

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP922016-URC001
Claimant:	HEPACO, LLC.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$226,591.13
Action Taken:	Offer in the amount of \$156,709.92

EXECUTIVE SUMMARY:

On November 17, 2021, the Augusta Fire Department (Augusta FD) received a call for a gas leak located at 3338 Commerce Drive, Augusta, Georgia.² Upon arrival on-scene, Augusta FD discovered what appeared to be a combustible/flammable liquid floating on the surface of Rocky Creek Basin.³ Augusta FD determined the spill originated toward the rear of 2088 Gordon Highway⁴ and migrated down an embankment into a ditch before entering into the Rocky Creek Basin. The United States Environmental Protection Agency Region 4 (“USEPA” or “FOSC”) was the pre-designated Federal On-Scene Coordinator (FOSC) based on the location of this incident. The USEPA determined that the incident posed a substantial threat of discharge of oil into the Savannah River, a navigable waterway of the United States⁵; but did not designate a potential responsible party.

On November 17, 2021, Augusta-Richmond County Emergency Management Agency (EMA) hired HEPACO, LLC (“HEPACO” or “Claimant”) to control and mitigate the discharge.⁶ HEPACO deployed boom, mitigated the migration of oil, and recovered and removed 4,000 gallons of contaminated oily water.⁷

On September 29, 2022, HEPACO presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$226,591.13.⁸ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that

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 Augusta Fire Department Incident Report dated November 17, 2021, Remarks Section on page 3

³ *Id.*

⁴ *Id.*

⁵ To ensure that HEPACO met its burden with respect to the cleanup activity, the NPFC coordinated with the EPA Region 4 as the Federal On-Scene Coordinator (FOSC) for this incident. After analyzing the incident and the actions taken by HEPACO, the FOSC opined that the response actions undertaken by HEPACO and its subcontractors were consistent with the National Contingency Plan. *See*, email from USEPA Region 4 to NPFC, dated January 18, 2023.

⁶ HEPACO claim submission received on September 29, 2022, Attachment A: “Signed HEPACO Blanket Rapid Response Service Agreement” dated November 17, 2021.

⁷ GAEPD report “Delta Tank Lines Scanned file” (hereinafter “GAEPD report”) received October 19, 2022.

⁸ HEPACO claim submission received September 29, 2022.

\$156,709.92 of the requested amount is compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On November 17, 2021, Augusta FD received a call for a gas leak located at 3338 Commerce Drive, Augusta, Georgia.⁹ Upon arrival on-scene, Augusta FD discovered what appeared to be a combustible/flammable liquid floating on the surface of Rocky Creek Basin; a navigable waterway of the United States.¹⁰ Augusta FD determined the spill originated toward the rear of 2088 Gordon Highway and migrated down an embankment into a ditch before entering into the Rocky Creek Basin.¹¹ Augusta FD contacted both their hazardous materials team and the Augusta-Richmond County Emergency Management Agency, who advised Augusta FD to notify the GAEPD which is part of the Georgia Department of Natural Resources (GADNR) of the spill.¹² GAEPD responded to the incident and assumed the role of the State On-Scene Coordinator (SOSC). GAEPD oversaw cleanup operations and investigated the spill.

Responsible Party

The spill in this case occurred at an onshore facility as defined by the Oil Pollution Act of 1990 (OPA).¹³ OPA defines the Responsible Party (RP) for a discharge from an onshore facility as “any person or entity owning or operating such facility.”¹⁴ GAEPD tracked the source of the spill to the MDR Trucking Facility in Augusta, Georgia.¹⁵ MDR notified GAEPD that a driver for Delta Tank Lines, LLC (Delta) regularly parked his tanker truck on the lot where the discharge originated.¹⁶ GAEPD initially identified three potential RPs responsible for the discharge, which include Delta Tank Lines Trucking LLC, SAM Real Estate and MDR Trucking.¹⁷ Later, after investigation, GAEPD concluded Delta was responsible for the discharge.¹⁸ However, to date, no federal agency has conclusively identified an RP for this incident.¹⁹ Conclusively identifying a RP at this stage is not vital to the proper adjudication of this claim. As such, the NPFC will adjudicate this claim accordingly.

Recovery Operations

⁹ Augusta Fire Department Incident Report dated November 17, 2021, page 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ An “onshore facility means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.” 33 U.S.C. § 2701(24).

¹⁴ 33 U.S.C. § 2701(26), 33 U.S.C. § 2701(32).

¹⁵ GAEPD report, page 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ GAEPD report.

¹⁹ This determination does not – and is not meant to – serve to exonerate any person or entity meeting the definition of a Responsible Party for any current or future liability associated with this discharge.

On November 17, 2021, EMA signed a contract with HEPACO, LLC. hiring it to provide cleanup of the oil spill, which included the removal of the contamination in Rocky Creek Basin.²⁰ HEPACO arrived on-site and began containment operations and oil cleanup and removal on November 17, 2021.

