

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

<b>Claim Number:</b>	UCGP923033-URC001
<b>Claimant:</b>	ENVIRONMENTAL SERVICES, INC.
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	REMOVAL COST
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$57,322.07
<b>Action Taken:</b>	Denial

### **EXECUTIVE SUMMARY:**

In October 2021, the vessel LUCKY LADY (LADY LUCK, as stated by the claimant) sank at the dock in the Thames River at Terminal Way, in Norwich, Connecticut.<sup>2</sup> The owner attempted to use a crane and a diver to salvage the vessel, but was unsuccessful.<sup>3</sup> The United States Coast Guard (USCG) Sector Long Island Sound responded and hired Miller Environmental Group to clean up the spill.<sup>4</sup> Once Miller Environmental removed the oil from the tanks and plugged the vents, the response ended in October 28, 2021, and the case was closed.<sup>5</sup>

In June 2022,<sup>6</sup> the occupant of the riverside property, Copar Operations, LLC (Copar), attempted to remove the vessel by demolishing it.<sup>7</sup> Environmental Services, Inc. (ESI or Claimant) states that oil was released and they were called out to respond to it.<sup>8</sup> Claimant provided the NPFC a copy of a \$60,962.02 invoice sent to Copar with the initial submission covering dates from May 24, 2022 through August 29, 2022.<sup>9</sup> The claimed sum certain initially was \$57,322.07<sup>10</sup> which excluded the state sales tax of \$3,639.95. After the NPFC requested additional information on several occasions, including clarification of the claimed amount, the claimant submitted an amended OSLTF Claim Form claiming \$24,041.42.<sup>11</sup>

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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> See, USCG SITREP-POL One, section 1A Situation dated October 20, 2021.

<sup>3</sup> UCGPB22001-SITREP-POL THREE AND FINAL dated October 28, 2021, under Section 2.B. Action Taken-26 September 2021.

<sup>4</sup> UCGPB22001-SITREP-POL THREE AND FINAL dated October 28, 2021.

<sup>5</sup> UCGPB22001-SITREP-POL THREE AND FINAL dated October 28, 2021.

<sup>6</sup> There is some uncertainty as to the year in which the incident and the claimant's alleged actions occurred. Both 2022 and 2023 dates are included in the claim form and the invoice provided to the NPFC. Claimant did not clarify when asked about the discrepancy.

<sup>7</sup> ESI OSLTF Optional claim form, questions 2 and 10, dated August 17, 2023.

<sup>8</sup> See, Email from ESI to NPFC dated October, 6, 2023.

<sup>9</sup> ESI invoice #81685 dated September 1, 2022, supplied with initial claim submission, pages 3-8 of 76.

<sup>10</sup> ESI OSLTF Optional claim form, question 3, dated August 17, 2023.

<sup>11</sup> Email from ESI to NPFC dated March 7, 2023.

On August 29, 2023, the National Pollution Funds Center (NPFC) received ESI's claim submission for \$57,322.07 in alleged removal costs.<sup>12</sup> However, the claimant had not yet presented its claim to the owner of the vessel, which was designated the source of an oil discharge as required by 33 U.S.C. §2713. The NPFC notified the claimant of this deficiency via email dated September 18, 2023.<sup>13</sup> The claimant finally satisfied the presentment to the vessel owner, responsible party as defined by OPA, on October 28, 2023.<sup>14</sup> After 90 days passed without the claimant receiving payment, the NPFC accepted the claim submission as properly presented by the claimant for adjudication as required by OPA.<sup>15</sup> The NPFC has thoroughly reviewed all documents submitted with the claim, analyzed the applicable laws and regulations, and after careful consideration, has determined that the claim must be denied.<sup>16</sup>

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

### ***Incident***

Oil was allegedly released to the Thames River in Norwich, Connecticut in June 20, 2022<sup>17</sup>, after the property occupant demolished the vessel, LADY LUCK (USCG identified it as LUCKY LADY<sup>18</sup>), in the water while trying to remove it.<sup>19</sup> Claimant alleged that engine oil and fuel discharged into the Thames River.<sup>20</sup>

As background, this vessel sank at the dock in 2021.<sup>21</sup> The vessel owner tried to have the vessel raised, but the attempt failed, so the U.S. Coast Guard responded and hired an Oil Spill Response Organization (OSRO) to remove the oil from the vessel and plug the vents.<sup>22</sup> The U.S. Coast Guard declared the response complete in October 28, 2021.<sup>23</sup> The case was closed.

