

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

<b>Claim Number:</b>	UCGP923030-URC001
<b>Claimant:</b>	Kirby Inland Marine
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$3,825.10
<b>Action Taken:</b>	Offer in the amount of \$3,825.10

### EXECUTIVE SUMMARY:

On May 10, 2023, the United States Coast Guard (USCG) Sector Houston-Galveston (“Sector Houston-Galveston” or “FOSC”) received notice from the Kirby Inland Marine (“Kirby” or “Claimant”) Greens Bayou Fleet that an unknown sheen, located 250 yards northwest of Proler Industries Dock Facility in Houston, Texas, had entered Greens Bayou; a navigable waterway of the United States.<sup>2</sup> Sector Houston-Galveston notified the National Response Center (NRC), describing the sheen as black in color and showing rainbow emulsions.<sup>3</sup> USCG Sector Houston-Galveston, in its capacity as the Federal On Scene Coordinator (FOSC) for this incident location, could not identify a responsible party, therefore the source of the spill remains a mystery.

Kirby hired American Environmental & Industrial Services, LLC (“AEIS” or “OSRO”) to clean up the spill.<sup>4</sup> On May 10, 2023, at approximately 1430 hours, AEIS arrived on scene and utilized sorbent sweeps, a 55-gallon poly drum and hand tools to aide in mitigation of the spill.<sup>5</sup> AEIS disposed of a substance-filled sorbent drum before leaving the scene on May 10, 2023, at approximately 2100 hours.<sup>6</sup>

On August 9, 2023, Kirby presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$3,825.10.<sup>7</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 all costs requested for \$3,825.10 are compensable and offers this amount as full and final compensation of this claim.

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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 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.

<sup>2</sup> USCG SITREP One and Final dated August 10, 2023.

<sup>3</sup> National Response Center (NRC) Report #1366903, pg. 2 of 5.

<sup>4</sup> Kirby claim submission received August 9, 2023, pg. 2 of 8, question 11.

<sup>5</sup> Email from Kirby to NPFC dated August 24, 2023. *See*, Complete Job File pg. 1 of 2.

<sup>6</sup> Email from Kirby to NPFC dated August 24, 2023. *See*, Complete Job File pg. 1 of 2.

<sup>7</sup> Kirby claim submission received August 9, 2023.

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

### ***Incident***

On May 10, 2023, Sector Houston-Galveston received notice from Kirby's Greens Bayou Fleet of an unknown sheen, located in the Greens Bayou waterway, approximately 250 yards northwest of the Proler Industries Dock Facility.<sup>8</sup> Sector Houston-Galveston notified the NRC, describing the sheen as black in color and emitting rainbow emulsions.<sup>9</sup>

Kirby's Greens Bayou Fleet crew members reported seeing a 15" x 5' clump of the substance resting against 2 of their vessels and described the substance sticking to the vessels.<sup>10</sup> Kirby's Greens Bayou Fleet crew members described the sheen was several hundred feet long by 15-25' wide and moving outbound further into the Greens Bayou.<sup>11</sup> Sector Houston-Galveston sent their Incident Management Division (IMD) Pollution Responder personnel to the scene between approximately 1400 to 1600 hours.<sup>12</sup> Coast Guard personnel noted the sheen to be approximately 100' long by 8' wide.<sup>13</sup>

### ***Responsible Party***

In accordance with the Oil Pollution Act of 1990, the owner/operator of the source which caused the oil spill is the Responsible Party (RP) for the incident.<sup>14</sup> The source of the spill could not be identified.

### ***Recovery Operations***

Equipment and vessels owned by Kirby were oiled by the sheen.<sup>15</sup> Kirby hired American Environmental & Industrial Services, LLC ("AEIS" or "OSRO") to clean up the spill, as a means to prevent further damage.<sup>16</sup> On May 10, 2023, at approximately 1430 hours, AEIS arrived on scene and utilized sorbent sweeps, a 55-gallon poly drum and hand tools to aide in mitigation of the spill.<sup>17</sup> AEIS disposed of a drum containing 120 pounds of oily sorbent material<sup>18</sup> before leaving the scene on May 10, 2023, at approximately 2100 hours.<sup>19</sup>

## **II. CLAIMANT AND NPFC:**

On August 9, 2023, the NPFC received a claim for \$3,825.10 from Kirby.<sup>20</sup> When the claim was received, it included a signed OSLTF Form, 3 photographs taken on-site from the spill location, and AEIS Invoice 23-274.<sup>21</sup>

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<sup>8</sup> USCG SITREP One and Final dated August 10, 2023.

<sup>9</sup> National Response Center (NRC) Report #1366903, pg. 2 of 5.

<sup>10</sup> Kirby claim submission received August 9, 2023, pg. 1 of 8.

<sup>11</sup> *Id.*

<sup>12</sup> Email from USCG Sector Houston-Galveston to NPFC dated August 23, 2023.

