

## CLAIM SUMMARY / DETERMINATION<sup>1</sup>

<b>Claim Number:</b>	UCGP922005-URC001
<b>Claimant:</b>	Atlantic Coast Marine Group, Inc.
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$8,875.94
<b>Action Taken:</b>	Denied

### **EXECUTIVE SUMMARY:**

On April 18, 2019, United States Coast Guard (USCG) Marine Safety Detachment (MSD) Fort Macon received notification from the North Carolina USCG Command Center regarding a submerged 1979 31' Silverton<sup>2</sup> in the Bridgeton Harbor Marina actively discharging fuel into the Neuse River, a navigable waterway of the United States.<sup>3</sup> The harbormaster deployed boom around the PEGASUS to mitigate further pollution damages to the waterway.<sup>4</sup>

In accordance with the Oil Pollution Act of 1990 (OPA),<sup>5</sup> Mr. (b) (6), owner of the 31' Silverton, was identified as the responsible party (RP) for the spill incident.<sup>6</sup> The FOSC's Representatives (FOSCR) arrived on-scene and notified the USCG's National Response Center (NRC) of the sunken vessel via NRC report # 1243109.<sup>7</sup> The FOSCR issued a Notice of Federal Interest ("NOFI") to Mr. (b) (6); dated April 18, 2019.<sup>8</sup>

Atlantic Coast Marine Group ("ACMG" or "Claimant")<sup>9</sup> states that the RP hired them to clean up the oil spill, remove the fuel remaining on the vessel, and refloat the vessel.<sup>10</sup> ACMG submitted its uncompensated removal costs to the National Pollution Funds Center (NPFC) for

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<sup>1</sup> This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant's rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant's rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

<sup>2</sup> USCG Pollution Responder Investigator Statement dated April 18, 2019 identifies the vessel name as PEGASUS (NC2023ED).

<sup>3</sup> USCG Pollution Responder Investigator Statement dated April 18, 2019 and USCG SITREP dated April 18, 2019.

<sup>4</sup> Federal On Scene Coordinator's Representative (FOSCR) provided an After-the-Fact Coordination letter dated December 18, 2021.

<sup>5</sup> 33 U.S.C. § 2701(32).

<sup>6</sup> USCG SITREP dated April 18, 2019.

<sup>7</sup> NRC Case Number 1243109.

<sup>8</sup> USCG Notice of Federal Interest (NOFI) dated April 18, 2019.

<sup>9</sup> ACMG is referenced as TowBoat US in USCG documents. The NPFC pulled ACMG's corporate records and it is worth noting that ACMG is also known as TowBoat US and is doing business as (DBA) TowBoat US – Beaufort in Carteret County, North Carolina.

<sup>10</sup> Atlantic Coast Marine Group, Inc. Pollution Response Time and Materials Contract dated April 18, 2019.

\$8,875.94.<sup>11</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that the claim should be denied in full because ACMG did not meet its burden of providing all evidence, information, and documentation deemed necessary by the NPFC to support the claim.<sup>12</sup>

## **I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

### ***Incident***

On April 18, 2019 the Bridgeton Harbor Marina harbormaster found a submerged 1979 31' Silverton. The harbormaster noticed that the vessel was actively discharging fuel into the Neuse River and deployed sorbent boom around the vessel.<sup>13</sup> The FOSC's Representatives (FOSCR) arrived on-scene and notified the USCG's National Response Center (NRC) of the sunken vessel via NRC report # 1243109.<sup>14</sup> The FOSCR issued a Notice of Federal Interest ("NOFI") to Mr. (b) (6); dated April 18, 2019.<sup>15</sup> The RP hired ACMG to clean up the oil spill, remove the fuel remaining on the vessel, and refloat the vessel.<sup>16</sup>

### ***Responsible Party***

In accordance with the Oil Pollution Act of 1990, the owner/operator of the 1979 31' Silverton in Bridgeton Harbor Marina is the Responsible Party (RP) for the incident.<sup>17</sup> On December 9, 2021, the NPFC issued a Responsible Party Notification Letter to Mr. (b) (6) via email.<sup>18</sup> A Responsible Party Notification letter notifies the owner/operator that a claim was presented to the National Pollution Funds Center (NPFC) seeking reimbursement of uncompensated removal costs incurred as a result of a discharge of oil to navigable waters of the United States.

### ***Recovery Operations***

On April 18, 2019, ACMG arrived at the Bridgeton Harbor Marina with personnel, a truck, and equipment to provide pollution mitigation and remediation services for Mr. (b) (6).<sup>19</sup> The FOSCR confirmed that ACMG was hired by the RP and completed actions to mitigate the threat to the environment from the approximately 50-gallons of fuel and lube oil that was onboard the vessel. The FOSCR's After-the-Fact coordination letter also confirmed that approximately 20-gallons of fuel and lube oil was recovered from the Neuse River. The vessel was refloated and removed from the waterway in order to prevent further discharge. The FOSCR confirmed that

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<sup>11</sup> ACMG's claim submission received dated November 10, 2021.

