

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPE20802-URC001
Claimant:	Olympus Technical Services, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$242,001.16
Action Taken:	Denial

EXECUTIVE SUMMARY:

On April 22, 2020, oil discharged from a cracked valve on one of Cardinal Oil, LLC's (Cardinal) two tanks at its tank battery site 75 miles north of Billings, Montana. The oil released into secondary containment, but an estimated four to ten barrels escaped into Little Wall Creek and traveled at least two miles downstream. Cardinal has been identified as the Responsible Party (RP) for the discharge.

On April 27, 2020, Cardinal hired Olympus Technical Services, Inc. (Olympus or Claimant) to clean up the discharged oil. Olympus commenced mobilization and response efforts on April 28, 2020.² The response was complete by July 17, 2020. Olympus submitted multiple invoices to Cardinal in 2020, but only received partial payment. When Cardinal stopped paying, Olympus submitted its claim to Cardinal for payment in January 2021. In accordance with its executed contract with Cardinal, Olympus sought remedies through mediation. On April 22, 2022, Olympus and Cardinal executed a Memorandum of Understanding agreeing to a settlement of \$267,794.13. When Cardinal did not pay in accordance with the agreement, Olympus commenced an action in court on June 14, 2022.³ On September 9, 2022, an evidentiary hearing was held. On November 21, 2022, the court issued an Order for Settlement enforcing the agreed settlement between the parties. On April 7, 2023, Olympus filed a Motion for Entry of Judgment which the court granted the same day, entering a judgment in favor of Olympus and against Cardinal.⁴ Olympus asserts that Cardinal has not yet paid the claimed amount. As such, Olympus presented its claim for the balance of its project costs totaling \$242,001.16 to the

¹ 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 with 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.

² EPA Region VIII Polrep #1 attached to initial claim in Attachment 2.

³ FINDINGS, CONCLUSIONS OF LAW AND ORDER TO ENFORCE SETTLEMENT attached to claim in Attachment 8 at p. 6 of 23.

⁴ JUDGMENT in Case No. DV-56-2021-0000741-BC in the Montana Thirteenth Judicial District Court, Yellowstone County, dated April 7, 2023, attached to initial claim at Attachment 8, p. 23 of 23.

National Pollution Funds Center (NPFC) seeking compensation from the Oil Spill Liability Trust Fund (OSLTF). The NPFC received the claim on April 20, 2023.

The NPFC reviewed all documentation submitted with the claim and the applicable law and regulations. and has determined that the claim cannot be paid from the OSLTF. A claimant seeking compensation from the OSLTF must retain all rights of recovery against a responsible party permitting the NPFC to acquire them by subrogation. The claimant failed to retain these rights. Therefore, the claim must be denied.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On April 22, 2020, Cardinal Oil, LLC reported to the National Response Center (NRC) (Report #1275888) a discharge of 100-120 barrels of oil from its tank battery site into secondary containment. The release was due to a cracked valve on one of two 400-barrel tanks at the Myers 21-7 battery site, located 75 miles north of Billings, Montana.⁵ On April 23, 2020, the Environmental Protection Agency (EPA) Federal On Scene Coordinator (FOSC) discussed the site situation with the Responsible Party (RP). The RP stated that Little Wall Creek was impacted 2 miles downstream. The RP estimated 4 barrels had been released to the creek.⁶ The extent of contamination was predominantly confined from the point of entry on Little Wall Creek to the creek's junction with North Willow Creek - a downstream distance of approximately 5 miles.

Responsible Party

Cardinal Oil, LLC, a regional oil and gas exploration company, was identified as the RP.

Recovery Operations

The response was initiated by the RP (Cardinal Oil, LLC) on April 23. The RP acquired supplies (boom and sorbent pads) and organized to conduct cleanup of the area with several staff members. The RP then hired Olympus Technical Services, on April 27, to complete the response. Olympus conducted a field reconnaissance on April 27 and then commenced with mobilization and response efforts starting April 28. A unified command consisting of Montana DEQ, an EPA Region 8 FOSC, and the RP held daily morning incident command (IC) meetings.