### ***Responsible Party***

The U.S. Coast Guard Sector Long Island Sound identified the vessel's owner as (b) (6).<sup>24</sup>

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<sup>12</sup> See, ESI Original claim submission dated August 17, 2023.

<sup>13</sup> See, Email from NPFC to ESI dated September 18, 2023.

<sup>14</sup> USPS Certified Mail return receipt signed by the RP October 28, 2023.

<sup>15</sup> 33 USC §2713(c).

<sup>16</sup> 33 CFR §136.115.

<sup>17</sup> There is some uncertainty as to the year in which the incident and the claimant's alleged actions occurred. Both 2022 and 2023 dates are included in the claim form and the invoice provided to the NPFC. Claimant did not clarify when asked about the discrepancy.

<sup>18</sup> UCGPB22001-SITREP-POL THREE AND FINAL dated October 28, 2021.

<sup>19</sup> See, CTDEEP Final Closeout report #202203231, undated. See also, ESI OSLTF Optional claim form, questions 2 and 10, dated August 17, 2023.

<sup>20</sup> Claimant emailed the NPFC on March 11, 2024, informing the NPFC of a call to the NRC (NRC #1364157) regarding the spill. The purpose of the claimant providing this information is unknown to the NPFC. NPFC researched the NRC report and was not able to verify the claimant's alleged facts, response or any coordination with the FOSC.

<sup>21</sup> See, USCG SITREP-POL One, section 1A Situation dated October 20, 2021.

<sup>22</sup> UCGPB22001-SITREP-POL THREE AND FINAL dated October 28, 2021.

<sup>23</sup> UCGPB22001-SITREP-POL THREE AND FINAL dated October 28, 2021.

<sup>24</sup> UCGPB22001-SITREP-POL THREE AND FINAL, section 1D, dated October 28, 2021.

## ***Recovery Operations***

On July 26, 2022, Claimant was called out by Copar and brought a boat, roll-off cans and a vac truck.<sup>25</sup> The claimant states that it worked with the State of Connecticut Department of Energy and Environmental Protection (CTDEEP) Spills Unit.<sup>26</sup> Containment boom was set around the spill and ESI used a vac truck to remove the oil.<sup>27</sup> ESI's boat was used for boom management and to collect absorbents inside the boomed area.<sup>28</sup> The claimant allegedly cleaned up the oil and disposed of the oil and debris collected in the roll-off cans.<sup>29</sup> The CTDEEP report provides no end date for response, but the claimant's amended invoice includes costs through August 5, 2023.<sup>30</sup> There is no record of direction by or coordination of the claimant's actions with U.S. Coast Guard Federal On Scene Coordinator (FOSC).

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

The claimant presented its claim to the vessel owner, (b) (6), who is the responsible party as defined by OPA, on October 28, 2023.<sup>31</sup>

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

On August 29, 2023, the National Pollution Funds Center (NPFC) received ESI's claim submission for \$57,322.07 in alleged removal costs.<sup>32</sup> However, the claimant had not yet presented its claim to the owner of the vessel, which was designated the source of an oil discharge as required by 33 U.S.C. §2713. The NPFC notified the claimant of this deficiency via email dated September 18, 2023. The claimant finally presented a claim for \$25,568.05 to the vessel owner, the responsible party as defined by OPA, on October 28, 2023.<sup>33</sup> After 90 days passed without the claimant receiving payment, the NPFC accepted the claim submission as properly presented by the claimant for adjudication as required by OPA.<sup>34</sup> The claimant amended its claim to the OSLTF to \$24,041.42.<sup>35</sup>

## **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>36</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.

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<sup>25</sup> CTDEEP Final Closeout report #202203231, undated.

<sup>26</sup> Email from ESI to NPFC dated October 11, 2023.

<sup>27</sup> ESI Optional OSLTF Claim Form dated August 17, 2023..

<sup>28</sup> CTDEEP Final Closeout report #202203231, undated.

<sup>29</sup> CTDEEP Final Closeout report #202203231, undated.

