CLAIM SUMMARY / DETERMINATION ON RECONSIDERATION

Date	: 1/21/2011
Claim Number	: 908017-002
Claimant	: Sundown Energy LP
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Claim Manager	: [redacted]
Amount Requested	: $4,399,881.12

INITIAL CLAIM AND DETERMINATION

Claimant, Sundown Energy LP (Sundown), is the owner of the East Potash Facility, which discharged oil or posed a substantial threat of discharging oil to navigable waters on or about August 29, 2005, subsequent to Hurricane Katrina making landfall near the facility. Claimant, which is the responsible party under the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, (OPA), is liable for removal costs resulting from the discharge.[1] It incurred costs to conduct removal actions for the discharge of oil from two in-service oil storage tanks located at the facility in August 2005. Sundown originally submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) on November 14, 2007, seeking reimbursement of removal costs in the amount of $4,399,881.[2]

Sundown asserted that it is not liable for the removal costs because the discharge of oil was caused solely by Hurricane Katrina and that Katrina was an act of God. Katrina made landfall in Florida as a Category 1 hurricane on August 25, 2005. In anticipation of Katrina making landfall in Louisiana, Governor Blanco, governor of the State of Louisiana, declared a State of Emergency on August 26, 2005. Katrina made landfall at Buras, LA as a Category 3 hurricane at 6:10 a.m. on August 29, 2005.

Sundown's East Potash Facility is located just east of the Mississippi River at approximately Mile Marker 40. The facility is located in an inlet just off the Mississippi River along several canals and it adjoins wetlands in some areas. At the time of Hurricane Katrina the area was accessible only by boat or plane and was largely undeveloped and uninhabited. Elevation at the facility is approximately 6-8 feet above sea level. Flood insurance was not available. The facility included two in-service 1500-barrel oil storage tanks that were interconnected by piping and were contained within a containment berm. The tanks each had a diameter of 21'6" and were 24'1" in height. At the time of the hurricane these two tanks contained a combined total of approximately 1,885 barrels of oil. The facility also included nine wells, six of which were producing oil and gas until the wells were shut in on August 27, 2005, two days prior to the hurricane coming ashore in Plaquemines Parish.[3] The wells produced oil and gas from leases covering lands situated immediately east of the Mississippi River. The East Facility wells collectively produced 600 to 700 barrels of oil per day. The well production logs reflect that oil was produced every day from August 2, 2005, through and including August 27, 2005, when 609

[1] OPA provides that the owner or operator of an onshore facility is the responsible party and is liable for removal costs and damages. 33 U.S.C. §§ 2701(32)(B) and 2702(a).

[2] Claimant also submitted a claim to the NPFC for removal costs incurred to conduct removal actions at its other facility, the West Potash facility. The other claim, in the amount of $1,319,800.41, was adjudicated separately. The Claimant also submitted a request for reconsideration in that claim and that request will be adjudicated separately.

[3] See well production logs.

barrels were produced.[4] Shipments of crude oil were picked up by barge every three to five days, averaging about 2,000 barrels per barge load. The last barge load, 2,044 barrels, was shipped from the facility on August 24, 2005.

According to information submitted by the claimant tanks similar to the facility's tanks were typically not bolted to their foundations but there was a risk that they could become buoyant during flooding conditions and float away. This is exactly what occurred with one of the tanks. When the facility became flooded during the hurricane, the tank became buoyant, floated off its foundation, lost structural integrity and discharged the crude oil within it. The second tank, mostly full of oil, did not dislodge but was punctured by an unidentified object, which holed the tank, resulting in the tank discharging its oil.

In its claim Sundown argued that the discharge from the tanks was caused solely by the effects of Hurricane Katrina, that Hurricane Katrina was an act of God because it was a grave, natural disaster; that it was unanticipated because the strong storm surge was historically higher than any hurricane, and that the storm intensified in a very short time. Claimant further argued that it exhibited due care or foresight because the facility and the tanks were in good working order at the time of the hurricane and that the facility's procedures for heavy weather events, which included hurricanes, were followed. Claimant argued that these procedures were reasonable actions and that any further actions would have been futile because of the intensity and ferocity of the storm. Claimant conceded that all natural disasters may be anticipated but that one must consider society's ability to predict any disaster and the technical advances to adequately warn and the ability to act on that warning.

