

CLAIM SUMMARY / DETERMINATION

Claim Number:	919005-0001
Claimant:	Pennsylvania Department of Environmental Protection
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$3,781.27
Action Taken:	Offer in the amount of \$3,781.27

EXECUTIVE SUMMARY:

An orphaned home heating oil tank was discovered along the banks of the Connoquenessing Creek, a tributary of the Beaver River, and lodged itself against a tree on the property of Mr. ██████████. The origin of the heating oil tank was unknown, and it had approximately 234 gallons of home heating oil and water mixture inside¹². Additionally heavy rains were forecasted for the near future from Hurricane Florence and the likelihood of further flooding along the creek was deemed high. As such, the Pennsylvania Department of Environmental Protection (PADEP or Claimant) hired a response contractor in order to vacuum out the contents of the abandoned tank and remove the tank from the creek bank. No responsible party (RP) was determined since the tank had no identifying marks and the property owner was not the owner of the source. The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$3,781.27 is compensable and offers this amount as full and final compensation for this claim.³

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On September 14, 2018, the United States Coast Guard's National Response Center (NRC) received notification that an orphaned home heating oil tank was discovered along the banks of the Connoquenessing Creek, a tributary of the Beaver River, and was threatening to discharge approximately 234 gallons of home heating oil and water mixture.⁴

Responsible Party

No responsible party (RP) has been identified for this incident.⁵

¹ National Response Center (NRC) report # 1224629 dated September 14, 2018.

² PA DEP Emergency Response Incident Report, Observation section, page 1 of 5, dated September 14, 2018.

³ 33 CFR 136.115.

⁴ National Response Center Report #1224629, reported on Septemeber 14, 2018.

⁵ PA DEP Emergency Response Incident Report, Potential Responsible Party section, page 1 of 5, dated September 14, 2018.

Recovery Operations:

Because heavy rains were expected in the area, PADEP hired McCutcheon Enterprises, Inc. as its response contractor and dispatched them to vacuum the liquid from the tank and remove the tank from the banks of the Connoquenessing Creek. The oil and water mixture was removed and disposed of at Danco Industries Inc. in Oil City, PA on or about September 18, 2018.⁶

II. CLAIMANT

On November 18, 2018, the NPFC received a claim for uncompensated removal costs from Pennsylvania Department of Environmental Protection (PADEP) dated November 9, 2018. The claim included the PADEP Emergency Response Incident Report, NRC Report # 1224629, Description of Actions & Dates on which work was performed, Analysis of spilled substance (PADEP Lab Analytical Report – Sample ID# 2541 441, map and aerial image of the incident location, pictures of impacted are/damage, email from U.S. EPA’s ██████████ to ██████████, Director of the PADEP Emergency Response, stating the actions taken by the DEP were necessary and consistent with the National Contingency Plan, explanation of PADEP’s rates, PADEP’s daily work sheets, PADEP payroll report, McCutcheon Enterprises, Inc. invoice # 10110526, proof of payment made to McCutcheon Enterprises, Inc., explanation of contractor’s rates, contractor’s daily work sheet, contractor’s time and material rate sheet, contractor’s third party purchase receipt, and contractor disposal documents.⁷

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁸ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant’s claim against the OSLTF.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.⁹ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁰ If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and finds facts and makes its determination based on the preponderance of the credible evidence.

⁶ NPFC Claim submission document entitled “Supporting Information, 2018-09-14 Orphaned Home Heating Oil Tank, North Sewickley Twp., Beaver Co., Description of Actions & Dates on which work was performed.”

⁷ NPFC claim submission file identified as NPFC claim # 919005-0001.

⁸ 33 CFR Part 136.

⁹ See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2011 WL 5187292, (E.D. La. 2011), “[T]he Fifth Circuit specifically recognized that an agency has discretion to credit one expert's report over another when experts express conflicting views.” citing *Medina County v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010).

¹⁰ See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them).

IV. DISCUSSION:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.¹¹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.¹² 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.¹³

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.
- (d) That the removal costs were uncompensated and reasonable.¹⁴

Upon initial review of the claim submission, the NPFC made a request, via email, for additional information to the Claimant on November 28, 2018 as described below¹⁵:

- 1) Proof of a signed service agreement/contract/standing agreement between the Pennsylvania Dept. of Environmental Protection and McCutcheon Enterprises and Danco Industries Inc.
- 2) Was there intent to seek recovery of any incurred costs for the sample analysis that was performed?

A second request for additional information was made on December 6, 2018 as described below¹⁶:

- 1) A detailed description of the reason for the purchase of supplies at Busy Beaver in Ellwood City, PA, and their usage in the oil and water mix cleanup efforts.

In response to the NPFC's initial request for additional information, the Claimant responded with the following email¹⁷:

- 1) "The Pennsylvania Dept. of Environmental Protection does not have a pre-existing service agreement/contract/standing agreement with McCutcheon Enterprises for cleanups or with Danco Industries Inc. for disposal. For emergency cleanups, the Department contracts with a cleanup contractor known to the Department that can

¹¹ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

¹² 33 CFR Part 136.

¹³ 33 CFR 136.105.

¹⁴ 33 CFR 136.203; 33 CFR 136.205.

¹⁵ NPFC email to PADEP dated November 28, 2018.

¹⁶ NPFC email to PADEP dated December 6, 2018.

¹⁷ PADEP email to NPFC dated December 3, 2018 .

respond in a timely manner. Disposal is arranged by the cleanup contractor through whatever arrangement it has made. For this cleanup, the Dept. contacted McCutcheon Enterprises by phone and entered into a verbal agreement for the cleanup.” The response also noted that the DEP is not seeking recovery of incurred costs for the sample analysis.

In response to the NPFC’s second request for additional information, the Claimant responded by providing detailed explanation for the Busy Beaver supply purchases and their usage in the oil and water mix cleanup¹⁸.

The NPFC has determined that the costs invoiced were billed in accordance with the contracted rates between the parties, including all subcontractors and third party services. All costs approved for payment were verified as being invoiced at the appropriate rate sheet pricing, including but not limited to, all third party or out of pocket expenses. All approved costs were supported by adequate documentation which included invoices and proofs of payment.

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, PADEP’s request for uncompensated removal costs in the amount of \$3,781.27 is approved.

Because this determination is a settlement offer¹⁹, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.²⁰ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.²¹ 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>2/1/19</i>
Supervisor Action: <i>Offer approved</i>

¹⁸ PADEP email to NPFC dated December 18, 2018.

¹⁹ 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).

²⁰ 33 CFR §136.115(b).

²¹ *Id.*