HEPACO deployed boom in several locations along the spill route to contain and reduce migration of the oil, deployed absorbents to remove the discharged oil and utilized a vacuum tanker to assist in the removal of oil, recovering approximately 4,000 gallons of contaminated liquid.²¹ In addition, HEPACO removed the source by removing stained soils at the suspected source location. HEPACO finished active remediation on November 19, 2021, and left booms and pads on-site to recover any oil substance residuals.²²

HEPACO returned to the site several times in order to monitor the site, change booms, and transfer waste offsite for disposal.²³ HEPACO hired several subcontractors to assist in waste disposal.²⁴ Response operations were completed by February 4, 2022.²⁵

II. NPFC AND RP:

Based on GAEPD initial report, the NPFC issued RP Notification letters dated October 20, 2022 to Delta Tank Lines, LLC,²⁶ the MDR Trucking Facility²⁷ and to Mr. (b) (6), owner of SAM Real Estate Investment, LLC.²⁸ A RP Notification letter notifies a potential RP that a claim was presented to the NPFC that is seeking reimbursement of uncompensated removal costs or damages incurred as a result of the incident in which the recipient is the identified or suspected RP. Delta denied responsibility for the discharge.²⁹ The other potential RPs did not respond to the NPFC letter.

III. CLAIMANT AND NPFC:

On September 29, 2022, the NPFC received a claim for \$226,591.13 from HEPACO.³⁰

Initially, HEPACO provided the NPFC with a contract agreement signed by both the Claimant and the Augusta-Richmond County EMA, email correspondence between HEPACO and the Augusta Engineering Department, email correspondence between HEPACO and the Georgia Environmental Protection Division, HEPACO's demand for payment letter to the EMA dated April 25, 2022, the EMA's response to HEPACO's demand letter, HEPACO's courtesy notice to United States Coast Guard of intention to pursue assistance from the NPFC and invoices associated with the costs claimed.³¹ On October 24, 2022, the NPFC requested additional information from HEPACO.³² On November 6, 2022, HEPACO submitted proof of all payments made to its subcontractors, all related subcontractor invoices,

²⁰ HEPACO claim submission received on September 29, 2022, Attachment A: "Signed HEPACO Blanket Rapid Response Service Agreement" dated November 17, 2021.

²¹ GAEPD report, pages 5-6 of 80 (at the November 17, 2021-17:30 through November 19, 2021 19:52 time entries).

²² GAEPD report, page 6 (at the November 19, 2021 19:52 time entry).

²³ See, information package submitted by HEPACO to NPFC received January 25, 2023, pages 1-12.

²⁴ See, HEPACO claim submission.

²⁵ HEPACO claim submission, "HEPACO Invoice FY22-1003964" dated March 29, 2022, page 11 referencing Earthworks Grading & Contracting Invoice 1843 dated February 4, 2022.

²⁶ Letter from NPFC to Delta Tank Lines, LLC dated October 20, 2022.

²⁷ Letter from NPFC to MDR Trucking Facility dated October 20, 2022.

²⁸ Letter from NPFC to Mr. (b) (6) (SAM Real Estate) dated October 20, 2022.

²⁹ See, emails from Delta to NPFC dated October 26, 2022 and November 22, 2022, each with an attachment.

³⁰ HEPACO Claim Submission.

³¹ HEPACO claim submission, Attachments A through G.

³² Email from NPFC to HEPACO dated October 24, 2022.

copies of the notifications HEPACO made to potential responsible parties, and all HEPACO claim-related daily form packets along with the various field notes.³³

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁴ 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.³⁵ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³⁶ 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.³⁷ An RP's liability is strict, joint, and several.³⁸ 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."³⁹ 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."⁴⁰ 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."⁴¹

³³ See, information package submitted by HEPACO to NPFC dated November 4, 2022.

³⁴ 33 CFR Part 136.

³⁵ 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)).

³⁶ 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).

³⁷ 33 U.S.C. § 2702(a).

³⁸ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³⁹ *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).

⁴⁰ 33 U.S.C. § 2701(31).

⁴¹ 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).⁴² The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴³ 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.⁴⁴

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.⁴⁵
- (d) That the removal costs were uncompensated and reasonable.⁴⁶

The NPFC analyzed each of these factors and determined that the majority of costs incurred and submitted by HEPACO 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.

Based on the location of this incident, the FOSC is the United States Environmental Protection Agency (USEPA).⁴⁷ All approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).⁴⁸

Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$156,709.62 while \$69,881.21 is deemed non-compensable for the following reasons:⁴⁹

1. Invoice FY21-1020711 – \$564.00

\$524.65 related to the use of flatbed trucks is denied. HEPACO submitted a claim for the use of three flatbed trucks. In response to a request from the NPFC for additional information to support these claimed costs, HEPACO provided “Daily Form Packets”. These packets support the use of two 1-Ton flatbed trucks and support the associated mileage costs for one 1-Ton flatbed truck.⁵⁰ Despite NPFC’s request for additional information as to the use of the third flatbed truck and the mileage associated with the second flatbed truck, these claimed costs remain unsupported by the administrative record. As such, HEPACO’s request for costs related to a third 1-Ton Flatbed

⁴² See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴³ 33 CFR Part 136.