The National Pollution Funds Center (NPFC), which adjudicates claims presented to the OSLTF, denied the defense and underlying claim via letter and determination dated November 9, 2010 (the original determination or determination). In the determination the NPFC explained that the criteria for entitlement to an act of God defense includes more than the fact that the event, i.e., Hurricane Katrina, was a grave natural disaster. To successfully establish an act of God defense a claimant must also establish that it exercised foresight or due care with respect to the oil concerned and that the discharge or substantial threat of a discharge and resulting removal costs or damages were caused solely by the act of God. 33 U.S.C. § 2703(a)(1).

The NPFC acknowledged in its original determination that Hurricane Katrina was one of the nation's disasters but noted that a disaster alone does not establish an act of God defense under OPA. The NPFC also noted that a hurricane in August in Louisiana and rapid intensification of a hurricane at this time of year is not unanticipated.[5] Regarding the storm surge, Sundown had acknowledged that the storm surge was higher than normal in part because it acted with the flow of the Mississippi River. Knowing that the facility sits next to the River, it would be anticipated that the surge would be higher at the facility and could cause flooding because of its adjacency to the River.

Further, in its determination the NPFC discussed the other criteria required to establish an act of God defense: (1) the exercise of due care or foresight and (2) that the disaster must be the sole cause of the discharge of oil. Even if Hurricane Katrina was exceptional and unprecedented, and the NPFC does not agree that it was, courts have addressed such events and determined that they

[4] See well production logs.

[5] The NPFC noted that Hurricane Betsy in 1965 intensified in less than three days and Hurricane Camille quickly intensified from a Category Four storm to a Category Five storm in two days.

did not meet the definition of an act of God because of the lack of due care or foresight. United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (Heavy rainfall is not an exceptional natural phenomenon within the meaning of CERCLA's narrow act of God defense where rains are foreseeable based on normal climatic conditions and where harm caused by the rain could have been averted by properly designed drainage canals.)[6]

In this case the NPFC determined that Sundown did not exercise due care or foresight, in light of the fact that its facility lies next to the Mississippi River and was at risk from heavy rains, a hurricane or storm surge, when it did not bolt the tanks to foundations, fill them with water or more frequently barge out its crude oil during hurricane season so that little or none would be stored in the tanks. More importantly, the facility continued to produce oil through August 27 when it was shut in. This was two days after the hurricane hit Florida and one day after Governor Blanco declared the state of emergency for Louisiana. Thus, even if Hurricane Katrina was an exceptional, unanticipated event, it was not the sole cause of the discharge because Sundown did not exhibit due care with respect to the oil. For these reasons the NPFC denied Sundown's claim that it was entitled to the act of God defense and, thus, not liable for the removal costs.

Mid-Continent Casualty Company (Mid-Continent), in a letter to the NPFC dated March 22, 2010, intervened and asserted its right of subrogation to this claim. See Mid-Continent Letter. Mid-Continent has reimbursed Sundown for its costs related to the incident. See Court documents attached to the Phelps Dunbar LLP email of October 19, 2010. Because Sundown has been compensated for its costs, if the NPFC were to grant the act of God defense and determine that Sundown is entitled to the defense, Mid-Continent claims entitlement to the reimbursement of its uncompensated removal costs.

RECONSIDERATION REQUEST

A claimant requesting reconsideration must make that request within 60 days of the date of the letter denying the claim. The request must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim.

By letter dated December 6, 2010 and received by the NPFC on December 14, 2010, Sundown requested reconsideration of the determination to deny the act of God defense and thus the claim. Sundown provided no documentation or arguments in support of the request other than to state that it adopts the positions of Mid-Continent in its separate request for reconsideration. Mid-Continent also requested reconsideration by letter dated December 14, 2010 and received by the NPFC on December 21, 2010. Mid-Continent states that the NPFC's findings and conclusions were erroneous and provided an affidavit from [redacted] as support for the request for reconsideration.

