

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	919011-0003
Claimant:	RESOLVE SALVAGE & FIRE (AMERICAS), INC.
Type of Claimant:	OSRO
Type of Claim:	REMOVAL COSTS
Claim Manager:	(b), (b) (6)
Amount Requested:	\$323,710.24
Action Taken:	Denial

EXECUTIVE SUMMARY:

In September 2017, Hurricane Maria struck the United States, Virgin Islands. The hurricane caused damage to vessels. One vessel casualty was the M/V BRIGADIER, a Ro-Ro / Container vessel that broke free from its moorings and ran aground approximately 20-feet off of Little Saint James Island, to the south east of St. John where she grounded on a shallow shoal. On October 2, 2017, the vessel's owner hired Resolve Salvage & Fire (Americas), Inc. (Resolve or Claimant) to salvage and refloat the vessel.² Resolve began its survey of the vessel on October 4, 2017,³ and determined that it had to remove oil from the vessel before attempting to refloat it. Over the next few weeks, Resolve pumped off the oil and refloated the vessel on November 15, 2017.⁴ Resolve states that operations ended December 18, 2017.⁵

The responsible party (RP) has been identified as Boynes Trucking System, Inc., (Boynes) as the owner of the Ro-Ro/Container vessel.⁶ Resolve was hired by the RP and executed an international BIMCO Wreckhire Agreement dated October 2, 2017.⁷ Within that agreement was an arbitration provision for resolution of disputes between the parties.⁸ The RP's hull and machinery insurer and pollution insurers made three separate payments to Resolve for the services provided.⁹ However, an outstanding amount totaling, \$323,710.24, remained unpaid. Resolve took the dispute over the outstanding balance to arbitration. The RP did not appear at the arbitration. The arbitration panel awarded Resolve, \$323,710.24,¹⁰ which Resolve sought to collect from the RP, Boynes. Boynes stated that the storm destroyed their business so they could

¹ This determination focuses on the issue of subrogation and its application to the claimant. However, in addition, this claimant recently sent a letter to the NPFC indicating it is in litigation to recover the costs it alleges it incurred in a related claim and in this present claim; case number 1:20-cv-10308 in the Southern District of New York. The NPFC notes that the Oil Pollution Act provides that "no claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim." *See*, 33 U.S.C. § 2713(b)(2). As such, in addition to the reasons for denial outlined herein, the NPFC notes that it could not otherwise approve this claim while the matter is in litigation.

² Resolve and Boynes BIMCO Wreckhire Agreement with date of October 2, 2017 listed on Annexes.

³ Page 1 of Resolve Executive Summary to its Claim Submission dated July 24, 2020.

⁴ Resolve Contractor's Daily Report, Section, three, Status of Casualty, and Section four, Status of Wreck Site, dated November 15, 2017.

⁵ Page 1 of Resolve Executive Summary to its Claim submission dated July 24, 2020.

⁶ CG 2692 – Report of Marine Casualty completed by [REDACTED] dated October 24, 2017.

⁷ Resolve and Boynes Trucking System, Inc. BIMCO Wreckhire Agreement dated October 2, 2017.

⁸ *Id.* Box 11(15), CL 21(a), 21(b) or 21(c) of CL 21.

⁹ *See*, Claim Submission pages 85, 86, 87, 88, and 89, of 160 for three itemized payments received.

¹⁰ *See*, Item #10 in the claim submission Table of Contents entitled Arbitration Final Award document.

not pay.¹¹ Therefore, Resolve presented its claim to the OSLTF for the, \$323,710.24 outstanding amount it attributes to pollution response. The NPFC denies the claim due to the Claimant's failure to retain all rights to which the OSLTF may be subrogated.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

In the aftermath of Hurricane Maria, the M/V BRIGADIER, was hard aground on the north end of the Little St. James Island, south east of St. Thomas in the United States (U.S.) Virgin Islands. The vessel was pushed onto the shallow shoal and was seated with the bow lifted out of the water with a five-degree trim by the stern and was seated with very little heel.¹² The survey team identified little damage on the exterior of the ship, but due to the grounding orientation the bottom plating along the length of the vessel was not accessible. Several large boulders were identified to the stern of the vessel that required repositioning prior to refloating the vessel.¹³ Resolve estimated that 3,000 to 5,000 gallons of fuel remained onboard between the main diesel tanks and the engine room day tank.¹⁴