EPA contacted Montana Department of Environmental Quality (MDEQ) and the Montana Board of Oil and Gas Conservation (BOGC). MDEQ was in contact with the RP as well as BOGC the previous day regarding the spill. The BOGC field representative went on-site and confirmed the spill impacted at least two miles. The representative estimated the spill occurred several days prior to it being reported. MDEQ estimated the release to the creek at closer to 10 barrels, as compared to the RP's four-barrel estimate. Although evidence of the spill reached two miles downstream, the BOGC field representative reported that except for occasional deeper

⁵ EPA Region VIII Polrep #1 attached to initial claim in Attachment 2, pg 3 of 12, "Description of Threat".

⁶ *Id.*

pools, there were minimum impacts to the stream bank and vegetation.⁷ The RP deployed sausage boom across sections of the creek, in front of culverts and at several locations for collection points. Sorbent pads were placed along oiled bank areas as well as one heavily oiled area on top of the bank. Responders began pushing oil downstream to collection areas. A downstream culvert below the oil impacts was located with an underwater inlet side to act as a downstream underflow dam.⁸

As of May 4, 2020, Olympus lined the soil stockpile area with a perimeter berm near the point of entry, excavated and placed soils impacted at the point of entry (approximately .5 acres) into the stockpile area, and removed impacted bank soil and vegetation and pooled oil. The response included excavation and hand shoveling of shoreline impacted soils and use of a vacuum truck and pom-poms on creek surface oil. The vac truck was effective on lighter oil and where access was available, while the pom-poms were most effective on high viscosity surface oils. Weed-free straw was effective at removal of high viscous oil on the water surface. Frequent use of sorbent boom collection points had been utilized to prevent further downstream migration of oil.⁹ Demobilization occurred on July 17, 2020.¹⁰

II. CLAIMANT AND RP:

On January 15, 2021, Olympus presented its claim for \$249,074.19, via its attorney, to the RP.¹¹ This claim included the balance of removal costs owed, plus late fees and legal fees. Olympus and Cardinal entered into mediation in the spring of 2022. On April 22, 2022, they executed a Memorandum of Understanding agreeing to a settlement of \$267,794.13. After continued nonpayment by Cardinal, Olympus commenced an action in court on June 14, 2022.¹² On September 9, 2022, an evidentiary hearing was held, and on November 21, 2022, the judge issued an Order for Settlement enforcing the agreed settlement between the parties. On April 7, 2023, Olympus filed a Motion for Entry of Judgment and the judge entered the Judgment the same day in favor of Olympus and against Cardinal.¹³

III. CLAIMANT AND NPFC:

Olympus presented its claim to Cardinal on January 15, 2021. It then proceeded to mediation in accordance with its contract with Cardinal, eventually obtaining a settlement and an entry of judgment against Cardinal for \$242,001.16 which Olympus asserts is still unpaid. More than 90 days have passed since Olympus submitted its claim to Cardinal. When a RP denies a claim or

⁷ EPA Region VIII Polrep #1 attached to initial claim in Attachment 2, pg 4 of 12, “Response Information – Initial Response”.

⁸ *Id.*

⁹ EPA Region VIII Polrep #1 attached to initial claim in Attachment 2, pgs 5-6 of 12, “Response Operations – Current Status reporting period ending May 4, 2020.”

¹⁰ EPA Region VIII Polrep #2 attached to initial claim in Attachment 2, pg 11 of 12, “Introduction – Background, Demob Date”.

¹¹ See Attachment 5 submitted with the initial claim submission – Letter dated January 15, 2021, from Olympus’ attorney to the RP, submitted via email and certified mail.

¹² FINDINGS, CONCLUSIONS OF LAW AND ORDER TO ENFORCE SETTLEMENT attached to claim in Attachment 8 at p. 6 of 23.

¹³ JUDGMENT in Case No. DV-56-2021-0000741-BC in the Montana Thirteenth Judicial District Court, Yellowstone County, dated April 7, 2023, attached to initial claim at Attachment 8, p. 23 of 23.

fails to settle a claim within 90 days, the claim can be submitted to the NPFC for adjudication. The NPFC received Olympus' claim on April 20, 2023.¹⁴

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁵ 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.¹⁶ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁷ 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.¹⁸ An RP's liability is strict, joint, and several.¹⁹ 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."²⁰ 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."²¹ 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

¹⁴ Initial Claim submission received by the NPFC April 20, 2023.

¹⁵ 33 CFR Part 136.

¹⁶ 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)).

¹⁷ 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).

¹⁸ 33 U.S.C. § 2702(a).

¹⁹ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²⁰ *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).