<sup>12</sup> 33 CFR 136.105(a) General Requirements for a Claim.

<sup>13</sup> FOSCR After-the-Fact Coordination letter dated December 18, 2021.

<sup>14</sup> NRC Case Number 1243109

<sup>15</sup> USCG Notice of Federal Interest (NOFI) dated April 18, 2019.

<sup>16</sup> Atlantic Coast Marine Group, Inc. Pollution Response Time and Materials Contract dated April 18, 2019.

<sup>17</sup> 33 U.S.C. § 2701(32). The FOSC has identified Mr. (b) (6) as the RP via USCG SITREP dated April 18, 2019.

<sup>18</sup> NPFC RP Notification Letter dated December 9, 2021.

<sup>19</sup> ACMG Invoice # 2019-418B dated April 19, 2019.

ACMG's response was necessary to prevent, minimize or mitigate the effects of the incident and the actions taken were consistent with the National Contingency Plan (NCP).<sup>20</sup>

## **II. CLAIMANT AND RP:**

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>21</sup> require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.<sup>22</sup>

ACMG's invoice in the amount of \$8,875.94 was presented to Progressive Insurance on or about April 19, 2019, however there was no evidence to support that ACMG presented its invoice in the amount of \$8,875.94 directly to the RP. Following the NPFC issuing an RP Notification Letter to the RP dated December 7, 2021, the NPFC received an email on December 22, 2021 from Mrs. (b) (6) confirming the RP had received an invoice back in May 2019.<sup>23</sup> On March 7, 2022, the NPFC received another email from Mrs. (b) (6) providing two separate letters with attachments from ACMG's Legal Representative, Mr. (b) (6) of Taylor & Taylor.<sup>24</sup>

Mr. (b) (6) sent a demand for payment letter dated February 10, 2022 to the RP that contained two separate ACMG Invoices dated April 19, 2019. The invoices were for \$2,051.50 and \$6,200.00, respectively. The total of both invoices amounted to \$8,251.50. A second demand letter was sent by Mr. (b) (6) to the RP dated February 18, 2022 which contained ACMG invoice 2019-418B in the amount of \$8,675.94 which included a \$200.00 payment credit for a payment made by the RP. This invoice constitutes presentment of costs in the amount of \$8,875.94 less the RP payment.

## **III. CLAIMANT AND NPFC:**

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.<sup>25</sup> ACMG presented its invoice # 2019-418, in the amount of \$6,200.00 to (b) (6) and (b) (6) on May 01, 2019, to which (b) (6) replied to ACMG stating he did not have \$6,200.00 but would like to make payments arrangements.<sup>26</sup> Having not received payment, ACMG presented its uncompensated removal costs claim to the NPFC in the amount of \$8,875.94 on December 07, 2021.<sup>27</sup>

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<sup>20</sup> FOSCR After-the-Fact Coordination letter dated December 18, 2021.

<sup>21</sup> 33 U.S.C. § 2701 *et seq.*

<sup>22</sup> 33 CFR 136.103.

<sup>23</sup> Email from (b) (6) to NPFC dated December 22, 2021.

<sup>24</sup> Email from (b) (6) to NPFC dated March 7, 2022 providing two demand for payment letters with attachments.

<sup>25</sup> 33 CFR 136.103.

<sup>26</sup> Email exchanges between (b) (6) and (b) (6) with ACMG dated May 1, 2019 and ACMG Invoice # 2019-418 for \$6,000 dated April 19, 2019.

<sup>27</sup> ACMG's claim submission to the NPFC dated November 10, 2021.

ACMG is represented by their Legal Counsel, Mr. (b) (6) of Taylor & Taylor, Attorneys at Law, PLLC. The NPFC obtained an Authorization to Represent statement from Mr. (b) (6), owner of ACMG.<sup>28</sup>

#### **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>29</sup> 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.<sup>30</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>31</sup> 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.<sup>32</sup> An RP's liability is strict, joint, and several.<sup>33</sup> 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."<sup>34</sup> 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."<sup>35</sup> The term "remove" or "removal" means "containment and removal of oil [...] from

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<sup>28</sup> Email from ACMG authorizing the NPFC to speak with (b) (6) as the Claimant's Legal Representative dated January 7, 2022.

<sup>29</sup> 33 CFR Part 136.

<sup>30</sup> 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)).

<sup>31</sup> 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).

<sup>32</sup> 33 U.S.C. § 2702(a).

<sup>33</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>34</sup> *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).

<sup>35</sup> 33 U.S.C. § 2701(31).

