

CLAIM SUMMARY / DETERMINATION

Claim Number:	921012-0001
Claimant:	Environmental Safety & Health Consulting Services, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$484,962.12
Action Taken:	Offer in the amount of \$484,866.12

EXECUTIVE SUMMARY:

On September 5, 2020, a failure occurred in the spinner gauge on top of the well head of oil well #LL&E 326, discharging approximately 126 gallons of crude oil into Bayou Lafourche;¹ a navigable waterway of the United States.² The oil spill created a dark black oil sheen on the water's surface estimated to be 1,500ft wide by 1,500ft long.³ Coast Guard Marine Safety Unit (MSU) Houma was the Federal On-Scene Coordinator (FOSC).⁴

White Marlin Oil & Gas Company ("White Marlin" or "RP"), is the listed lessee/permittee of the well,⁵ and is the responsible party (RP) as defined by the Oil Pollution Act of 1990.⁶ White Marlin hired Environmental Safety and Health Consulting Services, Inc. ("ES&H" or "Claimant") as the oil spill removal organization (OSRO) to perform removal activities.⁷ The OSRO activated personnel and equipment, and deployed boom in order to contain the spill.⁸ ES&H presented its uncompensated removal costs to the RP.⁹ After ninety days, having not reached a settlement with the RP days after presentment,¹⁰ ES&H presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$484,962.12.¹¹

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$484,866.12 of the requested amount is compensable and offers this amount as full and final compensation of the claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

¹ See, MSU Houma Situation Report (SITREP) dated September 5, 2020. See also, MSU Houma Pollution Responder Statement, dated October 13, 2020.

² MSU Houma SITREP dated September 5, 2020.

³ *Id.*

⁴ *Id.*

⁵ 33 U.S.C. § 2701.

⁶ USCG Notice of Federal Interest dated October 13, 2020.

⁷ Master Service Agreement between White Marlin and ES&H dated January 24, 2017.

⁸ ES&H claim submission dated January 22, 2021.

⁹ ES&H provided proof of presentment for five invoices totaling \$484,962.12. See, emails dated October 7, 2020, November 12, 2020, November 19, 2020 and December 4, 2020; Invoice #1-57298, #1-57329, #1-57372, 1-57427, and 1-57634.

¹⁰ Summary of Phone Conversation between the NPFC and White Marlin dated February 9 2021.

¹¹ ES&H claim submission received January 26, 2021.

Incident

On September 5, 2020, oil well # LL&E 326 (serial# 219187), discharged approximately 126 gallons of crude oil into Bayou Lafourche; a navigable waterway of the United States.¹² The discharge occurred due to a failure of the spinner gauge on top of the well head,¹³ causing crude oil to spray from the gauge and creating a dark black oil sheen on the water's surface that was estimated to be 1,500ft wide by 1,500ft long.¹⁴ The lessee/permittee for the well is White Marlin Oil & Gas Company.¹⁵

A local fisherman observed the spray and secured the discharge by closing a valve on the wellhead tree. This fisherman then made notification to White Marlin, who in turn made notification to the CG National Response Center.¹⁶ White Marlin deployed hard boom to ensure the discharge was properly contained and contacted its OSRO, ES&H, to conduct removal activities.¹⁷

Responsible Party

In accordance with the Oil Pollution Act of 1990, the lessee/permittee of the oil well # LL&E 326 is the Responsible Party (RP) for the incident.¹⁸ On November 25 2020, the NPFC issued a Responsible Party Notification Letter to White Marlin.¹⁹ A Responsible Party Notification letter notifies the lessee/permittee 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.

Recovery Operations

On September 5, 2020, White Marlin hired ES&H to perform oil spill removal activities.²⁰ ES&H performed cleanup operations and managed disposal from September 5, 2020 through October 8, 2020.²¹ ES&H returned on October 19, 2020, to perform the final cleanup of all operations.²²

Coast Guard Marine Safety Unit Houma (MSU Houma) was the Federal On-Scene Coordinator (FOSC). It conducted an on-scene assessment and investigation of the spill. The

¹² See, MSU Houma SITREP dated September 5, 2020.

¹³ MSU Houma Pollution Responder Statement dated October 13, 2020.

¹⁴ MSU Houma SITREP dated September 5, 2020.

¹⁵ State of Louisiana, Department of Natural Resources Office of Conservation, Amended Permit to Drill for Minerals dated August 26, 2015 for well serial # 219187.

¹⁶ National Response Center (NRC) Report #1286594, dated September 5, 2020.

