

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP924020-URC001
Claimant:	Able Clean-up Technologies, LLC
Type of Claimant:	OSRO
Type of Claim:	Uncompensated Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$11,549.75
Action Taken:	Denial

EXECUTIVE SUMMARY:

On May 17, 2023, the United States Coast Guard (“USCG”) National Response Center (“NRC”) received a report from Ben Schilling Logging Company that their crane had fallen through a collapsed bridge into Breakfast Creek, in Kootenai County, Idaho. About 1/3 of the crane submerged and released a silver sheen with occasional rainbow sheen into the creek.² Breakfast Creek flows into Spirit Lake, a navigable waterway of the United States.³ An estimated 20 gallons of oil and lube oil was released.⁴ The Idaho Department of Environmental Quality⁵ (“IDEQ”), in their role as the State On Scene Coordinator (“SOSC”), responded to the spill site where staff noted that it did not appear that the sheen was coming from the crane’s fuel tank, but rather was coming from the fluids and grease from the inner workings of the crane.⁶

Based on the location of this incident, the Federal On Scene Coordinator (FOSC) was the United States Environmental Protection Agency (USEPA).⁷ Idaho Department of Environmental Quality (IDEQ), as the State On Scene Coordinator (SOSC) for the incident, determined that Ben Schilling Logging owned and operated the crane that fell into Breakfast

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 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 Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, page 2 of 3, log entry by (b) (6) at 11:00 local time.

³ See, Email from Claimant to NPFC dated February 1, 2024 which included an email from the United States Environmental Protection Agency (USEPA) dated January 31, 2024, identifying Breakfast Creek as a tributary to Spirit Lake, a navigable waterway of the United States.

⁴ Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, page 3 of 3, log entry by (b) (6) at 11:48 local time.

⁵ National Response Center (NRC) Report # 1367495 dated May 17, 2023.

⁶ Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, page 3 of 3, log entry by (b) (6) on May 19, 2023 at 10:52 local time.

⁷ See, 40 CFR 300.120(a)(2).

Creek which caused the oil spill incident.⁸ IDEQ considered Ben Schilling Logging the Responsible Party (RP).⁹

The RP hired Able Clean-up Tech (“ACT” or “Claimant”), an Oil Spill Response Organization (OSRO), to remove the crane from the waterway and remediate the spill.¹⁰ ACT arrived on scene on May 17, 2023 and placed boom and skirt downgradient from the spill, along with absorbent pads.¹¹ On May 18, 2023, IDEQ arrived on scene to assist with the cleanup.¹² ACT arrived back at the site on May 18, 2023 and used a boat to navigate upstream Breakfast Creek to continue response actions and returned to the site through May 22, 2023 when it removed all boom and skirt.¹³ The RP hired a company that removed the crane on May 19, 2023.¹⁴ All contaminated materials were collected and disposed of by ACT at a subtitle D facility.¹⁵

The Claimant invoiced the RP on July 18, 2023 and the RP responded on July 27, 2023 refusing to pay the balance of the invoice, citing financial hardship.¹⁶ ACT presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$11,549.75 on January 2, 2024.¹⁷ 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 claim must be denied.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On May 17, 2023, the United States Coast Guard (“USCG”) National Response Center (“NRC”) received a report from Ben Schilling Logging Company that their crane had fallen through a collapsed bridge into Breakfast Creek, in Kootenai County, Idaho. About 1/3 of the crane submerged and released a silver sheen with occasional rainbow sheen into the creek.¹⁸ Breakfast Creek flows into Spirit Lake, a navigable waterway of the United States.¹⁹ IDEQ staff

⁸ Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, page 1 of 3 and January 17, 2024 email from SOSC to NPFC identifying the Responsible Party.

⁹ *Id.*

¹⁰ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024.

¹¹ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024, under Overview section, page 1 of 30.

¹² Email from SOSC to NPFC dated January 17, 2024.

¹³ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024, under Overview section, pages 1-2 of 30.

¹⁴ Email attachment from SOSC to NPFC dated January 17, 2024, “Photographic Documentation For: Ben Schilling Logging - Hazmat 2023-00075”

¹⁵ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024

¹⁶ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024, page 21 of 30, RP denial letter dated July 27, 2023.

¹⁷ Able Clean-up Technologies claim submission dated November 6, 2023.

¹⁸ Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, page 2 of 3, log entry by (b) (6) at 11:00 local time.

¹⁹ See, Email from Claimant to NPFC dated February 1, 2024 which included an email from the United States Environmental Protection Agency (USEPA) dated January 31, 2024, identifying Breakfast Creek as a tributary to Spirit Lake, a navigable waterway of the United States.

noted that it did not appear that the sheen was coming from the crane's fuel tank, but instead was coming from the fluids and grease from the inner workings.²⁰

Responsible Party

Ben Schilling Logging owned and operated the crane that fell into Breakfast Creek which caused the incident and, thus, the RP under Oil Pollution Act (OPA).²¹

Recovery Operations

ACT mobilized to the scene on May 17, 2023 and placed boom and skirt downgradient from the spill, along with absorbent pads. On May 18, 2023, IDEQ arrived on scene to assist with the cleanup.²² ACT arrived back at the site on May 18, 2023 and used a boat to navigate upstream Breakfast Creek to continue response actions and returned to the site through May 22, 2023 when it removed all boom and skirt.²³ The RP hired a company that removed the crane on May 19, 2023.²⁴ All contaminated materials were collected and disposed of by ACT at a subtitle D facility.²⁵