Responsible Party

Boynes Trucking System, Inc. is the owner of the Ro-Ro/Container vessel, M/V BRIGADIER.¹⁵ The operator is identified as Global Marine LLC.¹⁶ Boynes hired Resolve to salvage and refloat the vessel. The NPFC issued a Responsible Party Notification Letter to the RP, Boynes, on August 3, 2020.¹⁷ The NPFC has received no notification or response from the RP. A Responsible Party Notification letter notifies the owner and/or operator that a claim was presented to the National Pollution Funds Center (NPFC). We notified the RP that Resolve is seeking reimbursement of uncompensated removal costs incurred as a result of response services performed for their vessel that was identified as source of a substantial threat of a discharge of oil to navigable waters of the United States.

Recovery Operations

Boynes Trucking System, Inc. and Resolve executed a BIMCO Wreckhire Agreement for Resolve to salvage the vessel. Boynes designated Braemar Technical Services as its representative in dealing with Resolve on the refloating of the vessel. Braemar attended the survey performed by Resolve.

¹¹ See, Item #14 in the claim submission Table of Contents, Letter from Boynes Trucking System to Resolve's attorney dated July 9, 2020.

¹² Resolve M/V BRIGADIER Survey Report, see page 2 of 16, dated October 4, 2017.

¹³ Resolve M/V BRIGADIER Survey Report, see page 12 of 16, Fuel and Oil removal Section, dated October 4, 2017.

¹⁴ Resolve M/V BRIGADIER Survey Report, see page 14 of 16, Fuel and Oil Removal Section, dated October 4, 2017.

¹⁵ CG MISLE Activity # 6298327; CG 2692 – Report of Marine Casualty Completed by (b), (b) dated October 24, 2017.

¹⁶ Vessel Critical Profile dated August 31, 2020.

¹⁷ RP Notification Letter to Boynes dated August 3, 2020.

After the survey was completed, Resolve determined that it had to remove the oil from the vessel in order to prevent a pollution risk to the environment. The Coast Guard was aware of the vessel and its casualty and opened a MISLE case on October 31, 2017.¹⁸ However, there is no record of Federal On-Scene Coordinator (FOSC) direction, coordination or oversight. Resolve removed the oil from the vessel and pumped it onto a shore side tanker.¹⁹ Resolve patched ballast tanks²⁰, tested vent pipes for blowdown operations²¹, welded on a towing bit²² and patched the bulkhead inside the passageway.²³ It was successfully refloated on November 15, 2017 and was towed to deep water where the Tug CHAMPION connected alongside.²⁴ Resolve sent certificate of delivery to owners on November 20, 2017.²⁵ Resolve continued care taking of the vessel and pumped off minor leaks between November 22, 2017 and November 25, 2017.²⁶

Braemar provided a final report on the project, in which it apportioned Resolve's services between salvage and pollution response. The costs for salvage and pollution prevention services, inclusive of mobilization costs were split with the work on MISTER B and adjusted for the delays incurred due to negotiations with the landowner. The pollution response was a total of \$484,148.27 and salvage came to a total of \$793,700.64, for a final total of \$1,277,848.91.²⁷

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²⁸ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.²⁹

Resolve submitted its request for compensation to the owner of the vessel, M/V BRIGADIER via one (1) invoice, # 103522 dated January 18, 2018 in the amount of \$1,277,848.94 for services rendered that also contains a payment credit at the bottom in the amount of \$300,000.00 bringing the final invoiced amount to \$977,848.94.³⁰ The RP's insurers made three (3) partial payments dated December 14, 2017, February 9, 2018, and April 20, 2018.³¹

¹⁸ CG-2692, Seven (7) photographs, and photo of the BRIGADIER afloat post-hurricane and back at dock in Enigh Pond (Documents retrieved from CG MISLE Activity # 6298327).

¹⁹ Resolve Daily Contractor Reports, Section 5, Services, dated October 30, 2017 through November 2, 2017.

²⁰ Resolve Daily Contractor Report, Section 5, Services, item 4, dated November 2, 2017 and November 3, 2017.

²¹ Resolve Daily Contractor Report, Section 5, Services, item 4, dated November 6, 2017.

²² Resolve Daily Contractor Report, Section 5, Services, item 5, dated November 6, 2017.

²³ Resolve Daily Contractor Report, Section 5, Services, item 6, dated November 6, 2017.