[redacted] is a professor at Louisiana State University and serves as the Louisiana State Climatologist. He provided an affidavit discussing Hurricane Katrina and how it affected the U.S. Gulf Coast. He asserted that Katrina was an exceptional storm, producing the largest storm surge in recorded history.[7] He asserts that in 2005, at the time of Hurricane Katrina, available guidance models had poor skill in forecasting rapid intensity changes and that the National

[6] As discussed in its original determination courts look to CERCLA, Federal Water Pollution Control Act and OPA case law when determining if a party is entitled to an act of God defense.
[7] See Attachment 1, Affidavit of [redacted] dated December 13, 2010.

Hurricane Center did not predict Katrina strengthening from a Category 3 to a Category 5 on August 28, 2005. [redacted] also notes that "[W]hile hurricane track forecasting had improved drastically over past decades, it still has an average error of over 120 nautical miles in the 72 hour forecasts, with regard to pinpointing the location of the landfall."

In his affidavit, [redacted] begins by stating that Hurricane Katrina was a unique weather event and its strong winds and large size combined to produce the largest storm surge in U.S. history. He goes on to posit that these conditions and the resulting damage were likely never experienced together in the modern-day history of the U.S. Gulf Coast. In the remainder of the affidavit [redacted] lists factors associated with Hurricane Katrina's record-setting storm surge. Among these factors was the speed in which the hurricane strengthened.

[redacted] next describes the large size of the hurricane. [redacted] stated that the effect of a hurricane's size on surge levels was not understood in 2005. [redacted] then asserts that Katrina also produced strong winds and the combination of large size and strong winds were exceptional and that Katrina might have been the largest hurricane on record to strike the U.S.

NPFC's DETERMINATION ON RECONSIDERATION

The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, within 60 days after the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier. The Director, NPFC, will provide the claimant seeking reconsideration with written notification of the decision. This written decision is final. 33 CFR 136.115(d).

The Claimant timely requested reconsideration of its denial of the act of God defense and submitted an affidavit from [redacted] climatologist at Louisiana State University. [redacted] affidavit focuses on facts to support Claimant's argument that Katrina was exceptional and unanticipated, i.e., the speed at which it strengthened, its large size and its significant storm surge that resulted in much damage. The affidavit presented no new legal basis or substantive facts on reconsideration.

The NPFC's original determination to deny Claimant's act of God defense is supported by legal precedence and Congress' intent when it established the criteria for the defense in earlier statutes, the Federal Water Pollution Control Act (FWPCA) and CERCLA. The act of God defense language in OPA is identical to the CERCLA act of God defense language. Both CERCLA and OPA provide that "liable" or "liability" shall be construed to be the standard of liability under section 1321 of the FWPCA.[8] Thus, neither the language of OPA or CERCLA nor their legislative provisions suggest that the act of God provisions should be construed contrary to settled law applicable to the FWPCA.

In its original determination the NPFC acknowledged that Katrina was a disaster but stated that a disaster alone does not establish an act of God defense under OPA. [redacted] in his affidavit, asserts that Hurricane Katrina was exceptional and unanticipated and stated facts in support of this assertion. But as noted in its original determination and repeated in this determination on

[8] See 33 U.S.C. § 2701(17) and 42 U.S.C. § 9601(32).

reconsideration, the NPFC determines that these two assertions alone do not establish an act of God defense.

Facts surrounding Hurricane Katrina reflect that it intensified quickly but the NPFC noted in its original determination that two earlier hurricanes, Betsy and Camille intensified quickly in 1965 and 1969, respectively.[9] Thus, the rapid intensification of Hurricane Katrina was not unanticipated because it had occurred in prior hurricanes making landfall in Louisiana. Even if rapid intensification was unanticipated, that fact alone does not establish an act of God defense under OPA.