II. CLAIMANT AND RP:

On July 18, 2023, the Claimant sent the RP invoice #23133 for \$11,549.75, taking into account \$5,000 the RP had paid toward the \$16,549.75 total. On July 27, 2023, the RP sent the Claimant a letter stating that they were unable to pay any more than \$5,000 toward the invoice, citing financial hardship.²⁶

III. CLAIMANT AND NPFC:

When an RP denies a claim or has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.²⁷ On January 2, 2024, the NPFC received a claim from ACT for its uncompensated removal costs claim for \$11,549.75.²⁸ On January 23, 2024, the NPFC requested additional information from the Claimant, and followed up on January 31, 2024.²⁹

IV. DETERMINATION PROCESS:

²⁰ Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, page 3 of 3, log entry by (b) (6) on May 19, 203 at 10:52 local time.

²¹ 33 U.S.C. § 2701(32).

²² Email from SOSC to NPFC dated January 17, 2024.

²³ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024, under Overview section, pages 1-2 of 30.

²⁴ Email attachment from SOSC to NPFC dated January 17, 2024, "Photographic Documentation For: Ben Schilling Logging - Hazmat 2023-00075"

²⁵ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024.

²⁶ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024, see page 21, letter from Ben Schilling Logging to Able Clean-up Technologies dated July 27, 2023

²⁷ 33 CFR 136.103.

²⁸ Able Clean-up Technologies claim submission dated November 6, 2023 and received on January 2, 2024.

²⁹ See, email from NPFC to ACT dated January 23, 2024 requesting additional information; See, email from NPFC to ACT on January 31, 2024 followjng up on request for information.

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁰ 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.³¹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³² 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.³³ An RP's liability is strict, joint, and several.³⁴ 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."³⁵ 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."³⁶ 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."³⁷

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁸ The NPFC has promulgated a comprehensive set

³⁰ 33 CFR Part 136.

³¹ 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)).

³² 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).

³³ 33 U.S.C. § 2702(a).

³⁴ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³⁵ *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).

³⁶ 33 U.S.C. § 2701(31).

³⁷ 33 U.S.C. § 2701(30).

³⁸ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁹ 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.⁴⁰

OPA defines a “claim” as “a request made in writing for a sum certain, for compensation for damages or removal costs **resulting from an incident**.”⁴¹

An “incident” under OPA is defined as “any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, **resulting in the discharge or substantial threat of discharge of oil**.”⁴²

OPA defines “oil” as “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601) and which is subject to the provisions of that Act [42 USCA Section 9601 et seq.]”⁴³

Accordingly, OPA only applies to incidents involving oil, and, by definition, excludes those involving CERCLA hazardous substances. The claimant was unable to provide any evidence, such as a sample analysis, to substantiate that the product that released from the crane and discharged into Breakfast Creek was strictly a petroleum product. Based on the administrative record, the crane sustained moderate damage when it fell through the bridge and into the Creek below.⁴⁴ It is not clear if engine fluids commingled with fuel resulting in a mixed spill. The SOSC incident report notes “It does not appear the sheen in the creek is associated with a release from the fuel tank but rather fluids and grease from the workings of the machine.”⁴⁵

As a result, NPFC determines based on all the information it was provided by the claimant and obtained independently by the NPFC, that the claimant has failed to carry its burden of proving that the commingled mixture of oil and possible other engine fluids, that are the subject of the claimed removal expenses, was comprised solely of oil as defined by OPA.⁴⁶

VI. CONCLUSION:

³⁹ 33 CFR Part 136.

⁴⁰ 33 CFR 136.105.

⁴¹ 33 U.S.C. § 2701(14).

⁴² 33 U.S.C. § 2701(14) (emphasis added).

⁴³ 33 U.S.C. § 2701(23).

⁴⁴ See, Email from SOSC to NPFC dated January 17, 2024 with attachments.

⁴⁵ Idaho Communications Center Report #H-2023-00075 dated May 17, 2023, see page 3 of 3, log entry by (b) (6) on May 19, 203 at 10:52 local time.

⁴⁶ See, e.g., *Gatlin Oil v. United States*, 169 F.3d. 107 (4th Cir. 1999).

The NPFC finds the product that discharged on May 17, 2023, was more likely than not, a commingled product of engine fluids and oil.⁴⁷ Engine fluids commonly includes a varying concentration of organic compounds, inorganic compounds, and radionuclides, many of which are classified as CERCLA-listed hazardous substances.

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review: 3/12/2024

Supervisor Action: *Denial approved*

⁴⁷ See, Email from SOSC to NPFC dated January 17, 2024 that the Idaho Communications Center Report # H-2023-00075 dated May 17, 2023. On Page 3 of 3, a log entry dated May 19, 2023 at 10:52am local time by (b) (6) states in part that the SOSC (b) (6) of IDEQ provided a written email that stated in relevant part...."It does not appear the sheen in the creek is associated with a release from the fuel tank but rather fluids and grease from the workings of the machine." Without scientific laboratory evidence identifying the constituents of the spilled product, there is no evidence substantiating that the spilled product was an OPA oil.