

CLAIM SUMMARY / DETERMINATION

Claim Number:	919003-0001
Claimant:	Missouri Dept. of Natural Resources
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	5,750.52
Action Taken:	Offer in the amount of \$4,602.34

EXECUTIVE SUMMARY:

On July 13, 2016, Nemo Landing Marina, Inc. notified the Missouri State Highway Patrol that a severe thunderstorm with high winds picked up dock number five (5) and flipped it over causing it to land partially on dock number four (4). The caller reported that the vessels docked on dock number five were all severely damaged.¹ A sheen was present on the Pomme De Terre Lake, which is at the confluence of Lindley Creek and the Pomme de Terre River, a navigable waterway of the US. Missouri Department of Natural Resources (MO DNR or Claimant) was notified by the State Police and responded to the incident in its capacity as the State On Scene Coordinator (SOSC). MO DNR confirmed that a total of 15 boats were impacted and 12 of those boats were capsized causing a sheen. The marina provided a complete list of all vessel owners that had vessels housed at the marina, although identification of the vessels that spilled oil contributing to the sheen was not provided.

Nemo Landing Marina, Inc. hired Atlas Docks, LLC to handle cleanup and boat removal to mitigate the effects of the incident.² MO DNR presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$5,750.72 on November 14, 2018.³ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$4,602.34 is compensable and offers this amount as full and final compensation for this claim.⁴

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On July 13, 2016, a sheen was noticed on the waters of Pomme De Terre Lake near Pittsburg, MO, a navigable waterway of the United States, following the passing of a severe storm. Missouri State Highway Patrol called into the local MO DNR spill hotline to report that the storm's high winds picked up a loaded dock and overturned it, and also to report that a sheen appeared on the water's surface. The State On-Scene Coordinators (SOSCs), [REDACTED], [REDACTED], and [REDACTED], from MO DNR responded to the oil spill incident and provided oversight of the pollution removal activities. On July 14, 2018, began cleanup activities.⁵ The

¹ Missouri State Highway Patrol Report of Incident # 160454381.

² Missouri Department of Natural Resources Emergency Response Report # 1607131515ARD

³ Email from [REDACTED] to MO DNR dated November 14, 2018 acknowledging receipt of a claim submission.

⁴ 33 CFR 136.115.

⁵ Missouri Department of Natural Resources Environmental Emergency Response Incident Report, Page 2 of 3, Additional Information section dated July 13, 2016

Marina owner hired Atlas Docks LLC out of Camdenton, MO to perform boat removal and cleanup and removal of the damaged dock.⁶

Responsible Party

There are approximately 15 registered boat owners that had vessels housed at Nemo Landing Marina, Inc. at the time of the incident that were affected by the damage caused by the storm. MO DNR provided a complete list of the vessels housed at the marina along with the names and addresses of the vessel owners. It is important to note that no official Responsible Party (RP) notifications were made by either the SOSC or the FOSC, informing any of the vessel owners of possible liability under the Oil Pollution Act of 1990 (OPA).

Recovery Operations:

MO DNR personnel deployed 360 feet of sorbent boom around the damaged dock to contain the sheen. Two additional pieces of boom and half a bag of pads were placed to absorb sheen. Atlas Docks LLC began dock cleanup and boat removal on July 27, 2016. The Marina owner reported on August 22, 2016 that all boats had been removed from the water. MO DNR personnel performed a final assessment on August 24, 2016 indicating the end of the response.⁷

II. CLAIMANT

On November 14, 2018, the NPFC received a claim for uncompensated removal costs from the Missouri Department of Natural Resources, (MO DNR or Claimant), in the amount of \$5,750.52. The Claimant provided an Optional OSLTF Claim Form; cost summary for state personnel and equipment; pictures of site before and after cleanup; MO DNR Environmental Response Report; MO DNR Incident Report; Missouri State Highway Patrol Report of Incident; and NEMO Marina dock information.

In accordance with 33 USC 2713(b)(1)(c), the Governor of a state may present its claim first to the NPFC. The State of Missouri Department of Natural Resources (MO DNR) presented its claim directly to the NPFC without presenting to any or all of the potential responsible parties (PRPs) as allowed by statute.

On December 11, 2018, the Claimant sent an email to the NPFC amending its sum certain from \$5,750.52 to \$4,977.35 and attached an amended OSLTF Claim Form.⁸

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁹ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant's claim against the OSLTF.

⁶ Environmental Emergency Response Report, Page 4 of 8, Cleanup Action Comments section

⁷ Environmental Emergency Response Report, Page 4 of 8, Cleanup Action Comments section

⁸ Email from [REDACTED], MO DNR to [REDACTED], NPFC dated December 11, 2018 with attachments.

⁹ 33 CFR Part 136.

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.¹⁰ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹¹ 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 finds facts and makes its determination based on the preponderance of the credible evidence.

IV. DISCUSSION:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.¹² The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.¹³ 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.¹⁴

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 FOOSC or determined by the FOOSC to be consistent with the National Contingency Plan.
- (d) That the removal costs were uncompensated and reasonable.¹⁵

Upon initial review of the claim submission, the NPFC made a request for additional information to the Claimant as described below:¹⁶

1. Requested sample/testing analysis that confirmed the spilled substance as an oil, and disposal documentation for the boom/sorbents as applicable to ensure it was disposed of as non-hazardous petroleum contaminated waste;
2. Requested the DNR rate schedule that delineated the rates of charge/pricing schedule for the services, labor conducted, and equipment used; and also a copy

¹⁰ 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).

¹¹ 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).

¹² See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

¹³ 33 CFR Part 136.

¹⁴ 33 CFR 136.105.

