

CLAIM DETERMINATION

Claim Number:	UCGP922015-RPD004
Claimant:	D and C Motor Company
Type of Claimant:	RP
Type of Claim:	Defense to Liability, Act or Omission of a 3 rd Party
Claim Manager:	(b) (6)
Amount Requested:	\$14,287.76
Action Taken:	Offer in the Amount of \$14,287.76

EXECUTIVE SUMMARY:

On October 12, 2021, at approximately 10:00 p.m., a fire broke out in a storage shed adjacent to the D and C Motor Company (“D and C Motor” or “Claimant”) automotive service building in Milwaukie, Oregon.¹ The fire consumed a 275-gallon plastic tote containing used motor oil located next to the storage shed, resulting in the discharge of the tote’s contents.² The oil entered a storm drain and travelled via the storm water conveyance system into Kellogg Lake, a navigable waterway of the United States.³ D and C Motor personnel responded and placed sandbags and sorbent boom around the perimeter of their property to prevent oil from further migrating off their property.⁴

On October 13, 2021, black oil was observed on the surface of Kellogg Lake by a Clackamas County Water Environmental Services (CWES) employee and reported to the Oregon Department of Environmental Quality (ODEQ).⁵ ODEQ personnel responded⁶ and reported the oil spill to the U.S. Coast Guard (CG) National Response Center (NRC).⁷ The United States Environmental Protection Agency (USEPA) had authority as the Federal On-Scene Coordinator (FOSC)⁸ but relied upon ODEQ personnel to provide oversight of the removal activities.⁹ Oregon Department of Transportation (ODOT) personnel also responded and hired a contractor to respond to the oil spill on Kellogg Lake and adjoining tributaries as well as the storm water conveyance system impacted by the oil spill.¹⁰ D and C Motor personnel hired River City Environmental, Inc. (River City) to remove oil from their property and from the oil impacted catch basin located at the southwest corner of their parking lot.¹¹ An investigation into the cause of the fire conducted by the Clackamas County Sheriff’s Department revealed a transient person had started the fire that resulted in the destruction of D and C Motor’s 275-gallon plastic tote and subsequent discharge of oil.¹²

¹ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 1.

² *Id.*

³ *Id.*

⁴ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, pages 5 and 21-24.

⁵ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

⁶ *Id.*

⁷ NRC Report Number #1319398 dated October 13, 2021.

⁸ *See*, 40 CFR 300.120(a)(2).

⁹ Oregon DEQ consulted with USEPA FOSC, in the planning of initial response actions and throughout the full term of the response. *See*, Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

¹⁰ *Id.*

¹¹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated July 19, 2023, page 1.

¹² Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 3.

On January 4, 2022, ODEQ personnel determined that the spill response was complete.¹³

On January 18, 2022, D and C Motor personnel hired River City to remove all oil contaminated soil from around their leased property and conduct soil restoration.¹⁴

On April 18, 2023, D and C Motor submitted a claim for entitlement to a defense to liability, based on an act or omission of a third party¹⁵ to the CG National Pollution Funds Center (NPFC) and seek reimbursement of removal costs incurred under the defense in the amount of \$14,287.76.¹⁶ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that D and C Motor has demonstrated an entitlement to a defense to liability. Additionally, the NPFC has determined that \$14,287.76 is compensable and offers this amount as full and final compensation of this claim¹⁷ for its uncompensated removal costs and damages under the Oil Pollution Act (OPA).¹⁸

I. FACTUAL BACKGROUND:

A. D and C Motor Company, The Fire and Resulting Oil Spill, and Removal Activities

D and C Motor leased property located at 13690 SE McLoughlin Boulevard in Milwaukie, OR., that included a portion of a building used as single car repair garage and the adjoining parking lot.¹⁹ D and C Motor also maintained a 275-gallon aluminum framed plastic oil tote on the parking lot used for the collection of used motor oil.²⁰ The plastic oil tote was situated on the parking lot adjacent to D and C Motor's leased building and located approximately 2-4 feet from a storage shed.²¹ The storage shed was not part of D and C Motor's lease with the property owner and was not used for storage by D and C Motor personnel.²² D and C Motor's 275-gallon aluminum frame plastic tote was locked,²³ labeled "Used Waste Oil",²⁴ and stored within a plastic secondary containment designed to prevent oil from being discharged onto the ground in the event of an accidental overflow.²⁵ Security measures employed by D and C Motor personnel included a four-foot wooden fence enclosing the backside of the property,²⁶ a six-foot chain link fence with locked gate at the entrance to the property,²⁷ motion activated security lights

¹³ *Id.* Oregon DEQ consulted with the FOSC throughout the entirety of the response. *See*, Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

¹⁴ Letter from D and C Motor Company to the CG National Pollution Funds Center dated July 19, 2023, page 4.