<sup>30</sup> ESI Invoice #85427 dated October 26, 2023. Note that given the CTDEEP report supports the conclusion that the alleged incident likely occurred in 2022 despite claimant's invoice dates in 2023.

<sup>31</sup> Letter to (b) (6) and invoice #85427 dated October 26, 2023; and USPS Certified Mail return receipt signed by the RP October 28, 2023.

<sup>32</sup> See, ESI OSLTF Optional Claim Form dated August 17, 2023.

<sup>33</sup> USPS Certified Mail return receipt signed by the RP October 28, 2023.

<sup>34</sup> 33 USC §2713(c).

<sup>35</sup> Amended OSLTF Claim Form submitted with email from ESI to NPFC dated March 7, 2024.

<sup>36</sup> 33 CFR Part 136.

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>37</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>38</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>39</sup> An RP's liability is strict, joint, and several.<sup>40</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>41</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>42</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>43</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>44</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>45</sup> The claimant bears the burden of providing all evidence, information, and

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<sup>37</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>38</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>39</sup> 33 U.S.C. § 2702(a).

<sup>40</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>41</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>42</sup> 33 U.S.C. § 2701(31).

<sup>43</sup> 33 U.S.C. § 2701(30).

<sup>44</sup> See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>45</sup> 33 CFR Part 136.

documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.<sup>46</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>47</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>48</sup>

The claimant has not satisfied the legal requirements for a removal cost claim under OPA. The claimant provided no records showing that claimant's actions were directed by the FOSC or that the FOSC determined that the actions were consistent with the NCP. Given the information provided by the claimant, it appears the FOSC was not included or involved in the response. For removal costs to be compensable under OPA, the actions upon which they are based must either be determined by the FOSC and determined to be consistent with the National Contingency Plan or be directed by the FOSC. The claimant provided a state report as purported documentation of the appropriateness of its actions,<sup>49</sup> but this does not overcome the deficiency of not having coordinated its actions with the FOSC.

Further, the record provided by the claimant raises questions as to whether its actions were solely related to oil spill removal or included other actions. The initial invoice<sup>50</sup> provided to the NPFC by the claimant included charges for "boat retrieval" and pre-dated the time when the claimant alleged that the spill occurred, which was stated as June 6, 2023 on its claim form despite other documents showing 2022 in its submission and supplemental documentation.<sup>51</sup> Additionally, the claimant offered information regarding a National Response Center report #1364157.<sup>52</sup> The NPFC researched this report and found that the Coast Guard responded to a sunken boat in the Thames River, but the date was in March 2023 and the case was closed April 6, 2023.<sup>53</sup>

The NPFC must deny the claim for lack of FOSC coordination as required in accordance with the regulations.

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<sup>46</sup> 33 CFR 136.105.

<sup>47</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>48</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>49</sup> CTDEEP Incident Close out Report #202203231, undated.

<sup>50</sup> ESI invoice #81685 dated September 1, 2022, supplied with initial claim submission, pages 3-8 of 76.

<sup>51</sup> ESI Optional OSLTF Claim form dated August 17, 2023. Again, ESI provided a CTDEEP report for 2022, but invoice dating in 2023. ESI has not explained or clarified the discrepancy between the dates provided.

<sup>52</sup> Email from ESI to NPFC dated March 11, 2024.

<sup>53</sup> The NPFC notes that the NRC report number led to the discovery of a MISLE Case Report #1340177. This case report provides facts that differ from the claimant's stated facts. The dates were also different and the subject vessel name was not noted, but the vessel was much larger, and broke apart on land spilling about 25 gallons of gasoline into the soil. There was only a sheen and different OSROs were named, not including the claimant.

The NPFC has not specifically adjudicated the underlying claimed costs because it has denied the claim on the jurisdictional grounds of not being compensable under OPA.<sup>54</sup>

**VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Environmental Services, Inc.'s request for uncompensated removal costs is denied.

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Claim Supervisor:	<div style="background-color: black; color: red; text-align: center; padding: 5px; font-weight: bold;">(b) (6)</div>
Date of Supervisor's review:	
Supervisor Action: <i>Denial Approved</i>	
Supervisor's Comments:	

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<sup>54</sup> Because NPFC has determined that the claimant is not entitled to compensation, NPFC did not adjudicate whether these claimed expenses met the other regulatory requirements outlined in 33 CFR Part 136.