

CLAIM SUMMARY / DETERMINATION FORM

Date	: 1/23/2012
Claim Number	: 911042-0001
Claimant	: St Paul Surplus Lines Insurance
Type of Claimant	: Private (US)
Type of Claim	: Affirmative Defense
Claim Manager	: Eric Bunin
Amount Requested	: \$40,084.72

Incident:¹

At approximately 0815 on March 4, 2009 employees at Alpine Exploration Company (Alpine) discovered that oil was discharging from one of Alpine's saltwater disposal flow lines at its Kings Ridge Field facility offshore from Galliano, Louisiana. Approximately three barrels of crude oil discharged into Little Lake, a navigable water of the United States. Alpine owns and operates the flow line and is the responsible party (RP) for the incident. Alpine hired Environmental Equipment, Inc. (EEI) to conduct removal actions and paid EEI \$40,084.72 in removal costs associated with the removal actions.

Claimant and the Claim:

Claimant, St. Paul Surplus Lines Insurance (St. Paul), the subrogated insurer of Alpine Exploration Company (Alpine), presented a claim to the Oil Spill Liability Trust Fund (OSLTF) on March 17, 2011. Claimant asserts that Alpine is entitled to a complete defense and seeks reimbursement of the \$40,084.72 in removal costs that it reimbursed to Alpine. Claimant alleges that on March 4, 2009, an unidentified vessel or barge struck one of Alpine's flow lines at its King's Ridge facility in Galliano, Louisiana, which caused a discharge of approximately three barrels of oil.² Claimant states that Alpine reported the discharge to the Coast Guard, the NRC, and Louisiana State Police.

NPFC Information Request and Claimant Response

The NPFC requested additional information on March 25, 2011, including, but not limited to, photos or other evidence showing damage to the pipeline, records of inspections of the pipeline, evidence of compliance with applicable state and federal laws and regulations, a detailed map of the area identifying the facility and the pipelines, records of previous spills, and records of shut-off procedures and proof that the procedures were followed.³

In its August 19, 2011, response⁴ Claimant stated that it did not possess any photos of the damage sustained by the pipeline. It argues that the flow line was buried three feet below the mud line, in compliance with federal regulations. Claimant noted that since the flow line was buried three feet below the mud line, visual inspections were neither required nor possible. Claimant states that Alpine did not conduct metallurgical or structural tests on the damaged flow

¹ Information as provided in Claimant's submission.

² The Unauthorized Discharge Notification Report executed by HLP Engineering, Inc. on March 10, 2009, states that the spill resulted from a leak in the saltwater disposal line that runs from the facility to the disposal well. According to the sketch drawn by Corey Menard, the line runs from the well to the tank battery.

³ NPFC request for additional information dated March 25, 2011.

⁴ Claimant's Response dated August 19, 2011.

line. Finally, the response noted that the “area where the line is buried is shallow. Despite the fact that a channel for vessel traffic exists, vessels occasionally cut short of the channel entrance and navigate through the shallow area. Depending on the size of the vessel, the wheel wash associated with such activities acts as a dredge. This unauthorized and negligent dredging activity can and will damage flow lines which are buried in accordance with all applicable regulations.”⁵

APPLICABLE OPA LAW:

Each responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for removal costs and damages that result from such incident. 33 USC § 2702(a).

“Facility” means “any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, process, or transporting oil.” 33 USC § 2701(9).

“Responsible party” in the case of a pipeline means “any person owning or operating the pipeline.” 33 USC § 2701(32)(E).

“Removal costs” means “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 such an incident. 33 USC § 2701(31).

A responsible party’s liability will include “removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan”. 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”. 33 USC § 2701(23),

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, “a claimant must establish -

⁵ Response to NPFC request for additional information, dated August 19, 2011, Paragraph (8),

- (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 determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR 136.205 “the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC.” [Emphasis added].

THIRD PARTY DEFENSE UNDER OPA 90

A responsible party is not liable for removal costs or damages under section 2702 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by –

- (3) *an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party..., if the responsible party establishes, by a preponderance of the evidence, that the responsible party-*
 - (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.” 33 USC 2703(a)*

“Subsection (a) does not apply with respect to a responsible party who fails or refuses—

- (1) *to report the incident as required by law if the responsible party knows or has reason to know of the incident;*
- (2) *to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or*
- (3) *without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by the Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).” 33 USC 2703(c).*

“The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that –

- (1) *the responsible party is entitled to a defense to liability under section 1003.” 33 U.S.C. 2708(a)(1).*

CLAIMANT’S ARGUMENT for ENTITLEMENT TO COMPLETE DEFENSE:

