

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP924006-URC001
Claimant:	Environmental Safety & Health Consulting Services, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$210,342.10
Action Taken:	Offer in the amount of \$208,363.50

EXECUTIVE SUMMARY:

On July 31, 2023, the United States Coast Guard (“USCG”) National Response Center (“NRC”) received notification of an unknown amount of crude oil releasing from an 8-inch pipeline connecting Whitney Oil & Gas, LLC’s (“Whitney” or “RP”) East Bay Facility production platform to Whitney’s central facility into the Gulf of Mexico; a navigable waterway of the United States.² Whitney Oil & Gas, LLC, is the owner and operator of the pipeline and is the responsible party (RP),³ as defined by the Oil Pollution Act of 1990.⁴

On July 31, 2023, Whitney hired Environmental Safety & Health Consulting Services, Inc. (“ES&H” or “Claimant”) to perform response actions.⁵ Coast Guard Sector New Orleans was the Federal On-Scene Coordinator (“FOSC”). The FOSC oversaw the response actions of ES&H.⁶

Following source containment, ES&H flushed the source area and the dock/barge area and began bagging saturated sorbent and pads.⁷ All equipment, debris and waste material were fully removed from the scene by September 14, 2023, at which time, cleanup operations ended.⁸

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 National Response Center Report #1374815 July 31, 2023.

³ Email from FOSCR to the NPFC dated January 10, 2024.

⁴ 33 U.S.C. § 2701 (32).

⁵ ES&H Original Claim Submission received November 7, 2023. *See*, Whitney Oil & Gas IAP for 7/31/23 through 8/2/23 and signed by the RP.

⁶ Email from FOSCR to the NPFC dated January 10, 2024.

⁷ ES&H Original Claim Submission received November 7, 2023. *See*, Daily Services Ticket with ES&H Invoice 1-66245 pg. 26 of 27.

⁸ ES&H Original Claim Submission received November 7, 2023. *See*, Bill of Lading Short Form Tickets with Invoice 1-66774 pages 42-43 of 43.

On November 7, 2023, ES&H presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$210,342.⁹ 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 majority of the costs requested in the total amount of \$208,363.50 are compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On July 31, 2023, the United States Coast Guard (“USCG”) National Response Center (“NRC”) received notification of an unknown amount of crude oil releasing from an 8-inch pipeline connecting Whitney Oil & Gas, LLC’s (“Whitney” or “RP”) East Bay Facility production platform to Whitney’s central facility into the Gulf of Mexico; a navigable waterway of the United States.¹⁰

Responsible Party

In accordance with the Oil Pollution Act of 1990, the owner and operator of the pipeline is the Responsible Party (RP) for the incident.¹¹ Whitney Oil & Gas, LLC is the owner and operator of the pipeline and facility at the time when the spill incident occurred.¹² As such, Whitney is identified as the responsible party (RP), as defined by the Oil Pollution Act of 1990.¹³

ES&H presented two invoices to Whitney Oil & Gas, RP, that are subject of this claim and identified as invoice # 1-66245 dated August 18, 2023, and invoice # 1-66774 dated October 9, 2023.¹⁴ The NPFC issued a RP Notification letter to Whitney Oil & Gas, LLC dated November 7, 2023.¹⁵ A RP Notification letter notifies the RP that a claim was presented to the NPFC that is seeking reimbursement of uncompensated removal costs or damages incurred as result of the incident in which the recipient is the identified or suspected RP.¹⁶

Recovery Operations

On July 31, 2023, Whitney hired the Oil Spill Response Organization (“OSRO”) ES&H to clean up and remove all crude oil.¹⁷ ES&H began active recovery operations by placing sorbents and pads in and around the contaminated area.¹⁸ The FOSC oversaw the actions of ES&H who were under direction of the RP, Whitney during the July 31, 2023, cleanup operation.¹⁹

⁹ ES&H Original Claim Submission received November 7, 2023.

¹⁰ National Response Center Report #1374815 July 31, 2023.

¹¹ 33 U.S.C. §2701(32).

¹² Email from FOSCR to the NPFC dated January 10, 2024.

¹³ 33 U.S.C. §2701(32).

¹⁴ See, ES&H Original Claim Submission received November 7, 2023. See, ES&H Invoice 1-66245 and ES&H Invoice 1-66774.

¹⁵ See, RP Notification Letter dated November 7, 2023.

¹⁶ *Id.*

¹⁷ ES&H Original Claim Submission received November 7, 2023. See, Whitney Oil & Gas Incident Action Plans (IAPs) from July 31, 2023, through August 7, 2023.

¹⁸ ES&H Original Claim Submission received November 7, 2023. See, Supervisor Logs pg. 1 of 11.

¹⁹ Email from FOSCR to the NPFC dated January 10, 2024.

Following source containment, ES&H flushed the source area, and the dock/barge area, and began bagging saturated sorbent and pads.²⁰ Between August 5, 2023, and August 24, 2023, ES&H personnel visited the scene regularly to remove any remaining oil.²¹ Between September 13, 2023, and September 14, 2023, ES&H personnel returned on scene to retrieve all equipment, and to remove any remaining debris and waste material.²²

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²³ require all claims for removal costs must be presented to the responsible party before seeking compensation from the NPFC.²⁴

By October 9, 2023, ES&H had satisfied its presentment requirements under OPA.²⁵ The invoices were inclusive of labor, equipment and vehicles, materials and supplies, subcontractors, markup, and fixed priced items totaling \$210,342.10.²⁶ The RP has not paid the invoices.²⁷

III. CLAIMANT AND NPFC:

On November 7, 2023, ES&H presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$210,342.10.²⁸ The claim included ES&H's signed OSLTF form, two invoices representative of all costs claimed, the 2023 ES&H Rate Schedule, all associated Supervisor Logs, several Photographs, proof of Whitney's Chapter 11 Bankruptcy, a document detailing vendor payments and a sample analysis taken from the spill incident location.²⁹

On November 22, 2023, the NPFC requested additional information from ES&H.³⁰ On December 4, 2023, ES&H provided a detailed explanation in response to one of the three inquiries presented by the NPFC.³¹ On December 13, 2023, ES&H responded to the additional requests and submitted additional information in support of their claim.³²

²⁰ ES&H Original Claim Submission received November 7, 2023. *See*, Daily Services Ticket with ES&H Invoice 1-66245 pg. 26 of 27

²¹ ES&H Original Claim Submission received November 7, 2023. *See*, Supervisor Logs pages 6-11 of 11.

