpus Christi issued a Captain of the Port (COTP) Administrative Order to the owner of the Commercial Fishing Vessel (CFV) LITTLE JOSEPH.³ MSD Brownsville, in its capacity as the Federal On-Scene Coordinator's Representative (FOSCR) determined that there was an actual discharge and continuing substantial threat of discharge of oil requiring on-site oil spill response and a subsequent salvage operation.⁴

In accordance with the Oil Pollution Act of 1990, the owner of the CFV LITTLE JOSEPH was identified as the Responsible Party (RP) for the incident.⁵ The RP hired Bryant Industrial Services, LLC ("Bryant" or "Claimant") to perform oil pollution response and salvage activities.⁶ Bryant 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 \$62,719.12.⁸ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$62,168.09 of the requested \$62,719.12 is compensable and offers this amount as full and final compensation of this claim.

¹ San Padre Island Police Report # 19-02199 dated October 26, 2019.

² National Response Center Report # 1262214 dated October 26, 2019.

³ USCG Captain of the Port (COTP) Admin Order dated October 26, 2019 to Mr. (b), (b) (6), owner of the vessel.

⁴ USCG POLREP Three and Final dated March 13, 2020.

⁵ *Id.*

⁶ USCG POLREP One dated October 28, 2019.

⁷ Email from Claimant providing proof of presentment dated January 9, 2020.

⁸ 33 CFR 136.103(c).

I. INCIDENT, RECOVERY OPERATIONS, AND RESPONSIBLE PARTY:

Incident and Recovery Operations

USCG Sector Corpus Christi received notification from MSD Brownsville stating that on October 25, 2019, the CFV LITTLE JOSEPH SANK while transiting the Brownsville Ship Channel in Port Isabel, TX with a potential of approximately 9,000 gallons of diesel fuel and 50 gallons of lubricating oil onboard.⁹ A COTP Administrative Order was issued to the vessel owner, Mr. (b), (b) (6), detailing actions that needed to be completed including submitting a plan detailing specific response actions to mitigate or prevent the threat of any additional discharge from the vessel by 1600 local time on October 27, 2019.¹⁰

Bryant performed response actions under the direct supervision of the FOSCR as well as the State On-Scene Coordinator (SOSC), Texas General Land Office (TGLO).¹¹ Bryant personnel initially arrived on-scene on October 26, 2019, working on a salvage plan with USCG Sector Corpus Christi personnel. Weather and an unfavorable sea state¹² initially prevented operations, and so Bryant personnel and equipment were on stand-by from October 31 until November 5, 2019. Once they were cleared to begin operations once more, Bryant personnel were able to remove fuel from the first two tanks (11/05/2019 and 11/07/2019), but not the third because of its position in the sand.

It was at this same time that the RP, Mr. (b), (b), (b) (6), reported that he was unable to continue recovery operations, and was issued a Notice of Federal Assumption on November 7, 2019. It is at this point that the USCG took over removal operations, contracting with both Miller Environmental and Underwater Services for the remainder of the incident. A Federal Project Number N20005 was opened for this incident.

Responsible Party

In accordance with the Oil Pollution Act of 1990, the owner of the CFV LITTLE JOSEPH, Mr. (b), (b) (6), was identified as the Responsible Party (RP) for the incident.¹³ On September 18, 2020, the NPFC issued a Responsible Party Notification Letter to Mr. (b), (b) (6).¹⁴ A Responsible Party Notification letter notifies the owner and/or operator 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:

⁹USCG POLREP One dated October 28, 2019.

¹⁰ USCG Captain of the Port (COTP) Admin Order dated October 26, 2019 to Mr. (b), (b) (6), owner of the vessel.

¹¹ TGLO case file #2019-3862.

¹² Email from MSTC (b), (b) (6), dated October 23, 2020.

¹³ USCG POLREP One, Section I(a), dated October 28, 2019.

¹⁴ NPFC RP Notification Letter sent to Mr. (b), (b) (6) via electronic mail and USPS Certified Mail.

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)¹⁵ require all claims for removal costs or damages must be presented to the RP before seeking compensation from the NPFC.¹⁶ 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.¹⁷

III. CLAIMANT AND NPFC:

Bryant presented its uncompensated costs claim to the National Pollution Funds Center (NPFC) for \$62,719.12.¹⁸ The costs claimed are for Bryant personnel that responded on-scene beginning October 25 through November 7, 2019. The costs are for personnel time, divers, utility boats, fuel and miscellaneous supplies.¹⁹

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁰ 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.²¹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²² 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.²³ An RP's liability is strict, joint, and several.²⁴ 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

¹⁵ 33 U.S.C. § 2701 *et seq.*

¹⁶ 33 CFR 136.103.

¹⁷ *Id.*

¹⁸ 33 CFR 136.103(c).

¹⁹ See NPFC claim submission # N20005-0001, dated September 15, 2020.

²⁰ 33 CFR Part 136.

²¹ 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).

²² 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).

²³ 33 U.S.C. § 2702(a).

²⁴ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

favoring those responsible for the spills.”²⁵ 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.”²⁶ 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.”²⁷

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁸ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁹ 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.³⁰

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.³¹

The NPFC analyzed each of these factors and determined the majority of the costs incurred by Bryant 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.³² All approved costs were supported by adequate documentation, which included the Bryant Invoicing, the TGLO Incident Report # 2019-3862 and FOSC statements.

The amount of compensable costs is \$62,168.09, while \$551.03 was deemed not compensable for the following reasons:

²⁵ *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).

²⁶ 33 U.S.C. § 2701(31).

²⁷ 33 U.S.C. § 2701(30).

²⁸ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁹ 33 CFR Part 136.

³⁰ 33 CFR 136.105.

³¹ 33 CFR 136.203; 33 CFR 136.205.

³² Bryant 2019 Rate Sheets.

1. Costs on November 7, 2019 in the amount of \$500.00 are denied because the Claimant has not provided proof of payment for one of the claimed divers.³³
2. The third-party supplies and lodging costs were marked up 25% instead of the 20% allowed by the rate schedule. The difference between the two were denied, for a total of \$9.03 in claimed third-party costs denied.³⁴
3. The Claimant applied an 8.25% sales tax to all invoiced costs. To reflect those costs not deemed compensable, the amount approved was adjusted and the difference in the amount of \$42.00 was denied.

Overall Denied Costs = \$551.03

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Bryant's request for uncompensated removal costs is approved in the amount of **\$62,168.09**.

This determination is a settlement offer,³⁵ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁶ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.³⁷ 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: *11/16/2020*

Supervisor Action: Offer Approved: *Approved*

³³ Diver Invoices and Proof of Payment and Email from (b), (b) (6), dated November 3, 2020

³⁴ Third-party receipts and Bryant 2019 Rate Sheets.

³⁵ 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).

³⁶ 33 CFR § 136.115(b).

³⁷ *Id.*