Alpine operates oil and gas facilities along with pipelines in the King’s Ridge Field area of Galliano, Louisiana. The subject facility consists of several concrete structures that support the

separation equipment and the oil storage tanks.⁶ Produced salt water is stored in one 400-barrel tank. The facility also includes salt water disposal flow lines and oil pipelines.⁷ The separated crude oil is stored in four bulk storage tanks (1,500 barrels each) and is removed from the field by marine vessel. Wooden pile clusters are used to moor the oil transfer vessels. Claimant provided two documents to support its assertion that it is entitled to a third party defense. The first, a sworn affidavit from Corey Menard dated January 28, 2011, states that Mr. Menard supervised replacement of damaged flow lines at Alpine's facility in March 2009 and had an opportunity to "personally examine the damaged flow lines."⁸ He stated that "the damage did not appear to be caused by corrosion. Rather, the physical condition of the flow lines strongly indicated that they had been struck by a passing vessel."⁹

The second document, also dated January 28, 2011, is a drawing of the incident area prepared by Mr. Menard.¹⁰ Mr. Menard hand sketched the original location of the flow line and the location of the flow line "*following the contact with the unknown vessel/barge.*"¹¹ Claimant states that the "drawing clearly establishes that the actions of the unknown vessel/barge caused the flow line to move dramatically from its original location."¹² Claimant states that its explanation for the damage "is further supported by the fact that Mr. Menard installed the new flow line in the same exact place where the flow line was located prior to the accident."¹³ Based on Mr. Menard's statement and drawing, Claimant postulates that an unknown vessel or barge struck the pipeline on the night of March 3rd/4th causing the discharge. Further, Claimant states that Alpine did not own or operate the unknown vessel that struck the flow line.¹⁴

Claimant asserts that Alpine investigated whether the flow line was adequately buried. The investigation "determined that the flow line was adequately buried, as evidenced by the invoices from the burying operation which occurred in June of 2006."¹⁵ Claimant states that the flow line was buried in compliance with applicable regulations. To support these statements Claimant provided June 2006 Marlin Oilfield Divers invoices and daily tickets for pipeline burial for a job identified as being in Houma, LA (claimed to be the pipeline at issue). Claimant also asserts that the flow line had visible markers.

In its August 19, 2011 letter Claimant states that the area where the line is buried is shallow and even though a channel for vessel traffic exists, vessels occasionally cut short of the channel entrance and navigate the shallow area; depending on the size of the vessel the wheel wash acts as a dredge and can and will cause damage to flow lines. Therefore, Alpine determined that "it could have done nothing to prevent the discharge and the sole cause of the discharge was the unlawful conduct of a vessel or barge which struck the flow line."¹⁶ Accordingly, Claimant, in its

⁶ Claimant has not clearly stated how the flow line relates to the facility as a whole. Mr. Menard's drawing shows it leading from the wellhead to a storage tank battery, while the HLP Engineering notice states that it leads from the facility to the disposal well.

⁷ Alpine's Facility Response Plan Amendments dated January 2008.

⁸ Menard Affidavit, paragraph 6.

⁹ Id., at paragraph 7.

¹⁰ Claimant's Submission, attached to cover letter starting with "Claimant Information", dated March 17, 2011, page

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¹¹ Id.

¹² Id.

¹³ Mr. Menard is Corey Menard. He was the foreman with Roustabouts Inc. and supervised Roustabouts' replacement of the damaged flow lines.

¹⁴ Claimant's cover letter dated March 17, 2011, page 1.

¹⁵ Claimant's Submission, attached to cover letter dated March 17, 2011, part 2B.

¹⁶ See Claimant's March 17, 2011 submission cover letter.

capacity as subrogated insurer, submits that it is entitled to recover the removal costs associated with this incident pursuant to 33 U.S.C. 2701 and 2703.

NPFC ANALYSIS:

A responsible party may assert a claim for removal costs or damages under section 1013 if the responsible party *demonstrates* that he is entitled to a defense to liability under section 1003. 33 USC 2708(a)(1). (Emphasis added.) Several criteria must be met to establish entitlement to a defense to liability. OPA and its associated regulations provide that it is the claimant's burden to prove its claim and to establish entitlement.

First, a responsible party must establish, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting removal costs or damages were caused by an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party. 33 U.S.C. 2703(a)(3). Thus, there must be sufficient evidence that the third party exists or can be identified because the responsible party must establish that the third party is not an employee, agent or a person in a contractual relationship with the responsible party.