[redacted] notes in his affidavit that the effects of a hurricane's size on surge levels were not known in 2005; thus the high storm surge was unanticipated. The NPFC stated in its determination that storm surge associated with a hurricane, even as high as Katrina's surge is not unanticipated.[10] Along the coast, storm surge is often the greatest threat to life and property from a hurricane.[11] In addition to the NPFC's acknowledgement in its determination that Katrina created high storm surge levels, it noted that the Claimant acknowledged that any basic storm surge would act in conjunction with the flow of the Mississippi River causing substantial increase in the water surface elevation in the area, which could cause overtopping of levees and flooding.[12] Damage caused by floodwater and debris moving with the floodwater is not unanticipated. Given that the facility was located adjacent to the Mississippi River, it is not unanticipated that the storm surge would be high and the high levels could cause flooding and resultant damage to oil tanks in the hurricane's path. Further, even if the surge was the largest in U.S. history (and the Final Report of the Select Bipartisan Committee to Investigate the Preparation for and response to Hurricane Katrina refutes this because it describes the many physical similarities of Katrina to Hurricane Betsy and resultant damages, including high storm surge, breached levees and widespread flooding[13]), that alone does not establish the act of God defense under OPA. Hurricanes in Louisiana in the summer and flooding associated with hurricanes and storm surge, especially in low-lying coastal areas, are not unanticipated and do not alone establish an act of God defense under OPA.

Even if Katrina was the largest hurricane of its strength to approach the United States (i.e. it was unprecedented) that fact alone does not make the storm an act of God. As noted in the determination, other criteria are analyzed. United States v. Barrier Industries, Inc., 991 F. Supp. 678, 679 (S.D. N.Y. 1998) (Spills of hazardous substances caused by bursting pipes following an unprecedented cold spell in January is not an act of God within the meaning of CERCLA so as to absolve an owner of a waste site from liability for response costs given other factors antedating cold weather that attributed to the spill.) A claimant must also establish that he executed due care or foresight with respect to the oil and that the discharge was caused solely by the disaster.

Sabine Towing and Transportation Co. Inc. v. United States, 666 F. 2d 561 (Ct. Cl. 1981), is a FWPCA case. In Sabine the court analyzed whether a freshet condition in the Hudson River caused by an increased rate of flow due to rain and spring runoff of rain was an act of God. The Sabine Court examined the FWPCA legislative history on the act of God defense and determined that it was not.

---

[9] NPFC Determination, page 8 footnote.
[10] NPFC Determination, page 9.
[11] http://www.nhc.noaa.gov/ssurge/ssurge_overview.shtml
[12] NPFC Determination, page 9.
[13] NPFC Determination, page 8.

> The term "act of God" is defined to mean an act occasioned by an unanticipated grave natural disaster. Only those acts which an owner could have had no foreknowledge, could have made no plans to avoid, or could not predict would be included. Thus, grave natural disasters which could not be anticipated in the design, location, or operation of the facility or vessel by reason of historic, geographic, or climatic circumstances or phenomena would be outside the scope of the owner's or operator's responsibility.

Sabine, 666 F. 2d at 564, *quoting* Conf. Rep. No. 940, 91st Cong. 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 2712, 2722. Hurricane Katrina and Sundown's facility and operations do not fall within this meaning. Even though the natural event of Katrina was different from a freshet condition in a river, the reasoning is the same. The effects of hurricanes, storm surge and flooding should reasonably have been foreseen and anticipated given the facility's location, design and operations. In this case the Claimant should have had foreknowledge that its facility, lying adjacent to the Mississippi River at low elevation, could be at risk for the effects of a hurricane. In fact, Claimant had in place heavy weather procedures for preparing for weather events such as hurricanes. Thus, it knew the facility could be at risk, but continued to operate during hurricane season and continued to produce oil until August 27 at its own peril. Further, Claimant could have made plans to avoid the effects of the hurricane by installing different tanks, bolting them to their foundations, filling them with water or more frequently barging out the produced oil in order to keep oil in the tanks at a minimum. Alternatively, Claimant could have made a business decision to not operate the facility during hurricane season. But, choosing to continue operations during the hurricane season is a business decision to assume the risk of being liable for an oil-pollution incident. The decisions, actions or inaction in immediate preparation for the event are not the only factors to be considered, but the entirety of the operations and business decisions of the responsible party must be considered in determining whether that responsible party is entitled to an act of God defense.

The Sabine court recognized that business decisions made by responsible parties may require them to absorb the costs of cleaning up oil when accidents occur. In Sabine the responsible party argued that it could not have avoided the accident related to freshets in the Hudson River without suspending its operations and that Congress could not have intended that shippers stop using the River whenever there was danger from freshets. The Court stated that this rationale overstated the burden that section 1321 imposed.