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.”<sup>36</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>37</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

During review and adjudication of the claim submission, the NPFC made several requests for additional information summarized and broken down as follows:<sup>41</sup>

- a) Daily description of duties performed;
- b) Work logs and/or field notes from response;
- c) Any correspondence between ACMG and the USCG;
- d) Any correspondence between ACMG and RP that has not already been provided;
- e) ACMG Invoice 2019-418B – need an itemized breakdown of the charge of \$6,735.94 for the raising of the vessel;
- f) Provide proof of presentment of ACMG invoice 2019-418B to the RP in the amount of \$8,875.94 as requested from the NPFC; and
- g) NPFC requested that ACMG confirm whether or not their costs were supported by an ACMG commercial rate schedule since some of their costs were not found on the USCG BOA contract.

The deadline to provide all requested information was due no later than December 27, 2021. To date, no response has been received. On December 17, 2021, the NPFC again requested ACMG provide evidence demonstrating presentment of the unpaid ACMG invoice # 2019-418B to the RP.<sup>42</sup> The deadline for the requested information was December 27, 2021. The NPFC has only received proof of presentment however all other requests remain unanswered.

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<sup>36</sup> 33 U.S.C. § 2701(30).

<sup>37</sup> *See generally*, 33 U.S.C. §2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>38</sup> 33 CFR Part 136.

<sup>39</sup> 33 CFR 136.105.

<sup>40</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>41</sup> Request for Additional Information dated December 13, 2021.

<sup>42</sup> Email from NPFC to ACMG dated December 17, 2021.

On June 27, 2022 the NPFC made one final request for additional information that is summarized as follows:<sup>43</sup>

1. Labor charged– The ACMG invoice itemizes labor charges for a Supervisor and a Laborer at 5 hrs each on 4/19/19. Please provide the names of the employees and provide information on whether these two employees performed response or did they perform both response and fuel removal/ salvage of the vessel. Put another way, are the hours claimed in the amount of \$360.00 for strictly response work and therefore separate and distinct from the raising of the vessel and fuel removal invoiced in the amount of \$6,735.94? In order for the NPFC to make a positive adjudication of the costs, the claimant bears the burden of providing all requested information so that the NPFC understands the complete picture of all costs claimed;
2. ACMG invoiced for absorbent pads by the case at a rate of \$65.00 a case however the ACMG BOA contract identifies a different rate of \$60.00 per case. Please provide an explanation as to the price variation;
3. ACMG invoiced for the disposal of three drums at a rate of \$150.00 per drum. The ACMG BOA does not outline pricing for disposal therefore you must provide the disposal invoice from the facility that handled the disposal of the three drums and you must provide the disposal manifests for the drums. Additionally, provide the disposal facility invoice and proof of payment to the disposal facility for the services provided to ACMG. Failure to meet this burden will result in the denial of the costs claimed;
4. ACMG invoiced for an Admin fee of \$275.00 that is not addressed in the ACMG BOA. Please explain why this is charged and how the rate was derived;
5. ACMG invoiced for raising the vessel in order to perform fuel removal from the tanks in the amount of \$6,735.94 – An itemized breakdown of the costs that make up the \$6,735.94 must be provided in order to determine the nature of costs comprising of the amount requested. You must identify the personnel, materials and equipment, quantities, pricing structure and personnel names and description of work performed. Failure to substantiate the amounts claimed will result in a denial based on unsubstantiated costs. Your itemization should demonstrate the amount of time associated with the services claimed and you must identify if the personnel charged on the ACMG invoice for this service are different than the personnel used for response.

Based on ACMG’s failure to respond to the NPFC’s requests for additional information, the claim is denied in its entirety on the basis that the claimant failed to provide all requested information supporting the amounts claimed.<sup>44</sup> ACMG never responded to the NPFC with the additional information it requested and the NPFC determines the information provided to be inadequate to support compensation from the OSLTF.

Should the claimant request reconsideration, all requested documentation must be provided at the time of the request and a full accounting of all RP payments made to date must be provided

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<sup>43</sup> Email from NPFC to ACMG dated June 7, 2021. A copy of this letter was sent to both ACMG and its Legal Representative, Mr. (b) (6).

<sup>44</sup> 33 CFR § 136.105(a) - The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC to support the claim.

in order for the NPFC to determine the full amount of uncompensated costs at the time of reconsideration.<sup>45</sup>

**VI. CONCLUSION:**

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

<b>(b) (6)</b>	
Claim Supervisor:	<b>(b) (6)</b>
Date of Supervisor's review:	<i>7/22/2022</i>
Supervisor Action:	<i>Denial Approved</i>

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<sup>45</sup> During the course of the adjudication, the NPFC received confirmation of three payments made by the RP. They were confirmed via email from (1) ACMG to NPFC confirming payment of \$200.00 on January 26, 2022; (2) Mr. **(b) (6)** to NPFC confirming payment of \$200.00 on March 3, 2022; and (3) Mr. **(b) (6)** to NPFC confirming payment of \$200.00 on March 28, 2022.