In this case Claimant argues that an unknown vessel or barge damaged the flow line and the result was a discharge of oil from its line. However, Claimant has provided no objective evidence that the line was damaged by a vessel or barge but relies on Mr. Menard's statement that "the physical condition of the flow lines strongly indicated that they had been struck by a passing vessel." In its August 19, 2011 response to the NPFC request for additional information Claimant stated that it did not possess any photos of the damage sustained by the flow line. Nor, according to the response, did Alpine conduct any metallurgical or structural tests on the line. Since there are no pictures of the damaged line or the impacted area taken at the time of the discharge there is no way to determine what the damage to the flow line might have been or if the mud on the sea floor showed the effects of dredging that could have been caused by a vessel or barge scraping the bottom. Claimant relies solely on the Menard drawing and affidavit, which states that the damage to the line "did not appear to be caused by corrosion. Rather, the physical damage of the flow lines strongly indicated that they had been struck by a passing vessel."

There is conflicting evidence in the administrative record as to the source of the discharge. Claimant states that it was from an oil line; the HLP report states that it originated from a saltwater disposal flow line.¹⁷ Further, the HLP Engineering representative reporting the incident to the State on behalf of Alpine stated "[I]t is unclear what caused the leak." Additionally, there is insufficient evidence to demonstrate when the discharge occurred; the sheen was discovered on March 4; however, the discharge could have occurred earlier.

Thus, the argument that the damage to the flow line was caused by an unknown vessel or barge is not proven by facts and as such, it does not link the damage to an unknown, independent third party. Stated another way, Claimant's facts do not establish, by a preponderance of the evidence that an unrelated, third-party vessel contacted the pipeline and caused the damage and subsequently the discharge.

¹⁷ March 10, 2008 Unauthorized Discharge Notification Report.

In fact, even if Claimant were to establish that a vessel caused the damage, Alpine's response plan¹⁸ states that marine vessels navigate the area in order to offload/remove product. Thus, a vessel, moving the product from Alpine's storage tanks, could have damaged the line and it would have been in a contractual relationship with Alpine. Even if Claimant is correct in its speculation that a vessel struck its flow line, it has not demonstrated that the vessel was operated by an independent third party, and not an employee or agent of Alpine. If a vessel owned/operated or in a contractual relationship with Alpine caused the damage, the defense is not available to Alpine.

Second, the responsible party must establish that he took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions. Because of a lack of specificity of demonstrated facts, i.e., that a vessel might have caused the damage to the pipeline, the NPFC cannot determine whether Alpine took proper precautions against foreseeable acts of any possible third parties. If, in fact, a vessel did strike the pipeline and cause the discharge, and the NPFC denies that Claimant has established that this happened, Claimant cannot establish that Alpine took precautions against foreseeable acts with respect to the oil concerned. By its own admission the Claimant acknowledged that the area at the flow lines is shallow and that vessels sometimes traverse the shallow area and could act like a dredge, removing the sea floor.¹⁹ Alpine argues that "it could have done nothing to prevent the discharge and the sole cause of the discharge was the unlawful conduct of a vessel or barge which struck the flow line."²⁰ However, since Alpine knew that vessels sometimes travelled across the shallow area and could scour the mud bottom, it is foreseeable that vessels could damage Alpine's pipelines and cause oil discharges.

Alpine knows or should know that seafloor cover over its pipelines can erode and reduce the burial depth or uncover the lines altogether. Seafloor can be reduced or lost to erosion for many reasons. Other evidence shows the foreseeability of danger to the RP's pipeline at the incident location. There was a previous release from a flow line in the same location on June 30, 2007. This demonstrates that special attention should be paid to the pipelines in the area to prevent subsequent damage or leaks. Therefore, Alpine was under a duty to ensure that its pipelines remain covered to the minimum three-foot depth or risk the consequences. The RP knew that the seabed cover level could change for various reasons making its lines vulnerable to third party acts; thus, it was under a duty to take precautions to prevent such damage to its pipelines. But Alpine didn't even demonstrate that it took the minimum precaution of ensuring proper burial of its pipeline *at all times*. Claimant has not established that Alpine took appropriate precautions against the foreseeable acts or omissions of third parties.

The third criteria that must be established by the responsible party is that the RP exercised due care with respect to the oil. Without knowing how the incident occurred it cannot be determined what due care should be exercised. *U.S. v. Poly-Carb, Inc.*, 951 F. Supp. 1518, 1531 (D. Nev. 1996) (Because it is unknown what exactly was spilled the court could not determine what "care" is "due" for such a material or what steps were necessary.) In this case the Claimant has not established how the incident occurred; therefore, it is not clear what "due care" should be.

The flow lines were located in shallow water and were mandated by federal regulation to be buried three feet below the sea floor. There is no contemporaneous evidence that the pipeline was buried at the mandatory three feet below the seabed in accordance with the federal

¹⁸ Facility Response Plan revised in December 2006.

¹⁹ See response #8 in Kean Miller letter dated August 19, 2011.

