

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP924036-URC001
Claimant:	Kirby Marine Corporation
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$31,989.25
Action Taken:	Offer in the amount of \$31,761.25

EXECUTIVE SUMMARY:

On December 15, 2023, at 13:30 local time, the National Response Center (“NRC”) received notification of a rainbow sheen from an unknown source directly across from the Naval Reserve Fleet in the Neches River, a navigable waterway of the United States.² United States Coast Guard (USCG) Marine Safety Unit (MSU) Port Arthur is the Federal On Scene Coordinator (FOSC) for this incident based on the location. The FOSC has not been able to specifically identify a responsible party for the source that contaminated the Kirby property, therefore the source of the spill remains a mystery.³

Kirby Marine Corporation (“Kirby” or “Claimant”) hired its Oil Spill Response Organization (OSRO), Shelton Services, Inc. (“Shelton” or “OSRO”), to clean up the spill.⁴ On December 15, 2024, Kirby hired Shelton Services, Inc. to perform cleanup and disposal.⁵ Shelton began recovery efforts using sorbent boom and sorbent pads. Oily sorbents were placed in bags for future disposal.⁶

On April 17, 2024, Kirby presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$31,989.25.⁷ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful

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 (NRC) Report #1386801 dated December 15, 2023.

³ Email from FOSC to NPFC dated May 3, 2024, confirming no Responsible Party and providing coordination for the response.

⁴ See, Kirby Master Service Agreement with Shelton Services, Inc. dated October 10, 2017; See also, May 7, 2024, email from Kirby to NPFC with an attachment entitled “Shelton Services Inc. job notes, page 1 of 2.”

⁵ See, May 7, 2024, email from Kirby to NPFC with an attachment entitled “Shelton Services Inc. job notes, page 1 of 2.”

⁶ *Id.*

⁷ Kirby Marine Corporation claim submission received April 17, 2023.

consideration has determined that \$31,761.25 of the claimed costs are compensable and offers this amount as full and final compensation of this claim.

I. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁸ 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.⁹ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁰ 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.

II. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On December 15, 2023, at 13:30 local time, the National Response Center (“NRC”) received a notification of a rainbow sheen from an unknown source directly across from the Naval Reserve Fleet in the Neches River, a navigable waterway of the United States.¹¹

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.¹² No responsible party has been specifically identified at this time for the oil found in the general area that is the subject of this claim.

Recovery Operations

On December 15, 2024, Kirby hired Shelton Services, Inc, to perform cleanup and disposal.¹³ Shelton began recovery efforts using sorbent boom and sorbent pads. Oily sorbents were placed

⁸ 33 CFR Part 136.

⁹ 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)).

¹⁰ 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).

¹¹ NRC Report #1386801 dated December 15, 2023.

¹² 33 U.S.C. § 2701(32).

¹³ See, May 7, 2024, email from Kirby to NPFC with an attachment entitled “Shelton Services Inc. job notes, page 1 of 2.”

in bags for future disposal.¹⁴ On December 16, 2024, Shelton continued clean-up operations and placed new sorbent booms and pads as needed.¹⁵ All visible oil was recovered and sorbents were collected for disposal.¹⁶

III. CLAIMANT AND NPFC:

On April 17, 2024, Kirby Marine Corporation presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$31,989.25.¹⁷ The claim included a signed OSLTF Claim Form, emails regarding the incident between Kirby personnel, daily field logs and Shelton Services Inc. invoice.¹⁸

On April 25, 2024, the NPFC requested additional information from Kirby Marine Corporation.¹⁹ On May 7, 2024, and May 10, 2024, Kirby replied to the NPFC's request for additional information and provided payment confirmation, Shelton Services Inc job notes, disposal documentation, service agreement, and Shelton Services Inc rate sheet.²⁰

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.²¹ An RP's liability is strict, joint, and several.²² 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."²³ 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."²⁴ 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."²⁵

¹⁴ *Id.*

¹⁵ *See*, May 7, 2024, email from Kirby to NPFC with an attachment entitled "Shelton Services Inc. job notes, page 1 of 2."

¹⁶ *Id.*

¹⁷ Kirby Marine Corporation submission received April 17, 2024.

¹⁸ *Id.*

¹⁹ Email to Claimant dated April 25, 2024.

²⁰ Emails from Claimant dated May 7, 2024, and May 10, 2024.

²¹ 33 U.S.C. § 2702(a).

²² *See*, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

²³ *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).

²⁴ 33 U.S.C. § 2701(31).

²⁵ 33 U.S.C. § 2701(30).