²⁴ Resolve Daily Contractor Report, Section 5, Services, item 5, dated November 15, 2017.

²⁵ Resolve Daily Contractor Report, Section 5, Services, item 4, dated November 20, 2017.

²⁶ Resolve Daily Contractor Report, Section 5, Services, dated November 22, 2017 through December 10, 2017.

²⁷ Braemar Survey Report, Costs for Salvage and Pollution Prevention Section, page 8 of 35, dated November 20, 2017.

²⁸ 33 U.S.C. § 2701 *et seq.*

²⁹ 33 CFR 136.103(c)(1).

³⁰ Resolve invoice # 103522. Resolve provided invoice # 103253 dated November 14, 2017 which was used to record an RP payment of \$300,000.00, which was then credited to the actual service invoice # 103522 dated January 18, 2018. *See*, Claim Submission under Claimant's Payments Received tab, page 66 of 160.

³¹ *See*, Claim Submission under Claimant's Payments Received tab, pages 85 to 89 of 160.

In accordance with the BIMCO Wreckhire contract provisions³² between Resolve and the RP, they did not appear at the arbitration proceeding. The arbitration panel awarded Resolve a total of \$467,819.61 which included the outstanding due, interest, attorney's fees, and arbitrator's fees. Resolve demanded payment of this amount from Boynes, who notified Resolve that it could not pay.³³ Therefore, Resolve submitted its claim to the NPFC.

III. CLAIMANT AND NPFC:

When an RP has not settled a claim after ninety days of receipt, a claimant may elect to present its claim to the NPFC.³⁴ After Boynes notified Resolve that Boynes was out of business and could not pay them, Resolve presented the claim to the NPFC seeking \$323,710.24. On July 29, 2020, the NPFC received the claim which was dated July 24, 2020.³⁵ Claimant provided proof of submission to the owner of M/V BRIGADIER, along with proof of the RP's denial to pay the remaining costs.³⁶ Resolve alleges that the entire amount represents pollution response costs.³⁷ The NPFC began the adjudication process of the claim August 3, 2020.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁸ 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.³⁹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁴⁰ 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.⁴¹ An RP's liability

³² See, BIMCO Wreckhire arbitration provisions located in Box 11(15), CL 21(a), 21(b) or 21(c) of CL 21.

³³ Letter from Boynes to Resolve's attorney dated July 9, 2020.

³⁴ 33 CFR 136.103.

³⁵ Resolve's claim submission, See, pages one through eleven, dated July 24, 2020.

³⁶ Letter from Boynes Trucking System, dated July 9, 2020.

³⁷ See, page 3 of Resolve's Executive Summary to its Claim submission dated July 24, 2020.

³⁸ 33 CFR Part 136.

³⁹ 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)).

⁴⁰ 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).

⁴¹ 33 U.S.C. § 2702(a).

is strict, joint, and several.⁴² 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.”⁴³ 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.”⁴⁴ 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.”⁴⁵

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁷ 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.⁴⁸

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.⁴⁹

Additionally, before reimbursement can be authorized, other pertinent provisions of OPA must be satisfied, to wit: “[p]ayment of any claim or obligation by the Fund under this Act *shall be subject to* the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.”⁵⁰ Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be

⁴² See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

⁴³ *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).

⁴⁴ 33 U.S.C. § 2701(31).

⁴⁵ 33 U.S.C. § 2701(30).

⁴⁶ See generally, 33 U.S.C. §2712; 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁷ 33 CFR Part 136.

⁴⁸ 33 CFR 136.105.

⁴⁹ 33 CFR 136.203; 33 CFR 136.205.

⁵⁰ 33 U.S.C. § 2712(f). Emphasis added, noting this language imposes a threshold requirement that must be satisfied before the Oil Spill Liability Trust Fund can be used to pay a claim.

subrogated to all rights, claims, and causes of action that the claimant has under any other law.”⁵¹ Importantly here, the OPA also provides parties with the right to have their disputes resolved by a federal court.⁵²

The statute uses the phrase “all rights” without stating any temporal limitation. The word “all” is itself the quintessential word used to indicate an absence of limits. Because the statute does not place any temporal limits on the phrase “all rights,” the Congressional intent for a claimant to preserve “all” of its subrogation rights against a responsible party is clear.