²² ES&H Original Claim Submission received November 7, 2023. *See*, Bill of Lading Short Form Tickets with Invoice 1-66774 pages 42-43 of 43.

²³ 33 U.S.C. § 2701 *et seq.*

²⁴ 33 CFR 136.103.

²⁵ ES&H submitted two invoices to the RP. One on August 18, 2023 for interim costs, and one on October 9, 2023 for the remaining costs. These costs are the subject of the claim. *See*, ES&H Invoices #1-66245 dated August 18, 2023, and #1-66774 dated October 9, 2023.

²⁶ ES&H claim submission received November 7, 2023.

²⁷ The NPFC notes for the record that the RP filed Chapter 11 bankruptcy in the Eastern District of Louisiana on October 26, 2023 (Case #23-11873).

²⁸ ES&H claim submission received November 7, 2023.

²⁹ *Id.*

³⁰ Email from NPFC to ES&H dated November 22, 2023.

³¹ Email from ES&H to NPFC dated December 4, 2023.

³² Email from ES&H to NPFC dated December 13, 2023.

The RP did not settle the claim within 90 days from presentment.³³ As such, the NPFC adjudicated the claim.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁴ 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.³⁵ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³⁶ 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.³⁷ An RP's liability is strict, joint, and several.³⁸ 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."³⁹ 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."⁴⁰ 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

³³ 33 CFR 136.103(c).

³⁴ 33 CFR Part 136.

³⁵ 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)).

³⁶ 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).

³⁷ 33 U.S.C. § 2702(a).

³⁸ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³⁹ *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).

⁴⁰ 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.”⁴¹

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴² The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴³ 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.⁴⁴

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.⁴⁵
- (d) That the removal costs were uncompensated and reasonable.⁴⁶

The NPFC analyzed each of these factors and determined that most of the costs incurred and submitted by ES&H 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.

All approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).⁴⁷

Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$208,363.50, while \$1,978.60 is denied for the following reasons:⁴⁸

1. ES&H is seeking a total of \$4,900.00 for costs associated with the use of 400 feet of 18-inch Containment Boom for 7 days from August 10, 2023, to August 16, 2023.⁴⁹ The approved rate is \$1.75 per foot. However, the Daily Services Tickets found on ES&H Invoice 1-66774 pg. 37 and 39 indicate only 300 feet of 18-inch Containment Boom were

⁴¹ 33 U.S.C. § 2701(30).

⁴² *See generally*, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴³ 33 CFR Part 136.

⁴⁴ 33 CFR 136.105.

⁴⁵ After analyzing the incident and the actions taken by ES&H, the FOSC opined that the response actions undertaken by ES&H were consistent with the National Contingency Plan. *See*, Email from USCG Sector NOLA to the NPFC dated November 14, 2023.

⁴⁶ 33 CFR 136.203; 33 CFR 136.205.

⁴⁷ Email from USCG Sector NOLA to the NPFC dated November 14, 2023.

⁴⁸ Enclosure 3 provides a detailed analysis of the amounts approved by the NPFC.

⁴⁹ ES&H Original Claim Submission received November 7, 2023. *See*, Daily Services Ticket with ES&H Invoice 1-66774 pgs. 37 and 39.

used each day, not the 400 feet per day as claimed.⁵⁰ Costs are approved at the supported rate of \$1.75 per foot, for the combined total of 2100 feet; totaling \$3,675.00. Total costs denied = \$1225.00.⁵¹

2. ES&H is seeking a total of \$753.60 for costs noted on Tarp Depot Invoice 141738.⁵² No evidence of proof of payment was submitted with the claim. Following the NPFC's request for proof of payment,⁵³ ES&H stated the costs were an estimate and had not been paid to the contractor.⁵⁴ The claimant has not incurred these costs and as such, they cannot be compensated. The claim for these costs is denied. Total costs denied = \$753.60.⁵⁵

Overall Denied Costs: \$1,978.60⁵⁶

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 **\$208,363.50**.

This determination is a settlement offer,⁵⁷ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁵⁸ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵⁹ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

⁵⁰ ES&H Original Claim Submission received November 7, 2023. *See*, Daily Services Ticket with ES&H Invoice 1-66774 pgs. 37 and 39.

⁵¹ *See*, Enclosure 3.

⁵² ES&H Original Claim Submission received November 7, 2023. *See*, Tarp Depot, Inc. Invoice 141738, submitted with Invoice 1-66774 pg. 31 of 43.

⁵³ Email from NPFC to ES&H dated November 22, 2023.

⁵⁴ Email from ES&H to NPFC dated December 13, 2023.

⁵⁵ *See*, Enclosure 3, Sheet 3, Line 221.

⁵⁶ Enclosure 3 provides a detailed analysis of the amounts approved by the NPFC.

⁵⁷ 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).

⁵⁸ 33 CFR 136.115(b).

⁵⁹ *Id.*

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review:

Supervisor Action: *Offer Approved*