

CLAIM DETERMINATION

Claim Number:	E19304-0001
Claimant:	Lewis Environmental, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$67,174.04
Action Taken:	Offer in the amount of \$66,860.29

EXECUTIVE SUMMARY:

An unknown quantity of red-dye diesel fuel has been released by an unknown source into the Schuylkill River, a navigable waterway of the United States. The United States Environmental Protection Agency (USEPA) Federal On Scene Coordinator's Representative (FOSCR) has not identified a responsible party (RP) for the spill as defined by the Oil Pollution Act of 1990.¹ Lewis Environmental, Inc. ("Lewis Environmental" or "Claimant"), was hired by the Pennsylvania Department of Environmental Protection (PADEP) as the Oil Spill Response Organization (OSRO) for the incident. Having not received payment for oil spill response activities,² Lewis Environmental presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$67,174.04.³ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$66,860.29 of the requested amount is compensable and offers this amount as full and final compensation of this claim.⁴

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On January 4, 2019, the PADEP was notified by the local water authority to report a sheen on Dresher Creek that led to the Schuylkill River. The source of contamination was traced to a groundwater seep at the base of a slope next to Dresher Creek.⁵ The PADEP contacted Lewis Environmental to boom the waterway and to assist with the investigation of the source of contamination.⁶ The Claimant responded on January 4, 2019, and placed sorbent pads in the water, used booms to contain the spill in the water and sent personnel on site to perform oil spill removal activities.⁷ Lewis Environmental completed all response actions on January 23, 2019.⁸

¹ 33 U.S.C. § 2701(32).

² 33 CFR 136.103(c).

³ Lewis Environmental, Inc. claim submission dated May 3, 2019.

⁴ 33 CFR 136.115.

⁵ United States Environmental Protection Agency Polrep 1 dated February 5, 2019.

⁶ Phone Conversation between Vice President ██████████, Lewis Environmental, and Claims Manager ██████████, NPFC, dated May 15, 2019.

⁷ Lewis Environmental, Inc. Invoice 46385 dates of service 1/4, 1/5 & 1/6 dated January 8, 2019.

⁸ Lewis Environmental, Inc. claim submission dated May 3, 2019.

On January 30, 2019, EPA Region III arrived on site, serving as the FOSCR for the oil spill incident and determined that the oil discharged into a navigable waterway and required cleanup.⁹ EPA Region III opened the fund (FPN E19304) in response to the oil spill on February 4, 2019.

Responsible Party

The PADEP initially identified a commercial property owned by Universal Machine, Co. (Universal) located on a slope above the Dresher Creek as a potential source of the spill. The facility has two underground fuel storage tanks (UST's) onsite, both owned by Universal. According to federal reports provided by the FOSCR, it was at the direction of PADEP that both tanks were pumped down and pressure tested; following which, both tanks passed the pressure tests.¹⁰ On May 21, 2019, the EPA reported to the NPFC that additional red fuel oil was flowing out of the soil and into the tributary, nearly 6 months after the UST's owned by Universal were emptied.¹¹

Lewis Environmental identified Universal as the RP in their claim submission.¹² However, Universal never took ownership of the spill. The EPA's on-site FOSCR's stated the spill source is considered a mystery, and noted that Universal may not be the definitive responsible party as claimed by Lewis.¹³ Furthermore, neither of the two EPA FOSCR's have served a Notice of Federal Interest (NOFI) to Universal because the investigative efforts to date have not indicated they are the RP.¹⁴ This includes, but is not limited to, the investigation work done by Lewis, and their subcontractors.

Recovery Operations

Lewis Environmental, Inc. received notification from PADEP, requesting it to handle the spill response at which time they mobilized to the spill location on January 4, 2019.¹⁵ Upon arrival, they placed sorbent pads in the water, used booms to contain the spill and sent personnel on site to assist with oil spill removal activities.¹⁶ Lewis Environmental completed all response actions on January 23, 2019.¹⁷

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)¹⁸ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.¹⁹

⁹ Email from FOSCR [REDACTED], EPA, to Claims Manager [REDACTED], NPFC, dated May 21, 2019.

¹⁰ United States Environmental Protection Agency Polrep 1 dated February 5, 2019.

¹¹ Email from FOSCR [REDACTED], EPA, to Claims Manager [REDACTED], NPFC, dated May 21, 2019.

¹² Lewis Environmental, Inc. claim submission dated May 3, 2019.

¹³ Phone Conversation between FOSCR [REDACTED], EPA, and Claims Manager [REDACTED], NPFC, dated May 21, 2019.

¹⁴ Email from EPA's [REDACTED], FOSCR, to NPFC's [REDACTED], Claims Manager, dated May 21, 2019.

¹⁵ Phone Conversation between Vice President [REDACTED], Lewis Environmental, and Claims Manager [REDACTED], NPFC, dated May 15, 2019.

¹⁶ Lewis Environmental, Inc. Invoice 46385 dates of service 1/4, 1/5 & 1/6 dated January 8, 2019.

¹⁷ Lewis Environmental, Inc. claim submission dated May 3, 2019.

¹⁸ 33 U.S.C. § 2701 *et seq.*

¹⁹ 33 CFR 136.103.