Should a claimant limit its rights in any way, the claimant cannot transfer “all rights” by subrogation to the Fund were it to compensate the claimant. In the claim at hand, the arbitration provision in the Claimant’s contract with the responsible party is limiting language. If the OSLTF were to pay claims when the claimant has limited its options to recover against a responsible party, the deterrent purpose of OPA would be eliminated by turning the Fund into an insurance policy for both oil spillers and companies that make business-driven or ill-advised litigation (or pre-litigation) decisions to release, or otherwise agree to limited rights against, those oil spillers. “The Act provides limited compensation when the party responsible for an oil spill is unavailable. It does not function as a private insurance company.”⁵³

As the OSLTF’s trustee, the NPFC must decide how to best vindicate its subrogation rights against a responsible party, not the claimant.

Importantly here, the OPA also provides parties with the right to have their disputes resolved by a federal court.⁵⁴ Congress intended that, subject to a very limited exception not implicated here,⁵⁵ “the United States district courts **shall have exclusive original jurisdiction** over all controversies arising under [OPA] and that venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides.... [T]he Fund shall reside in the District of Columbia.”⁵⁶

The rights provided by 33 U.S.C. § 2717 are important. The ability to have a controversy resolved by a federal court is not a trivial right. Although Resolve had the absolute right to enter into an agreement to resolve all of its disputes by arbitration, Resolve may not waive its right to sue the responsible party in federal court and remain eligible for OSLTF reimbursement. If the NPFC paid Resolve’s claim, then under subrogation, the NPFC would be bound by the terms of the contract as Resolve agreed to them. Or in other words, the NPFC would be forced to enforce its subrogation rights against the responsible party in the same manner Resolve would be required⁵⁷ as opposed to a federal court as contemplated by OPA.

⁵¹ 33 U.S.C. § 2715(a).

⁵² 33 U.S.C. § 2717(b).

⁵³ *Gatlin Oil Co. v. United States*, 169 F.3d 207, 213 (4th Cir. 1999).

⁵⁴ 33 U.S.C. §2717(b).

⁵⁵ Those cases which involve state and federal claims for removal costs or damages can be brought together in a state forum rather than requiring plaintiffs to bring their OPA claims exclusively in federal court. *See*, 33 U.S.C. § 2717(c). *See, Tanguis v. M/V WESTCHESTER*, 153 F.Supp.2d 859 (E.D. La. 2001) for a more detailed discussion. *See also*, 33 U.S.C. § 2717(a)(also not implicated).

⁵⁶ 33 U.S.C. § 2717(b) (emphasis added).

⁵⁷ BIMCO Wreckhire Agreement

The NPFC has long held, and courts have long agreed, the proper interpretation of the term “all rights” in OPA means “all rights,” not merely all rights the claimant might have at the time of the claim.⁵⁸ The plain language of 33 U.S.C. § 2712(f), and the history of OPA as a whole establish that the Fund is available to pay claims only where a claimant has protected all of its rights to recover against the responsible party.

Because a claimant seeking compensation from the Fund under OPA must retain all rights of recovery against a responsible party permitting the NPFC to acquire them by subrogation, and the claimant has not demonstrated that it has done so, no part of this claim can be reimbursed by the OSLTF.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Resolve Salvage & Fire (Americas), Inc.’s request for uncompensated removal costs is denied.

Because the NPFC determined that the claimant is barred from recovering its claimed costs from the OSLTF on the statutory issue of subrogation, the NPFC has not adjudicated any other issues with the claim or its associated costs.

	(b), (b) (6)
Claim Supervisor:	(b), (b) (6)
Date of Supervisor’s review:	<i>1/22/2021</i>
Supervisor Action:	<i>Denial Approved</i>
Supervisor’s Comments:	

⁵⁸ *Kenan Transp. Co. v. U.S. Coast Guard*, 2006 WL 1455658 at *4, *4 n.7 (N.D. Ga. 2006). That Congress required a claimant to preserve all rights... is clear in the legislative history.... Congress required broadly that the claimant assure all rights be acquired by the Government.... Reimbursement is allowed only if claims... are preserved so they may be asserted by the Government as subrogee of the claims. That Congress would condition the payment of a claim in return for the claimant broadly protecting the Government’s right to assert a broad set of claims... makes practical and legal sense. *Affirmed, Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed.Appx. 902, 904 (11th Cir. 2006); *Accord., Rich Franklin Corp. v. U.S. Dep’t of Homeland Security*, 2008 WL 337978 (D. Or. 2008).