¹⁵ 33 CFR 136.203; 33 CFR 136.205.

¹⁶ Email from NPFC to Claimant dated November 27, 2018

- of the indirect costs calculation methodology/documentation to support the added calculation and what agency costs are included in its calculation;
3. Requested a site layout/map that indicated the location of the fuel pump, and whether or not the pump was affected by the event/to what was the extent to which it was affected;
 4. Requested information to confirm federal oversight of the pollution removal activities by the United States Coast Guard (USCG) or the Environmental Protection Agency (EPA);
 5. Requested confirmation identifying the source(s) of the spill
 6. Requested the names and addresses of the owners of these 15 impacted vessels along with identification of the specific vessels that released fuel

In response to the NPFC's request for additional information, the Claimant provided the following information:¹⁷

1. Several attachments, to include DNR Time & Leave records; Wise El Santo invoice #1166437, Wise El Santo Purchase Order and Purchase Authorization Form #3ESP170037; Wex receipts; Robo Car Wash receipt; Cost Summary for Project # NJ17ER1V; UMB Credit Card Statements (2); DNR pay and fringe benefit breakdown spreadsheet; amended OSLTF Claim Form; NEMO Marina fuel pump location aerial photo; EPA Cognizant Agency Negotiation Agreement (FY2017 indirect costs rate sheet);
2. The Claimant answered the questions as such:
 - (a) DNR did not collect samples of the spilled substance, and the contaminated sorbents were disposed of by Atlas Docks.
 - (b) Neither the EPA, nor the USCG responded to the incident; however, the EPA was notified.
 - (c) The indirect costs were calculated by multiplying all direct costs for the incident by the indirect rate for FY17 of 29.76%.
 - (d) The NEMO Marina's fuel pumps are located on the dock housing the marina store and were not impacted.
 - (e) MO DNR was unable to provide additional information pertaining to the names and addresses of the owners of the impacted vessels, over and above what they originally provided which appeared to be a comprehensive list of all vessel owners at the marina and not just the impacted vessel owners

On February 19, 2019, the NPFC contacted the Claimant via telephone made an additional request for information. A follow-up email was sent to the Claimant and memorialized the phone call as described below:¹⁸

1. Please provide information regarding DNR position descriptions and pay rates for its personnel, and DNR daily field logs/narratives with descriptions of the actions undertaken by DNR personnel (to include a breakdown of equipment and supplies used) in response to the spill cleanup.

¹⁷ Email from Claimant to NPFC, dated December 11, 2018

¹⁸ Email from NPFC to Claimant, dated February 19, 2019

2. Please provide disposal documentation affirming the disposal of any contaminated materials, booms, and absorbents, the amounts of disposed materials, and the location/facility to which the contaminated materials were transported for proper disposal.

The Claimant responded by submitting a MO DNR personnel hourly rates spreadsheet and a MO DNR daily explanation sheet detailing MO DNR cleanup activities on intermittent dates from July 13, 2016 to August 24, 2016.¹⁹ It was also noted that MO DNR personnel deployed nine packs of absorbent boom during cleanup activities and left three with the Marina owner. The contaminated boom was properly disposed of by Atlas Docks LLC.²⁰

MO DNR is the statutory authority in Missouri for hazardous substance releases under Chapter 260, Sections 260.500 - 260.550 in the revised statutes of Missouri.²¹ SOSCs respond to hazardous material incidents/environmental emergencies for the purpose of addressing any material released to land, water, or atmosphere that may impact the environment, public health, and/or property. They also assist in mitigation of the incident by coordinating response, remediation, and monitoring with on-scene personnel, including fire officials, law enforcement, contractors, property owners, and local, state, and federal officials.²²

In accordance with their authority, MO DNR personnel deployed absorbent boom on the Pomme De Terre Lake to mitigate the effects of the spilled substance and control its spread. As such, based upon the preponderance of credible evidence, that the actions undertaken by MO DNR in its capacity as the SOSC, is determined by the NPFC to be consistent with the National Contingency Plan (NCP) and necessary to mitigate the effects of the spill on the surface waters of the Pomme De Terre Lake.²³

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the Claimant's request for uncompensated removal costs is approved in the amount of \$4,602.34.

The NPFC denies the Claimant's request for \$25.00 related to the purchase of three car washes for agency vehicles, as the charges were not incurred by the Claimant for removal actions as defined under OPA. The NPFC denies the Claimant's request for \$264.00 related to the purchase the three packs of boom that were left with the Marina owner as inventory in the event they need it therefore not considered part of the active response actions. The NPFC denies the Claimant's request for \$86.01 related to indirect costs claimed. Total denial costs equal \$375.01.

¹⁹ Email from Claimant to NPFC, dated February 20, 2019

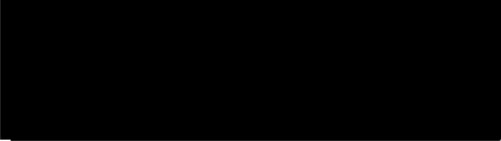

²⁰ Email from Claimant to NPFC, dated February 26, 2019

²¹ Revisor of Statutes, State of Missouri, Title XVI Conservation, Resources and Development, Chapter 260 Environmental Control, Sections 260.500 – 260.550

²² Email from Claimant to NPFC, First Paragraph, dated February 20, 2019

²³ The NPFC has determined that the actions undertaken by the Claimant are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4)

Because this determination is a settlement offer²⁴, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.²⁵ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.²⁶ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.


Claim Supervisor: 
Date of Supervisor's review: <i>3/14/19</i>
Supervisor Action: <i>Determination to pay approved</i>

²⁴ 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 compensated 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).

²⁵ 33 CFR §136.115(b).

²⁶ *Id.*