¹⁵ 33 U.S.C. § 2703(a)(3).

¹⁶ D and C Motor Company claim submission with a sum certain of \$21,186.50 dated April 18, 2023, page 2. *See also* letter from D and C Motor Company to the CG National Pollution Funds Center amending their sum certain to \$14,287.76 dated June 21, 2023, page 9.

¹⁷ 33 CFR 136.115.

¹⁸ 33 U.S.C. § 2703(a).

¹⁹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 2.

²⁵ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 3.

²⁶ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 12.

²⁷ *Id.*

throughout the parking lot,²⁸ security cameras,²⁹ a warning sign alerting trespassers of video surveillance,³⁰ and security patrols conducted randomly twice every evening.³¹

On October 12, 2021, at approximately 10:00 p.m., a fire broke out within the storage shed located adjacent to the D and C Motor's automotive service building and 275-gallon plastic oil tote.³² The fire consumed the shed, the plastic liner of the tote,³³ and the tote's secondary containment³⁴ resulting in the discharge of the tote's contents.³⁵ The Clackamas County Fire Department responded to the fire³⁶ and their firefighting water mobilized the discharged oil into the local stormwater conveyance system owned by ODOT.³⁷ The oil travelled via the storm water conveyance system approximately half a mile north to its outfall with Linder Creek.³⁸ The oil continued down Linder Creek until it entered Kellogg Creek, and ultimately Kellogg Lake, a navigable waterway of the United States.³⁹ D and C Motor personnel responded shortly after the fire and placed sandbags and sorbent boom around the perimeter of their property to prevent oil from further migrating off their property.⁴⁰

On October 13, 2021, black oil was observed on the surface of Kellogg Lake by a CWES employee and reported to the ODEQ.⁴¹ ODEQ personnel responded as the State On-Scene Coordinator⁴² and coordinated with Mr. (b) (6), EPA FOSC, initially in their planning and throughout the full term of the response.⁴³ Mr. (b) (6) served as the FOSC⁴⁴ but relied upon ODEQ to provide oversight of the removal activities.⁴⁵ ODEQ personnel attended the scene throughout the response to evaluate site conditions, effectiveness of containment measures and other aspects of the response in coordination with the FOSC.⁴⁶

ODOT personnel also responded as the owners of the storm water conveyance system and hired US Ecology to deploy containment and absorbent boom within the creeks and Kellogg

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 4.

³² Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 1.

³³ *Id.*

³⁴ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 3.

³⁵ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 1. ODEQ estimated that the tote was nearly full at the time of discharge based upon observations and conversations with D and C Motor personnel. *See* Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 1. However, D and C Motor personnel reported the tote to be half-full at the time of the discharge. *See* letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 2.

³⁶ D and C Motor Company claim submission dated April 18, 2023, page 2.

³⁷ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, pages 5 and 21-24.

⁴¹ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See*, 40 CFR 300.120(a)(2).

⁴⁵ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

⁴⁶ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, pages 2-3. *See also* emails between ODEQ personnel and Mr. Richard Franklin provided by the claimant within their original claim submission dated April 18, 2023, pages 29 and 30.