<sup>13</sup> USCG SITREP One and Final dated August 10, 2023.

<sup>14</sup> 33 U.S.C. § 2701(32).

<sup>15</sup> Kirby claim submission received August 9, 2023, pg. 1 of 8.

<sup>16</sup> Kirby claim submission received August 9, 2023, pg. 2 of 8, and Email from Kirby to NPFC dated August 24, 2023. *See*, Complete Job File pg. 1 of 2.

<sup>17</sup> Email from Kirby to NPFC dated August 24, 2023. *See*, Complete Job File pg. 1 of 2.

<sup>18</sup> Email from Kirby to NPFC dated August 24, 2023. *See*, AEIS\_20230822\_090516 pg. 1 of 2 for Bill of Lading, and pg. 2 of 2 for Work Order.

<sup>19</sup> Email from Kirby to NPFC dated August 24, 2023. *See*, Complete Job File pg. 1 of 2.

<sup>20</sup> Kirby claim submission dated May 26, 2023.

<sup>21</sup> Kirby claim submission received August 9, 2023.

On August 10, 2023, the NPFC requested additional information from Kirby.<sup>22</sup> On August 24, 2023, Kirby submitted their reply to the NPFC's requests, including proof payment to AEIS for costs affiliated with the spill incident, the complete job file, the work order and bill of lading associated with the disposal of the sorbent drum and the paid/signed copy of AEIS's Invoice 23-274.<sup>23</sup>

On August 25, 2023, the NPFC requested additional information from Kirby.<sup>24</sup> On August 25, 2023, Kirby submitted the 2023 AEIS rate sheet in response to the NPFC's request.<sup>25</sup> The NPFC made one final request for additional information on September 6, 2023,<sup>26</sup> and on September 8, 2023, Kirby submitted an explanation of all disposal costs in response to the NPFC's request.<sup>27</sup>

### **III. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>28</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>29</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>30</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.

### **IV. 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>31</sup> An RP's liability is strict, joint, and several.<sup>32</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>33</sup> OPA was intended to cure these deficiencies in the law.

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<sup>22</sup> Email from NPFC to Kirby, dated August 10, 2023.

<sup>23</sup> Email from Kirby to NPFC, dated August 24, 2023, with Attachments.

<sup>24</sup> Email from NPFC to Kirby, dated August 25, 2023.

<sup>25</sup> Email from Kirby to NPFC, dated August 25, 2023, with 2023 AEIS Rate Sheet.

<sup>26</sup> Email from NPFC to Kirby, dated September 6, 2023.

<sup>27</sup> Email from Kirby to NPFC dated September 8, 2023, with AEIS Stream Environmental Information document.

<sup>28</sup> 33 CFR Part 136.

<sup>29</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>30</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>31</sup> 33 U.S.C. § 2702(a).

<sup>32</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>33</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).

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>34</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>35</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>36</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>37</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>38</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>39</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>40</sup>

The NPFC analyzed each of these factors and determined that all costs incurred and submitted by Kirby 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.

Based on the location of this incident, the FOSC is the United States Coast Guard Sector Houston-Galveston (“Sector Houston-Galveston” or “FOSC”).<sup>41</sup> All approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).<sup>42</sup>

Upon adjudication of the costs, the NPFC has determined that all costs submitted by Kirby in the amount of \$3,825.10 are compensable and as such, all removal costs claimed are approved.<sup>43</sup>

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<sup>34</sup> 33 U.S.C. § 2701(31).

<sup>35</sup> 33 U.S.C. § 2701(30).

<sup>36</sup> *See generally*, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>37</sup> 33 CFR Part 136.

<sup>38</sup> 33 CFR 136.105.

<sup>39</sup> The NPFC coordinated with USCG Sector Houston-Galveston, as the Federal On-Scene Coordinator (FOSC) for this incident. After analyzing the incident and the actions taken by Kirby, the FOSC opined that the response actions undertaken by Kirby and its subcontractor were consistent with the National Contingency Plan. *See*, email from USCG Sector Houston-Galveston to the NPFC dated August 23, 2023.

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

<sup>41</sup> 40 CFR 300.120(a)(2).

<sup>42</sup> Email from USCG Sector Houston-Galveston to the NPFC certifying that all actions and costs were consistent with the NCP, dated August 23, 2023.

<sup>43</sup> Enclosure 3 provides a detailed analysis of the amounts approved by the NPFC.

## **V. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Kirby's request for uncompensated removal costs is approved in the amount of **\$3,825.10**.

This determination is a settlement offer,<sup>44</sup> the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>45</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>46</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

**(b) (6)**

Claim Supervisor: **(b) (6)**

Date of Supervisor's review: **9/13/23**

Supervisor Action: ***Offer approved***

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<sup>44</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>45</sup> 33 CFR 136.115(b).

<sup>46</sup> *Id.*