> If shippers have established a general practice not to interrupt normal navigation during freshets and, presumably, to absorb in their operating costs any damage to their ships from freshet-related incidents, then it does not seem harsh for Congress to require shippers to also absorb the costs of cleaning up any oil that is spilled when accidents occur. It would be inconsistent with the strictness with which the conference committee recommended that "unanticipated" for the purposes of section 1321 to be read, to allow the section to cover regular and frequent conditions, like freshets, where the dangers are expected and where the losses are normally worked into the cost of doing business.

Sabine, 666 F. 2d at 565.

In the coastal areas of the U.S. hurricanes are common. In this case Claimant made a business decision to own and operate a facility in a low lying area of southeastern Louisiana next to the Mississippi River. Claimant admits that the remote location of the East Potash Facility with limited means of access hampered its ability to undertake extended and extensive efforts to secure its facilities.[14] It could anticipate damages from hurricanes, storm surges and flooding. It could also anticipate debris moving along with surge and flood waters that might cause damage to and rupture its tanks. Claimant knew that flood insurance was not available for the facility. Where these kinds of risks and potential damages are foreseeable, losses resulting from these events are a cost of doing business. Notwithstanding these risks Claimant made a decision not to anchor its tanks or fill them with water prior to the approach of a hurricane. It did not cease producing oil until August 27, 2008, when it shut in the wells in anticipation of Hurricane Katrina making landfall in Louisiana. Nor did it barge out larger quantities of oil during August, typically one of the most active months for hurricanes in the Gulf of Mexico. Its failure to take more actions and better precautions in anticipation of a hurricane did not exhibit due care with respect to the oil. Finally, Hurricane Katrina was not the sole cause of the discharge of oil and resulting removal costs.

Summary

In its original determination, the NPFC determined that Claimant did not establish by a preponderance of the evidence that it was entitled to an act of God defense because it had not established that the hurricane was an unanticipated grave natural disaster or other phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight, and the discharge of oil and the resulting removal costs were not caused solely by the hurricane.

The NPFC denies this claim on reconsideration for the same reasons. Claimant did not establish that Katrina was an act of God under OPA, Claimant did not exhibit due care with respect to the oil and, thus, Katrina was not the sole cause of the discharge. Sundown has not established entitlement to a defense to liability and, consequently, Mid-Continent is not entitled to such a defense by subrog[redacted]

Claim Supervisor[redacted]
Date of Supervisor's review: 3/23/11
Supervisor Action: DENIED ON RECONSIDERATION APPROVED
Supervisor's Comments:

[14] See claimant's Claim Justification at page 21.

U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 202-493-6831
E-mail:
Thomas.S.Morrison@uscg.mil
Fax: 202-493-6937

5890

~~1/12/2011~~
3/23/11

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Jones, Walker, Waechter, Poitevent, Carrere and Denegre, LP - COUNSEL
ATTN: Mr. Michael A. Chernekoff
JP Morgan Chase Tower
600 Travis Street
Suite 6601
Houston, TX 77002

RE: Claim Number: 908017-002

Dear Mr. Chernekoff:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 908017-002 involving the oil discharge from claimant's tanks during Hurricane Katrina. Compensation is denied for the reasons stated in the attached Claim Summary/Determination on Reconsideration.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,

Thomas S. Morrison
Chief, Claims Adjudication Division
U.S. Coast Guard

ENCL: Determination Form

cc. Steven J. Levine, Phelps Dunbar LLP

U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 202-493-6831
E-mail:
Thomas.S.Morrison@uscg.mil
Fax: 202-493-6937

5890

~~1/12/2011~~
3/23/11

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Phelps Dunbar LLP
Attn: Steven J. Levine
II City Plaza
400 Convention Street, Suite 1100
Baton Rouge, LA 70802-5618

RE: Claim Number: 908017-002

Dear Mr. Levine:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 908017-002 involving the oil discharge from claimant's tanks during Hurricane Katrina. Compensation is denied for the reasons stated in the attached Claim Summary/Determination on Reconsideration.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,

Thomas S. Morrison
Chief, Claims Adjudication Division
U.S. Coast Guard

ENCL: Determination Form

cc. Michael A. Chernekoff, Jones Walker, Waechter, Poitevent, Carrere, & Denegre LLP