¹⁷ Master Service Agreement between White Marlin and ES&H dated January 24, 2017.

¹⁸ See, 33 U.S.C. § 2701 (32). See also, Louisiana Department of Natural Resources - Permit to Drill issued to White Marlin for Well 219187.

¹⁹ NPFC RP Notification Letter sent to White Marlin dated January 27, 2021.

²⁰ Master Service Agreement between White Marlin and ES&H dated January 24, 2017.

²¹ See, MSU Houma SITREP dated September 5, 2020. See also, emails dated October 7, 2020, November 12, 2020, November 19, 2020 and December 4, 2020.

²² ES&H disposed of remaining soiled material on November 3, 2020. See, ES&H Invoice #1-57634 dated November 16, 2020.

FOSC performed oversight of ES&H's cleanup activities and declared the response complete October 19, 2020.²³

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²⁴ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.²⁵

White Marlin indicated to the NPFC that it had received the invoices from the claimant but was unable to pay them in just one payment.²⁶ White Marline further explained that it proposed pay the costs submitted by ES&H in smaller payments, but ES&H did not agree to this arrangement.²⁷

III. CLAIMANT AND NPFC:

When a RP has not settled a claim after ninety days of receipt or denies a claim, a claimant may elect to present its claim to the NPFC.²⁸ The Claimant submitted all costs to the RP via email between October 7, 2020 through December 5, 2020.²⁹ On January 26, 2021, the NPFC received a claim for uncompensated removal costs from Environmental Safety & Health Consulting Services, Inc., dated January 22, 2021.³⁰

ES&H provided the NPFC with five invoices explaining the costs claimed, photo documentation of the spill incident, supervisor logs, signed daily tickets and a published rate sheet.³¹

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³² 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

²³ MSU Houma SITREP dated September 5, 2020.

²⁴ 33 U.S.C. § 2701 *et seq.*

²⁵ 33 CFR 136.103.

²⁶ Summary of Phone Conversation between the NPFC and White Marlin dated February 9, 2021.

²⁷ *Id.*

²⁸ 33 CFR 136.103.

²⁹ ES&H provided proof of presentment for five (5) invoices totaling \$484,962.12. *See*, emails dated October 7, 2020, November 12, 2020, November 19, 2020 and December 4, 2020; Invoice # 1-57298, #1-57329, #1-57372, 1-57427, and 1-57634.

³⁰ ES&H claim submission dated January 22, 2020.

³¹ *See*, emails from ES&H to NPFC dated January 26, 2021.

³² 33 CFR Part 136.

the facts of the claim.³³ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³⁴ 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.³⁵ An RP's liability is strict, joint, and several.³⁶ 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."³⁷ 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."³⁸ 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."³⁹

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁰ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴¹ 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.⁴²

³³ 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)).

³⁴ 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).

³⁵ 33 U.S.C. § 2702(a).

³⁶ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³⁷ *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).

³⁸ 33 U.S.C. § 2701(31).

³⁹ 33 U.S.C. § 2701(30).

⁴⁰ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴¹ 33 CFR Part 136.

⁴² 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.⁴³

The NPFC analyzed each of these factors and determined the amount of compensable removal costs is \$484,866.12. A total of \$96.00 is denied, as indicated below:

ES&H submitted a claim \$240.00 for 12 chemical boom lights used on 9/5/2020.⁴⁴ The NPFC found that the signed daily ticket dated 9/5/2020 supports the use, as claimed. However, the ES&H rate schedule indicates that the rate is \$12.00 per light,⁴⁵ not \$20.00 per light as billed on Invoice 1-57298.⁴⁶ As such, the claim for boom lights is approved for \$144.00, while the \$96.00 is denied.⁴⁷

Overall Denied Costs: \$96.00

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, ES&H's request for uncompensated removal costs is approved in the amount of **\$484,866.12**. This determination is a settlement offer,⁴⁸ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁴⁹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵⁰ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

⁴³ 33 CFR 136.203; 33 CFR 136.205.

⁴⁴ ES&H Invoice #1-57298 dated September 18, 2020.

⁴⁵ 2020 ES&H Rate Schedule.

⁴⁶ ES&H Invoice #1-57298 dated September 18, 2020.

⁴⁷ See, Enclosure 3 for a detailed accounting of costs.

⁴⁸ 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).

⁴⁹ 33 CFR 136.115(b).

⁵⁰ *Id.*

(b) (6)

Claim Supervisor:

(b) (6)

Date of Supervisor's review:

Supervisor Action: *Offer Approved*