

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

<b>Claim Number:</b>	UCGP922012-URC001
<b>Claimant:</b>	South Carolina DHEC
<b>Type of Claimant:</b>	State Government
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$53,136.00
<b>Action Taken:</b>	Offer in the amount of <b>\$42,007.51</b>

### EXECUTIVE SUMMARY:

On June 3, 2019, at 6:15pm local time, the South Carolina Department of Health and Environmental Control (“SCDHEC” or “claimant”) was notified of a sunken vessel, identified as a 52’ Egg Harbor Sportfisher “Patience”,<sup>2</sup> that was actively leaking fuel in Lake Murray, a navigable waterway of the United States in South Carolina.<sup>3</sup>

In accordance with the Oil Pollution Act of 1990 (OPA),<sup>4</sup> Mr. (b) (6) is identified as the owner of the vessel and responsible party (“Responsible Party” or “RP”).<sup>5</sup> South Carolina Department of Natural Resources (SCDNR) reported that it received a notification on June 3, 2019 at 7:20pm local time that a neighbor’s boat was sinking and leaking diesel fuel. Mr. (b) (6) of SCDNR reported that he would call Sea Tow<sup>6</sup> to respond to the incident.<sup>7</sup> South Carolina Department of Health and Environmental Control (SCDHEC), in its capacity as the State On Scene Corrdinator (SOSC) for the incident, arrived on scene at approximately 8:45pm on June 3, 2019. Sea Tow was already on scene responding to the incident.<sup>8</sup> SCDHEC activated its response contractor, A & D Environmental<sup>9</sup> who responded as the lead prime contractor and

<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> SCDHEC Incident Report dated June 4, 2019, page 5 of 5, June 3, 2019 report entry by (b) (6).

<sup>3</sup> SCDHEC Incident Report dated June 4, 2019, page 1 of 5; National Response Center (NRC) Report #1247744 dated June 3, 2019; USEPA FOSC coordination statement dated June 5, 2019; and 1977 Navigability Study for United States Army Corps of Engineers Charleston District, Saluda River Bason, Report # 14.

<sup>4</sup> 33 U.S.C. § 2701(32).

<sup>5</sup> National Response Center (NRC) Report #1247744 dated June 3, 2019 and SCDHEC Incident Report dated June 4, 2019, page 1 of 5, under Potential Responsible Party section.

<sup>6</sup> According to the South Carolina Secretary of State – Business Entities Online, Sea Tow Lake Murray LLC changed its corporate name to Hydro Tech Marine Services LLC effective July 10, 2014. See South Carolina Secretary of State – Business Entities Online website at <https://businessfilings.sc.gov/BusinessFiling/Entity/Search>.

<sup>7</sup> SCDHEC Incident Report dated June 4, 2019, page 4 of 5, report entry from Mr. (b) (6) of SCDNR.

<sup>8</sup> SCDHEC Incident Report dated June 4, 2019, page 5 of 5, June 3, 2019 report entry by Christopher L. Phillips.

<sup>9</sup> SCDHEC Purchase Order dated October 20, 2017 showing A & D as a contracted Response Company to SCDHEC.

subcontracted with Sea Tow aka Hydro Tech Marine Inc. since Sea Tow was not a contracted response contractor with the SOSC. Sea Tow responded beginning on June 3, 2019 and A&D Environmental Services Inc. responded beginning on June 5, 2019 for oil removal and boat salvage.<sup>10</sup>

SCDHEC presented its uncompensated removal costs to the National Pollution Funds Center (NPFC) on May 4, 2022 in the amount of \$53,136.00.<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 \$42,007.51 of the requested \$53,136.00 is compensable and offers this amount as full and final compensation of this claim.

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

### ***Incident***

On June 3, 2019, SCDHEC responded to the report of a sunken vessel leaking oil in Lake Murray, a navigable waterway of the United States. SCDHEC, in its capacity as the State On Scene Coordinator (SOSC) hired, oversaw, and monitored the removal and cleanup operations performed by Sea Tow and A&D Environmental throughout the response.<sup>12</sup> The United States Environmental Protection Agency (USEPA) Federal On Scene Coordinator (FOSC) determined that SCDHEC, in its capacity as the State On Scene Coordinator (SOSC), would have lead jurisdiction on the cleanup and no further USEPA action was required.<sup>13</sup>

### ***Responsible Party***

In accordance with the Oil Pollution Act of 1990, the owner and operator of the 52' Egg Harbor Sportfisher "Patience" is the Responsible Party for the incident.<sup>14</sup> On May 5, 2022, the NPFC issued a Responsible Party Notification Letter to Mr. (b) (6) via certified mail.<sup>15</sup> A Responsible Party Notification letter notifies the RP 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 June 3, 2019, Sea Tow was dispatched to the incident location by Mr. (b) (6) of SCDNR.<sup>16</sup> Sea Tow arrived and stated that they have been deployed to the RP's boat (Egg

<sup>10</sup> SCDHEC Incident Report dated June 4, 2019, page 5 of 5.