Lake to prevent the movement of oil into the Willamette River.⁴⁷ Cleaning of the source area and within the stormwater systems was completed to prevent further movement of oil into the waterway.⁴⁸ After the cleaning, absorbents were left in the catch basins of the stormwater system to absorb any residual oil that might remain.⁴⁹ Passive oil collection methods continued over several months by leaving the booms in place and relying on anticipated rain events to flush out any residual oil to the collection points.⁵⁰

On October 19, 2021, D and C Motor personnel hired River City to pressure wash oil from the asphalt parking lot surrounding their building, remove all oil contaminated debris around their parking lot and to remove the oil from the oil impacted catch basin located at the southwest corner of their parking lot.⁵¹

On January 4, 2022, ODEQ personnel declared the cleanup complete as there was no additional oil recoverable from the waterways and only very minor sheening observed entering Kellogg Lake.⁵² In total, 4.98 tons of oily absorbents and debris along with approximately 150 gallons of oily water were collected and disposed of during the response.⁵³

On January 18, 2022, D and C Motor personnel hired River City to remove all oil contaminated soil from around their leased property and conduct soil restoration.⁵⁴

B. Investigation into the Fire at D and C Motor Company

On October 12, 2021, at approximately 6:22 p.m., a security camera mounted on the backside of D and C Motor's automotive service building and directed into their parking lot recorded an individual scaling the four-foot wooden fence surrounding the backside of the property.⁵⁵ Once on premise, the individual entered a storage shed located adjacent to D and C Motor's automotive service center building and 275-gallon plastic tote containing used motor oil.⁵⁶ Security camera footage recorded the individual entering and then departing the storage shed on several occasions between 6:22 p.m. and 9:40 p.m. and recorded the individual on one occasion departing the storage

⁴⁷ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 2.

⁵¹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated July 19, 2023, page 1. *See also* email from Mr. (b) (6) to the CG National Pollution Funds Center dated October 25, 2023, wherein he confirmed that the actions taken by D and C Motor personnel in response to the oil spill were necessary to prevent, minimize, or mitigate the effects of the oil spill. Additionally, Mr. (b) (6) confirmed that the response actions of D and C Motor personnel were consistent with the National Contingency Plan.

⁵² Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022, page 3.

⁵³ *Id.*

⁵⁴ Letter from D and C Motor Company to the CG National Pollution Funds Center dated July 19, 2023, page 4. *See also* email from Mr. (b) (6) to the CG National Pollution Funds Center dated October 25, 2023, wherein he confirmed that the actions taken by D and C Motor personnel in response to the oil spill were necessary to prevent, minimize, or mitigate the effects of the oil spill. Additionally, Mr. (b) (6) confirmed that the response actions of D and C Motor personnel were consistent with the National Contingency Plan.

⁵⁵ Security camera footage from 6:22 p.m. - 6:25 p.m. dated October 12, 2021, provided by the claimant with their original claim submission dated April 18, 2023.

⁵⁶ *Id.* *See also* letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 1.

shed with an open flame and then re-entering the storage shed with an open flame.⁵⁷ Smoke was recorded exiting the storage shed on numerous occasions during this time period.⁵⁸ The individual was last recorded exiting the storage shed and departing the property at 9:40 p.m.⁵⁹ Heavy smoke was recorded exiting the storage shed and flames from the fire originating from within the storage shed were first recorded at 9:50 p.m.⁶⁰

An investigation conducted by the Clackamas County Sheriff's office confirmed the individual recorded on the security video was the person responsible for the fire that originated from within the storage shed.⁶¹ The investigation also revealed the identity of that individual but efforts to locate and charge them as the party responsible for the fire were unsuccessful as the individual is believed to be transient and without a home address.⁶²

C. Responsible Party and the Claim

D and C Motor owned the 275-gallon plastic tote containing used motor oil at the time of the incident⁶³ and is the responsible party (RP).⁶⁴

On April 19, 2023, D and C Motor submitted a claim for entitlement to a defense to liability, act or omission of a third-party⁶⁵ claim to the NPFC requesting compensation of removal costs incurred on October 19, 2021, for the removal of oil from their parking lot and catch basin located at the southwest corner of the parking lot and on January 18, 2022, for the removal of oil contaminated soil and soil restoration under the defense in the amount of \$14,287.76.⁶⁶

II. DISCUSSION:

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.⁶⁷ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant's claim against the OSLTF.