²⁰ The criminality of any third party acts is irrelevant to the RP's responsibility to take precautions against those acts.

regulations, 49 C.F.R. § 192.327, at the time of the discharge. Claimant alleges that the flow line was adequately buried because Alpine's investigation found the invoices from the burying operation in June 2006. This evidence is not persuasive. The flow line burial invoices do not clearly identify that the pipeline at issue is the one being buried. The locations are not clearly the same. The invoices and daily time tickets state that the burial location was Houma, but the Coast Guard report provided by the Claimant and the Claimant's records state the damaged pipeline location to be King's Ridge or Galliano, Louisiana near Little Lake. Geographically, Houma and Galliano are about 35 miles apart in Louisiana.

However, even assuming that the burial records are for the correct pipeline at issue, the invoices and daily time tickets were from June 2006, almost three years prior to the incident. The records would only demonstrate that the pipeline had been properly buried in 2006. They do not establish that the line was buried at the mandated depth in 2009 at the time of the discharge.²¹

In its August 19, 2011 response to the NPFC request for additional information Claimant states that visual inspections were not possible or required "[s]ince the flow line was buried three feet below the mud line."²² The NPFC accepts this statement as an admission that the RP did not verify proper burial depth at the time of the incident. Thus, the flow line at issue could have been sitting atop the seafloor or buried less than the required three feet below the mud line at the time of the discharge. This would have exposed it to contact by vessels or to other movement along the seafloor. Knowing that vessels could traverse the area, that the water was shallow, that lines could migrate by tidal influence or propeller wash and that the sea floor could be eroded, due care with respect to the oil would include inspecting the lines to ensure that they were buried at all times at the required regulatory depth to protect them.

Claimant asserts that inspection of the depths of the lines was not needed because the pressure flowing through the flow line is constantly monitored and this safeguarded against leaks.²³ Claimant alleges that safety-shut-down systems are at the wellhead and the facility and that they shut in if there is a drastic pressure change.²⁴ No mention is made of minor pressure changes. However, it is evident that the system did not detect a pressure loss for this incident's release. The release was only found by visual observation of the sheen.²⁵ Alpine learned of the discharge when the sheen was observed at about 8:15am on March 4, 2009.²⁶ There is no evidence that pressure monitoring alerted Alpine or automatically shut in the system. Alpine's monitoring system and shut-off measures appeared to be insufficient or non-functioning at the time of the discharge. If the flow line was operating at its working pressure of 2,000 PSI at the time of the rupture and no pressure loss was detected, the RP's facility forced oil out the rupture and into the water. Claimant provided no evidence that Alpine had inspected or tested the monitoring system at any time prior to the discharge. The system's failure and the failure to inspect or test the system does not demonstrate due care, but establishes that Alpine contributed to the incident and prevents it from establishing a sole fault third party defense.

For the reasons stated above the Claimant has not established, by a preponderance of evidence, that an unrelated third party solely caused the discharge from Alpine's pipeline, that Alpine

²¹ Counter to the Claimant's allegations, Alpine experienced another discharge of oil from a flow line in the same area in June 2007.

²² See response #6 in the Kean Miller letter dated August 19, 2011.

²³ Claimant's August 19, 2011 response, paragraph 6.

²⁴ Claimant's August 19, 2011 response, paragraphs I(6) and I(10).

²⁵ Exhibit 1, HRH Engineering Reports

²⁶ See response #10 in Kean Miller letter dated August 19, 2011.

exhibited due care with respect to the oil or took precautions against foreseeable acts of third parties, or complied with applicable underwater pipeline cover regulations.

DETERMINATION:

The NPFC finds that as the subrogated insurer presenting this claim, St. Paul has not met its burden of establishing by a preponderance of evidence that Alpine Exploration is entitled to a third party defense to liability. Therefore, St. Paul's underlying claim for removal costs is denied.

Claim Supervisor:	
Date of Supervisor's review:	2/3/12
Supervisor Action:	Denial approved
Supervisor's Comments:	

U.S. Department of
Homeland Security

United States
Coast Guard



Director
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Kean Miller Hawthorne D' Armond McCowan & Jarman, LLP
ATTN: Sean McLaughlin
909 Poydras Street, Suite 1400
New Orleans, LA 70112

RE: Claim Number: 911042-0001

Dear Mr. McLaughlin:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 911042-0001 involving Alpine Exploration Company's flow line in Galliano, Louisiana. Compensation is denied for the reasons stated in the enclosed Claim Summary/Determination Form.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter or within 30 days of your receipt of this letter, whichever date is earlier, and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number 911042-0001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
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Eric Damm
Claims Manager
U.S. Coast Guard