<sup>11</sup> 33 CFR 136.103(b)(3).

<sup>12</sup> SCDHEC Incident Report, page 5 of 5

<sup>13</sup> NRC Report #1247744 dated June 3, 2019 and FOSC coordination statement dated June 5, 2019.

<sup>14</sup> 33 U.S.C. § 2701(32).

<sup>15</sup> NPFC RP Notification Letter sent to Mr. (b) (6) dated May 5, 2022.

<sup>16</sup> SCDHEC Incident Report dated June 4, 2019, page 4 of 5, report entry from Mr. (b) (6) of SCDNR.

Harbor Sportfisher - "Patience") several times. Oil absorbent booms and pads were deployed. Sea Tow left the scene at 10:45pm to resume clean-up the next morning.<sup>17</sup>

On June 4, 2019, Sea Tow arrived to the scene at 7:45am. An anonymous report from a neighbor was made that the RP and some friends returned to the boat to remove items. The report was first made to the Newberry Sheriff's office who in turn contacted Captain (b) (6) from Sea Tow. The activity on the boat further spread the diesel oil. Sea Tow continued to clean up the oil after deploying more boom on site. There was dive and salvage gear on site. Sea Tow left at 4:30pm to resume clean-up the next morning.<sup>18</sup>

On June 5, 2019, Sea Tow arrived at 8:30am and A & D Environmental arrived at 9:10am for clean-up efforts. Sea Tow came with a vessel, captain and two other workers. A & D arrived with three employees, a vacuum truck and a driver. The two contracting companies held a safety meeting at 9:15-9:50am. Site prep was done to remove oil from the surface of the water. A diver entered the water to secure air bags to the rear of the sunken vessel. Additional pads and boom were deployed to capture oil. After removing as much diesel oil as possible from the tank, an attempt to lift the rear of the boat was made to sit upright in the water. One member from both Sea Tow and A & D responded to the other side of the lake due to oil spread and deployed oil and boom absorbent pads.<sup>19</sup>

On June 6, 2019, cleanup was continued and completed according to A & D invoice.<sup>20</sup>

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

The Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>21</sup> permit claims for removal costs to be first presented to the Fund by the Governor of a State for removal costs that are incurred by the State.<sup>22</sup>

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

SCDHEC presented its uncompensated removal cost claim to the NPFC for \$53,136.00 dated May . The claim included an OSLTF Claim Form dated May 3, 2022, SCDHEC Incident Report 202001498 updated June 12, 2019, SCDHEC Authorization of Response Actions form signed by Mr. (b) (6) of SCDHEC dated June 5, 2019, a FOSC coordination statement signed by the FOSC on June 5, 2019, A&D Env Invoice #SVC019848 dated August 27, 2020, Sea Tow (Hydro Tech Marine Inc) Invoice #986-4144 and NRC Report # 1247744 dated June 3, 2019.<sup>23</sup>

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<sup>17</sup> SCDHEC Incident Report, page 5 of 5, June 3, 2019 report entry by (b) (6)

<sup>18</sup> SCDHEC Incident Report, page 5 of 5, June 4, 2019 report entry by (b) (6)

<sup>19</sup> SCDHEC Incident Report, page 5 of 5, June 5, 2019 report entry by (b) (6)

<sup>20</sup> A&D Invoice #SVC012770 received May 4, 2022

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

<sup>22</sup> 33 CFR 136.103(b)(3).

<sup>23</sup> SCDHEC claim submission dated May 3, 2022.

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

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>24</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>25</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>26</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>27</sup> An RP's liability is strict, joint, and several.<sup>28</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>29</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>30</sup> 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."<sup>31</sup>

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<sup>24</sup> 33 CFR Part 136.

<sup>25</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>26</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>27</sup> 33 U.S.C. § 2702(a).

<sup>28</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>29</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>30</sup> 33 U.S.C. § 2701(31).

<sup>31</sup> 33 U.S.C. § 2701(30).

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>32</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>33</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>34</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.<sup>35</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>36</sup>

The NPFC analyzed each of these factors and determined the majority of the costs incurred by SCDHEC and submitted herein are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced at the appropriate rate sheet pricing and all costs were supported by adequate documentation which included invoices and/or proof of payment where applicable.

The amount of compensable costs is \$42,007.51 while \$11,128.50 are denied as follows:

1. A&D's Emergency Response Pickup was invoiced at \$76.00 per hr. The A & D rate sheet identifies the rate as \$75.00 per hr. therefore the difference in pricing is denied in the amount of \$8.00;<sup>37</sup>
2. A&D's labor category for a Field, Emergency Technican was invoiced at a rate of \$76.00 per hr. The A & D rate sheet identifies the rate as \$55.00 per hr. therefore the difference in pricing is denied in the amount of \$168.00;<sup>38</sup>
3. A&D invoiced PPE at a Level C PPE rate in the amount of \$22.00 per person. The NPFC denies the price of Level C PPE as excessive because there is no need for breathing apparatus equipment for this response. Level D PPE would be the appropriate protection level for this response although the A&D PO rate sheet does

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<sup>32</sup> See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

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

<sup>34</sup> 33 CFR 136.105.