⁵⁷ Security camera footage from 6:22 p.m. - 6:25 p.m. dated October 12, 2021, provided by the claimant with their original claim submission dated April 18, 2023. *See also*, security camera footage 7:20 p.m. - 7:34 p.m. provided by the claimant with their original claim submission dated April 18, 2023. *See also*, security camera footage 8:09 p.m. - 8:10 p.m. provided by the claimant with their original claim submission dated April 18, 2023. *See also*, security camera footage 8:40 p.m. - 8:58 p.m. provided by the claimant with their original claim submission dated April 18, 2023. *See also*, security camera footage 9:15 p.m. - 9:23 p.m. provided by the claimant with their original claim submission dated April 18, 2023. *See also*, security camera footage 9:38 p.m. - 9:54 p.m. provided by the claimant with their original claim submission dated April 18, 2023.

⁵⁸ *Id.*

⁵⁹ Security camera footage 9:38 p.m. - 9:54 p.m. provided by the claimant with their original claim submission dated April 18, 2023.

⁶⁰ *Id.*

⁶¹ D and C Motor Company claim submission dated April 18, 2023, page 19.

⁶² *Id.* *See also* summary of conversation between the CG National Pollution Funds Center and Clackamas County Sheriff's Department dated May 1, 2023.

⁶³ D and C Motor Company letter to the CG National Pollution Funds Center dated June 21, 2023, pages 2-3.

⁶⁴ 33 U.S.C. § 2701(32)(B).

⁶⁵ 33 U.S.C. § 2703(a)(3).

⁶⁶ D and C Motor Company claim submission with a sum certain of \$21,186.50 dated April 18, 2023, page 2. *See also* letter from D and C Motor Company to the CG National Pollution Funds Center amending their sum certain to \$14,287.76 dated June 21, 2023, page 9.

⁶⁷ 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.⁶⁸ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁶⁹ 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 finds facts and makes its determination based on the preponderance of the credible evidence.

III. DETERMINATION PROCESS:

A responsible party 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.⁷⁰ A responsible party's liability is strict, joint, and several.⁷¹ When enacting the Oil Pollution Act (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."⁷² OPA was intended to cure these deficiencies in the law.

Notwithstanding the above, under limited circumstances the Oil Spill Liability Trust Fund, administered by the NPFC, may reimburse a responsible party for its uncompensated removal costs and damages when the responsible party establishes an entitlement to a defense to liability under 33 U.S.C. § 2703.

Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that a defense under 33 U.S.C. § 2703 applies before the OSLTF can reimburse removal costs or damages. Consistent with this statutory requirement, the OSLTF's claims regulations also require all claimants to carry the burden of proving an entitlement to reimbursement.⁷³ Therefore, as with any other claimant, a responsible party must prove an entitlement under the OPA before receiving reimbursement from the OSLTF. If a responsible party fails to introduce evidence in support of any of the elements necessary to establish entitlement to compensation from the OSLTF or fails to establish each of the elements by a preponderance of the credible evidence, the NPFC must deny the claim.⁷⁴

⁶⁸ 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).

⁶⁹ 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).

⁷⁰ 33 U.S.C. § 2702(a).

⁷¹ See, H.R. Rep. No. 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

⁷² *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.).

⁷³ See, 33 CFR 136.105(a) ("The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim."); and 33 CFR 136.105(e)(6)(Requiring that each claim include evidence to support the claim).

⁷⁴ OPA's legislative history makes it clear that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708. As explained in the House Conference Report on OPA:

The third-party defense under the OPA is “narrowly construed.”⁷⁵ A defendant must demonstrate that “the release or threatened release was caused solely by an unrelated third party.”⁷⁶ In order to prevail on its defense, D and C Motor must establish by a preponderance of the evidence that the discharge of oil and the resulting damages or removal costs were caused solely by an act or omission of a third party⁷⁷ and that it

- (a) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances and
- (b) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.⁷⁸

The claimant has satisfied its burden on each of these statutory requirements.

A. “... evidence that the discharge of oil and the resulting damages or removal costs were caused solely by an act or omission of a third party”

The Clackamas County Sheriff’s Department investigated the fire that originated within the storage shed adjacent to D and C Motor’s 275-gallon plastic used oil tote.⁷⁹ Their investigation confirmed that the person recorded in D and C Motor’s security video started the fire that resulted in the loss of D and C Motor’s 275-gallon plastic used oil tote.⁸⁰ However, efforts to locate that individual and charge them as the party responsible for the fire were unsuccessful as the person is believed to be transient and without a home address.⁸¹