⁴⁴ 33 CFR 136.105.

⁴⁵ The NPFC coordinated with the EPA as the Federal On-Scene Coordinator (FOSC) for this incident. After analyzing the incident and the actions taken by HEPACO, the FOSC opined that the response actions undertaken by HEPACO and its subcontractors were consistent with the National Contingency Plan. See, email from USEPA to the NPFC dated January 18, 2023.

⁴⁶ 33 CFR 136.203; 33 CFR 136.205.

⁴⁷ 40 CFR 300.120(a)(2).

⁴⁸ Email from the EPA to the NPFC certifying that all actions and costs were consistent with the NCP, dated January 18, 2023.

⁴⁹ Enclosure 3 provides a detailed analysis of the amounts approved and denied by the NPFC.

⁵⁰ See, information package submitted by HEPACO to NPFC dated November 4, 2022, with Daily Form Packets dated November 18, 2021. HEPACO package to NPFC received January 25, 2023 with two attachments, both entitled “HEPACO Daily Form Packet” dated November 18, 2021.

Truck in the amount of \$517.65 is denied. Additionally, the \$7.00 requested for mileage for the second flatbed truck is also denied.

HEPACO's rate schedule supports an Energy, Security and Recovery fee of 7.5% of the total invoice.⁵¹ Since the amount of the approved costs for the invoice is decreased by \$524.65, NPFC must also reduce the reimbursable amount of the Energy, Security and Recovery Fee that relates to this invoice. The original request was for \$5,890.81. Applying this fee to the adjusted invoice results in a reimbursable amount of \$5,851.46. The difference of \$39.35 is denied.

2. Invoice FY22-1003964 – \$52,890

\$49,200 related to Earthworks Grading and Contracting is denied. HEPACO claimed \$49,200 for Earthworks Grading & Contracting, LLC's Invoice 1795, which consisted of \$41,000.00 in service costs⁵² and an additional \$8,200.00 in markup costs.⁵³ On October 24, 2022, the NPFC requested HEPACO provide proof of payment in order to substantiate their request for the service costs.⁵⁴ No proof of payment was provided and as such, the costs totaling \$49,200.00, are denied.

As discussed above, HEPACO's rate schedule supports an Energy, Security and Recovery fee of 7.5% of the total invoice.⁵⁵ Since the amount of the approved costs for the invoice is decreased by \$49,200, NPFC must also reduce the reimbursable amount of the Energy, Security and Recovery Fee that relates to this invoice. The original request was for \$8,771.80. Applying this fee to the adjusted invoice results in a reimbursable amount of \$5,081.80.⁵⁶ The difference of \$3,690.00 is denied.

3. HEPACO submitted a request for \$16,427.17 in finance charges as part of their original claim.⁵⁷ Finance charges are not an OPA compensable removal cost.⁵⁸ As such, the request for \$16,427.17 is denied.
4. An unidentified amount of \$.04 is denied as unsupported by the record.⁵⁹

Overall Denied Costs: \$69,881.21

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, HEPACO's request for uncompensated removal costs is approved in the amount of \$156,709.92.

⁵¹ HEPACO claim submission, Attachment A. Rate Schedule found on page 8.

⁵² HEPACO claim submission, HEPACO Invoice FY22-1003964 dated March 29, 2022, pages 4-5 referencing Earthworks Grading & Contracting Invoice 1795 dated January 18, 2022.

⁵³ HEPACO claim submission, HEPACO Invoice FY22-1003964 dated March 29, 2022.

⁵⁴ Email from NPFC to HEPACO dated October 24, 2022.

⁵⁵ HEPACO claim submission, Attachment A. Rate Schedule found on page 8.

⁵⁶ See, Enclosure 3.

⁵⁷ HEPACO Claim Submission received September 29, 2022.

⁵⁸ "The Act contains no provisions that would make such an award possible... [T]he government is not liable for interest under the Act." *Gatlin Oil Co. v. United States*, 169 F.3d 207, 214 (4th Cir. 1999); 33 U.S.C. 2701(31).

⁵⁹ See, Enclosure 3.

This determination is a settlement offer,⁶⁰ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁶¹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁶² Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

<p>(b) (6)</p> <p>Claim Supervisor: (b) (6)</p> <p>Date of Supervisor's review: May 9, 2023</p> <p>Supervisor Action: <i>Approved</i></p>

⁶⁰ 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).

⁶¹ 33 CFR 136.115(b).

⁶² *Id.*