<sup>35</sup> FOSC coordination statement dated June 5, 2019.

<sup>36</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>37</sup> A&D Invoice #SVC012770; A&D PO rate sheet shows truck price on page 3 of 5; and Summary of Costs spreadsheet line 7.

<sup>38</sup> A&D Invoice #SVC012770; A&D PO rate sheet shows truck price on page 3 of 5; and Summary of Costs spreadsheet line 9.

- not list Level D PPE as a billable option therefore this item is denied in the total amount of \$154.00;<sup>39</sup>
4. A&D invoiced for three cubic yard boxes in the amount of \$190.00 each however the rate sheet does not identify the cubic yard boxes as part of their pricing schedule and no third party receipt was provided to support the cost therefore the total amount of \$168.00 is denied;<sup>40</sup>
  5. A&D invoiced for the disposal of three non-RCRA cubic yard boxes however the A&D pricing schedule does not list this as a billable service nor were there any third party receipts provided to support the amount claimed therefore the total amount of \$570.00 is denied;<sup>41</sup>
  6. Sea Tow/Hydro Tech invoiced their Laborer category at a rate of \$58.50 per hour when the rate sheet identifies the rate as \$38.50 per hr. The NPFC has reduced the rate in accordance with the rate sheet and denies a total of \$430.00 in excess of the rate sheet pricing;<sup>42</sup>
  7. Sea Tow/Hydro Tech invoiced for Supplies/equipment at a single rate of \$100.00 however the Sea Tow rate sheet does not identify this as a billable item and no third party receipt was provided to support the claimed cost and as such, the NPFC denies \$100.00;<sup>43</sup>
  8. Sea Tow/Hydro Tech invoiced for a one-time demob/decontamination charge however the Sea Tow rate sheet does not identify this as a billable charge, therefore NPFC denies the total amount of \$500.00;<sup>44</sup>
  9. Sea Tow/Hydro Tech invoiced sales tax however the Sea Tow rate sheet does not identify sales tax as a billable item nor did they provide a receipt identifying sales tax paid in the amount claimed, therefore NPFC denies the total amount of \$80.66;<sup>45</sup>
  10. A&D invoiced for a 30% administrative markup on Sea Tow/Hydro Tech invoiced amount of \$21,398.51 however the A&D rate sheet does not identify an allowance of

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<sup>39</sup> A&D Invoice #SVC012770; A&D PO rate sheet shows PPE on page 5 of 5; and Summary of Costs spreadsheet line 10.

<sup>40</sup> A&D Invoice #SVC012770; A&D PO rate sheet does not identify this as an inventory item; and Summary of Costs spreadsheet line 13.

<sup>41</sup> A&D Invoice #SVC012770; A&D PO rate sheet does not identify this a billable item; and Summary of Costs spreadsheet line 15.

<sup>42</sup> Sea Tow invoice #986-4144; Sea Tow rate sheet lists a Trained Laborer at a rate of \$38.50 per hr; and Summary of Costs spreadsheet lines 21,31, and 37.

<sup>43</sup> Sea Tow invoice #986-4144; Sea Tow rate sheet lists a Trained Laborer at a rate of \$38.50 per hr; and Summary of Costs spreadsheet line 27.

<sup>44</sup> Sea Tow invoice #986-4144; Sea Tow rate sheet does not identify demob or decontamination as a billable item; and Summary of Costs spreadsheet line 41.

<sup>45</sup> Sea Tow invoice #986-4144; Sea Tow rate sheet does not identify sales tax as a billable item; and Summary of Costs spreadsheet line 44.

a 30% administrative markup on subcontracted services therefore the NPFC denies \$6,419.55;<sup>46</sup> and

11. A&D invoiced for an ESI-Energy, Security, & Insurance charge based on 5% of the total A&D invoiced amount of \$50,605.72 however the A&D PO rate sheet does not identify this as a billable charge therefore the NPFC denies the full amount of \$2,53029.<sup>47</sup>

**Overall Denied Costs:** \$11,128.50

**VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, request for uncompensated removal costs is approved in the amount of **\$42,007.51**.

This determination is a settlement offer,<sup>48</sup> the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>49</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>50</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

<p style="text-align: center;"><b>(b) (6)</b></p> <p>Claim Supervisor: <b>(b) (6)</b></p> <p>Date of Supervisor's review: <i>7/14/22</i></p> <p>Supervisor Action: <i>Offer Approved</i></p>
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<sup>46</sup> A&D Invoice #SVC012770; A&D PO rate sheet does not identify this a billable item; and Summary of Costs spreadsheet line 48.

<sup>47</sup> A&D Invoice #SVC012770; A&D PO rate sheet does not identify this a billable item; and Summary of Costs spreadsheet line 50.

<sup>48</sup> 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).

<sup>49</sup> 33 CFR § 136.115(b).

<sup>50</sup> 33 CFR § 136.115(b).