The NPFC asked D and C Motor if the person identified by the Clackamas County Sheriff’s Department was a current or former employee of D and C Motor Company.⁸² D and C Motor personnel responded that the person identified by the Clackamas County Sheriff’s Department was

Section 1008 of the House bill allows a responsible party..., or a guarantor for that responsible party... to assert a claim for removal costs and damages *only if the responsible party... can show that the responsible party...has a defense to liability or is entitled to a limitation of liability.* H.R. Conf. Rep. 101-653 at 110 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 788 (emphasis added). *See also, Apex*, 208 F.Supp.2d 642 (claimant failed to carry its burden of proof with respect to the “act of God” defense); *International Marine Carriers v. OSLTF*, 903 F.Supp. 1097 (S.D. Tex. 1994) (claimant must show elements of a third party defense by a preponderance of the evidence); *Water Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009) (holding that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708).

⁷⁵ *Xiamen Ocean Shipping Co. v. United States*, 2012 WL 12882375, *7 (D. Haw. 2012). *See also, Int’l Marine Carriers v. Oil Spill Liability Trust Fund*, 903 F.Supp. 1097, 1105 (S.D. Tex. 1994).

⁷⁶ *United States v. A & N Cleaners & Launderers, Inc.*, 854 F.Supp. 229, 239 (S.D.N.Y. 1994); *see, Shore Realty Corp.*, 759 F.2d 1032, 1044-45 & n. 17; *United States v. Stringfellow*, 661 F.Supp. 1053, 1061 (C.D. Cal. 1987) (third-party defense applies “only where a totally unrelated third party is the sole cause of the release or threatened release of a hazardous substance”).

⁷⁷ 33 U.S.C. § 2703(a)(3).

⁷⁸ *Id.* *See also*, “[The statute] ... requires a showing that the responsible party exercised due care with respect to the spilled oil and that it took precautions against the foreseeable acts or omissions of the third party to whom it is attempting to shift liability.” *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 752 (5th Cir. 2011).

⁷⁹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 3.

⁸⁰ D and C Motor Company claim submission dated April 18, 2023, page 19.

⁸¹ Summary of conversation between the CG National Pollution Funds Center and Clackamas County Sheriff’s Department dated May 1, 2023.

⁸² Email from the CG National Pollution Funds Center to D and C Motor Company dated May 8, 2023.

not a current or former employee of D and C Motor Company.⁸³ The NPFC also asked D and C Motor if they ever had any know interactions with the person identified by the Clackamas County Sheriff's Department and if so, what were those interactions.⁸⁴ D and C Motor personnel responded that they had never had any known interactions or contact with the individual identified by the Clackamas County Sheriff's Department.⁸⁵

The NPFC finds that D and C Motor has met its burden under this portion of the statute in that the damages to D and C Motor's 275-gallon plastic used oil tote were caused solely by an act or omission of a third party.

B. "... evidence that the responsible party exercised due care and took precautions against foreseeable acts"

Due care has been described by the courts as being "derived not only from statutory standards, but also from the dictates of reasonableness and prudence under the given circumstances of a case."⁸⁶ As a result, D and C Motor was required to take reasonable precautions to prevent both intentional and accidental spills in light of all the relevant facts and circumstances. When interpreting OPA's predecessor statute, the U.S. Court of Claims held that "... a claimant cannot recover, even if a vandal or third party immediately caused the spill, if the claimant does not prove that reasonable action had been taken to prevent or forestall such intervention by the third party."⁸⁷

The NPFC asked D and C Motor to provide evidence that it exercised due care with respect to the oil and took precautions against foreseeable acts or omissions of a third party.⁸⁸ In response, D and C Motor personnel explained the precautions taken to safeguard their 275-gallon plastic tote of used motor oil.⁸⁹ Specifically, their 275-gallon plastic tote was constructed within an aluminum frame and locked,⁹⁰ labeled "Used Waste Oil",⁹¹ and stored within a plastic secondary containment designed to prevent oil from being discharged onto the ground in the event of an accidental overflow.⁹²

Additionally, D and C Motor personnel provided the security measures employed to protect their property.⁹³ Specifically, the property was enclosed by a four-foot wooden fence surrounding the backside of the property,⁹⁴ and a six-foot chain link fence with locked gate at the entrance to the property.⁹⁵ D and C Motor also maintained motion activated security lights throughout the

⁸³ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 6.