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁷ 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.²⁸

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;²⁹
- (d) That the removal costs were uncompensated and reasonable.³⁰

The claimant seeks reimbursement of \$31,989.25 for labor, equipment, materials, and disposal.³¹ Kirby and its contractor, Shelton arrived on-scene prior to the FOSC who arrived the following day and has confirmed in writing that they could not confirm whether or not the source of a spill the day prior at Kirby location was the same source of discharge as no samples were taken.³² After the NPFC analyzed each of the above-referenced factors, it determined that most of the 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.

All approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).³³

Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$31,761.25 while \$228.00 is denied for the following reasons:³⁴

1. Shelton Services, Inc. invoiced their 19' to 31' Response Trailer (enclosed) at a rate of \$400.00 per day which does not match the identified rate sheet price of \$350.00 per day

²⁶ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁷ 33 CFR Part 136.

²⁸ 33 CFR 136.105.

²⁹ Email from FOSC to the NPFC dated May 10, 2024.

³⁰ 33 CFR 136.203; 33 CFR 136.205.

³¹ See, May 7, 2024, email from Kirby to NPFC with an attachment entitled "24KM27143 Spill Invoice – signed."

³² See, May 10, 2024, email response to NPFC questions in providing FOSC for Kirby and its contractor's response to the incident.

³³ *Id.*

³⁴ Enclosure 3 provides a detailed analysis of the amounts approved by the NPFC.

as billed on December 15, 2023, and December 16, 2023.³⁵ The NPFC therefore denies \$100.00 in excessive rate sheet pricing for the 19' to 31' Response Trailer (enclosed).³⁶

Total costs denied for trailer pricing: \$100.00

2. Shelton Services, Inc. invoiced a quantity of three hand tools daily on December 15, 2023, and December 16, 2023, in the total amount of \$132.00.³⁷ Shelton's rate sheet listed hand tools at a rate of \$22.00 each however Shelton invoiced hand tools at a rate of \$35.00 each.³⁸ The NPFC therefore denies \$78.00 in excessive rate sheet pricing for each hand tool.³⁹

Total costs denied for hand tool pricing: \$78.00

3. Shelton Services, Inc. invoiced a Vessel, 24' to 27', 90 HP to 300 HP at a rate of \$900.00 per day on December 16, 2023.⁴⁰ Shelton's rate sheet listed a Vessel, 24' to 27', 50 HP to 300 HP at a rate of \$850.00 per day.⁴¹ The NPFC therefore denies \$50.00 in excessive rate sheet pricing for the Vessel, 24' to 27', 90 HP to 300 HP costs.⁴²

Total costs denied for Vessel pricing: \$50.00

Overall Denied Costs: \$228.00⁴³

V. CONCLUSION:

After careful analysis of all the supporting documentation provided by the claimant and the entire administrative record, the NPFC determines and finds as a matter of fact that the claimant has demonstrated entitlement to payment for certain removal costs.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Kirby Marine Corporation request for uncompensated removal costs is approved in the amount of **\$31,761.25**.

³⁵ See, May 7, 2024, email from Kirby to NPFC with an attachment entitled "24KM27143 Spill Invoice – signed", pages 1-2, and 4 of 6; See also, May 10, 2024, email from Kirby to NPFC with the Shelton Services, Inc. Rate Schedule page 3 of 11.

³⁶ Encl (3) Summary of Costs spreadsheet, lines 19 and 45.

³⁷ May 7, 2024, email from Kirby to NPFC with an attachment entitled "24KM27143 Spill Invoice – signed", pages 1-2, and 4 of 6.

³⁸ May 10, 2024, email from Kirby to NPFC with the Shelton Services, Inc. Rate Schedule, page 7 of 11.

³⁹ Encl (3) Summary of Costs spreadsheet, lines 27 and 53.

⁴⁰ May 7, 2024, email from Kirby to NPFC with an attachment entitled "24KM27143 Spill Invoice – signed", pages 1 and 4 of 6.

⁴¹ May 10, 2024, email from Kirby to NPFC with the Shelton Services, Inc. Rate Schedule, page 3 of 11.

⁴² Encl (3) Summary of Costs spreadsheet, line 47.

⁴³ Enclosure 3 provides a detailed analysis of the amounts approved and denied by the NPFC.

This determination is a settlement offer,⁴⁴ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁴⁵ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁶ 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:	10/31/2024
Supervisor Action:	<i>Offer Approved</i>

⁴⁴ 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).

⁴⁵ 33 CFR 136.115(b).

⁴⁶ 33 CFR 136.115(b).