²¹ 33 U.S.C. § 2701(31).

damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”²²

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²³ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁴ 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.²⁵

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.²⁶

Olympus alleges that it incurred uncompensated removal costs. It sought recovery from the RP, followed by mediation in accordance with its contract with Cardinal, then commenced an action in state court against the RP for nonpayment in which it was awarded a entry of judgment. Olympus pursued the RP and failed to obtain compensation. Olympus now seeks reimbursement from the Fund, but for the reasons stated below it cannot be compensated by the Fund.

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.”²⁷ Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.”²⁸ Importantly here, the OPA also provides parties with the right to have their disputes resolved by a federal court.²⁹

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. As the

²² 33 U.S.C. § 2701(30).

²³ See generally, 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁴ 33 CFR Part 136.

²⁵ 33 CFR 136.105.

²⁶ 33 CFR 136.203; 33 CFR 136.205.

²⁷ 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.

²⁸ 33 U.S.C. § 2715(a).

²⁹ 33 U.S.C. § 2717(b).

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

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 claimant limited the rights it could subrogate to the Fund in several ways. First, the Dispute Resolution provision in the Claimant's contract with the responsible party is limiting language. Second, the claimant entered into mediation to resolve its rights against the RP. Finally, the claimant commenced a court action to enforce the settlement agreement and obtained a judgment on its claim in the state court.

If the OSLTF were to pay claims when the claimant has limited its options to recover against a responsible party, as the claimant has here, 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 litigation (or pre-litigation) decisions that result in 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."³⁰

Importantly here, the OPA also provides parties with the right to have their disputes resolved by a federal court.³¹ Congress intended that, subject to a very limited exception not implicated here,³² "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."³³

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 Olympus had the absolute right to enter into an agreement to resolve all of its disputes by mediation and then enforce the resulting settlement in state court, Olympus has thus restricted or limited its remaining rights against the RP. Having done so, Olympus is not eligible for OSLTF reimbursement. If the NPFC paid Olympus' claim, then under subrogation, the NPFC would be bound by the results of Olympus' actions as opposed to NPFC commencing its own action in a federal court as contemplated by OPA. Olympus' business decision to have a dispute resolution provision in their contract, followed by the agreed upon mediation, and then commencing a court action against the RP are fatal to Olympus' claim.

Olympus no longer has "all rights" that it originally would have had and could assign to the government. The court in *Rich Franklin* stated unequivocally, "[u]nder the OPA, specifically [33 U.S.C.] § 2712(f), [it is the] NPFC [that] has the authority to make decisions regarding recovery against a responsible party *after receiving all subrogation rights from a claimant*."³⁴ The court

³⁰ *Gatlin Oil Co. v. United States*, 169 F.3d 207, 213 (4th Cir. 1999).

³¹ 33 U.S.C. §2717(b).

³² 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).

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

³⁴ *Rich Franklin Corp. v. U.S. Dep't of Homeland Security*, 2008 WL 337978 (D. Or. 2008).

continued, “§ 2712(f), as a statutory requirement, is a condition providing that *all* rights against the responsible party be available in order for a claimant to be eligible for compensation.³⁵ The court concluded that “[a]ny other interpretation would violate the clear intent of the statute. [NPFC’s] decision in denying compensation under the OPA, specifically § 2712(f), comports with the plain language of the statute, existing judicial authority and congressional intent.”³⁶

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.³⁷ 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.³⁸

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 done so. This claim simply cannot 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, Olympus Technical Services, Inc.’s request for uncompensated removal costs is denied.

Claim Supervisor:	(b) (6)
Date of Supervisor’s review:	6/13/23
Supervisor Action:	<i>Denial Approved</i>
Supervisor’s Comments:	

³⁵ *Id.* (Emphasis in original)(Citing *Kenan Transp. Co. v. U.S. Coast Guard*, 2006 WL 1455658 at *2-3)(sic)

³⁶ *Id.* See also, *Kenan*, 2006 WL 1455658 at *4 n. 7.

³⁷ *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).

³⁸ That Congress required a claimant to preserve all rights it had against a third party is clear in the legislative history. The Senate bill had proposed that the Fund “acquire by subrogation the rights of claimants to which the Fund paid removal costs or damages and to recover those removal costs or damages from the responsible party.” The House bill proposed that reimbursement be conditioned on the Government “acquiring by subrogation all rights of the claimant or State to recover from the responsible party.” H.R. Rep. No 101-653, at 115-116 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 795. The conference rejected the Senate limitation to clean-up costs and damages and adopted, instead, the “all rights” version.