⁸⁴ Email from the CG National Pollution Funds Center to D and C Motor Company dated May 8, 2023.

⁸⁵ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 6.

⁸⁶ *Baby Oil, Inc. v. United States*, 938 F. Supp. 2d 640, 646 (E.D. La. 2013) (citing *Coumou v. United States*, 107 F.3d 290, 295–96 (5th Cir. 1997), *withdrawn and superseded in part on reh'g by Coumou v. United States*, 114 F.3d 64 (5th Cir. 1997)).

⁸⁷ *Union Petroleum Corp. v. United States*, 228 Ct. Cl. 54, 73, 651 F.2d 734, 745 (1981) (citing *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. United States*, 216 Ct. Cl. 155, 159, 575 F.2d 839, 841 (1978). *Cf.*, *United States v. HVI Cat Canyon*, 314 F.Supp.3d 1049 (C.D.Cal. 2018)

⁸⁸ Email from the CG National Pollution Funds Center to D and C Motor Company dated May 8, 2023.

⁸⁹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 2.

⁹⁰ *Id.*

⁹¹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 3.

⁹² *Id.*

⁹³ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 12.

⁹⁴ *Id.*

⁹⁵ *Id.*

parking lot,⁹⁶ and mounted security cameras on the roof of their building directed into their parking lot.⁹⁷ D and C Motor also maintained a warning sign in their parking lot alerting trespassers of video surveillance.⁹⁸

Lastly, D and C Motor employed Metro Protection Services to conduct daily in-person patrols of their property.⁹⁹ Specifically, Metro Protection Services conducted two nightly drive-through patrols of the property between the hours of 8:00 p.m. and 7:00 a.m. The timing of the patrols was randomized throughout the night to maximize effectiveness.¹⁰⁰ To demonstrate the effectiveness of these patrols, D and C Motor personnel provided Metro Protection Services response reports documenting past successes of locating and re-directing transients from D and C Motor's property as part of their security service patrols.¹⁰¹

In sum, the security measures employed by D and C Motor represent noteworthy examples of its due care and its reasonable precautions taken to prevent intentional or accidental releases of oil.

As such, the NPFC finds that D and C Motor has met its burden under this portion of the statute in that they exercised due care with respect to the oil concerned and took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts of omissions.

IV. OSLTF COMPENSIBLE RESPONSE COSTS

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.¹⁰² The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, page 4.

¹⁰⁰ *Id.*

¹⁰¹ Letter from D and C Motor Company to the CG National Pollution Funds Center dated June 21, 2023, pages 13-20.

¹⁰² *See generally*, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

¹⁰³ 33 CFR Part 136.

¹⁰⁴ 33 CFR 136.105.

¹⁰⁵ 33 CFR 136.203; 33 CFR 136.205.

In this case, D and C submitted a claim for entitlement to a defense to liability, act or omission of a third party to the NPFC and seek reimbursement of removal costs incurred under the defense in the amount of \$14,287.76.¹⁰⁶

The NPFC analyzed each of these factors and determined that all of the costs incurred by the claimant and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined all approved costs were invoiced at the appropriate rate sheet pricing and were billed in accordance with the rate schedule provided. All approved costs were supported by adequate documentation, which included invoices, proofs of payment, and/or FOSC statements.

V. CONCLUSION

Based on a comprehensive review of the record, the applicable law, and regulations, and for the reasons outlined above, the claimant's request for a defense to liability, based on an act or omission of a third party is approved and its request for uncompensated removal costs is approved in the amount of \$14,287.76.

This determination is a settlement offer;¹⁰⁷ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.¹⁰⁸ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.¹⁰⁹ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor:

(b) (6)

Date of Supervisor's review: *December 15, 2023*

Supervisor Action: *Claim Approved*

¹⁰⁶ D and C Motor Company claim submission with a sum certain of \$21,186.50 dated April 18, 2023, page 2. *See also* letter from D and C Motor Company to the CG National Pollution Funds Center amending their sum certain to \$14,287.76 dated June 21, 2023, page 9.

¹⁰⁷ 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 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).

¹⁰⁸ 33 CFR § 136.115(b).

¹⁰⁹ *Id.*