Lewis Environmental presented costs to Universal Machine Co. for \$35,427.29 on January 7, 2019, and Universal paid the costs totaling \$35,427.29, on January 9, 2019.²⁰ Lewis presented its additional costs totaling \$67,174.04 on January 8, 2019, January 15, 2019 and January 16, 2019.²¹ Universal refuses to pay any further costs as Universal feels they are being wrongfully cited as the RP by Lewis.²²

Lewis Environmental presented an authorization contract with their claim submission, signed by Lewis Environmental's Vice President and Universal's owner,²³ which they believe cites Universal as the RP. Although this document reflects a contractual business agreement between the two parties, it does not identify a responsible party (RP) for the spill as defined by the Oil Pollution Act of 1990.²⁴ As of today, Universal is not identified by the FOSCR as the definitive RP.²⁵

III. CLAIMANT AND NPFC:

When a RP has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.²⁶ On May 14, 2019, the NPFC received a claim for uncompensated removal costs from Lewis Environmental dated May 3, 2019. The costs presented to the NPFC are in the amount of \$67,174.04. The claim to the NPFC consists of labor, equipment, materials, personal protective equipment and fuel surcharges. Specifically, the claim contains \$35,917.28 for Invoice 46422, \$8,609.76 for Invoice 46444 and \$22,647.00 for Invoice 46470; totaling \$67,174.04.²⁷

The items cited on the daily work reports matched the costs submitted. Lewis Environmental stated that additional costs had been paid by Universal. However, verification of the payment provided by Universal, and costs associated with the payment were not provided with the original submission. In support of their claim, Lewis Environmental provided proof of payment from Universal in the amount of \$35,427.29,²⁸ and additional labor, equipment, materials, personal protective equipment and fuel surcharges in the amount of \$35,427.29 for Invoice 46385.²⁹ The Claimant has chosen not to present the additional \$35,427.29 found on Invoice 46385 as these costs are paid and as such, are not OPA compensable.

Furthermore, the NPFC requested copies of any federal agency or private entity test results associated with samples collected from the scene of the oil spill incident, including but not limited to the results of samples collected by Lewis Environmental, Inc., as well as a copy of any tests and/or probes of the UST's owned by Universal Machine, Co. that are cited in the original claim submission as the source of the spill. Lewis Environmental responded with the soil sample

²⁰ Universal Machine Co. of Pottstown Check #4886, dated January 9, 2019.

²¹ Lewis Environmental, Inc. claim submission received May 14, 2019.

²² Phone Conversation between Attorney [REDACTED], Universal's Legal Representative, and Claims Manager [REDACTED], NPFC, dated May 21, 2019.

²³ Lewis Customer Work Authorization Agreement signed January 4, 2019.

²⁴ 33 U.S.C. § 2701(32).

²⁵ Phone Conversation between FOSCR [REDACTED], EPA, and Claims Manager [REDACTED], NPFC, dated May 21, 2019.

²⁶ 33 CFR 136.103.

²⁷ Lewis Environmental, Inc. claim submission received May 14, 2019.

²⁸ Universal Machine Co. of Pottstown Check #4886, dated January 9, 2019.

²⁹ Invoice 46385 dated January 8, 2019.

testing results of soils surrounding Dresher Creek and lab results correspondent with the substance being leaked into Dresher Creek,³⁰ but was unable to provide the NPFC with any tests or probes of the UST's owned by Universal.³¹

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³² 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.³³ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³⁴ 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.

V. DISCUSSION:

A responsible party 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.³⁵ A responsible party's liability is strict, joint, and several.³⁶ 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."³⁷ OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred removal cost 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

³⁰ Aquaterra Soil Sample Location report dated January 9, 2019, and Pace Analytical National Center for Testing & Innovation report dated January 11, 2019.

³¹ Email from Vice President [REDACTED], Lewis Environmental, to Claims Manager [REDACTED], NPFC, dated May 22, 2019.

³² 33 CFR Part 136.

³³ 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).

³⁴ 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).

³⁵ 33 U.S.C. § 2702(a).

³⁶ See, H.R. Rep. No. 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³⁷ *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.).

from an incident.”³⁸ 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.”³⁹

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.⁴⁰ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴¹ 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.⁴²

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.⁴³
- (d) That the removal costs were uncompensated and reasonable.⁴⁴

The NPFC analyzed each of these factors and determined that the majority of costs incurred by Lewis Environmental, Inc. and submitted to the NPFC are compensable removal costs based on the supporting documentation provided. The NPFC determined that the OPA compensable approved costs invoiced were billed in accordance with the contracted rates between the parties, including all 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 expenses.⁴⁵ All approved costs are supported by adequate documentation which included invoices and proofs of payment.

The amount of compensable costs is \$66,860.29 while \$313.75 is deemed non OPA compensable for the following reasons:⁴⁶

1. The costs related to Lewis Environmental’s Project Manager, [REDACTED], for Monday, 1/14/2019 and Monday, 1/7/2019 are denied because the start and finish times specified

³⁸ 33 U.S.C. § 2701(31).

³⁹ 33 U.S.C. § 2701(30).

⁴⁰ *See generally*, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴¹ 33 CFR Part 136.

⁴² 33 CFR 136.105.

⁴³ The FOSC was not assigned to this incident until after Lewis Environmental’s cleanup was completed. To ensure that Lewis Environmental met its burden with respect to this factor, the NPFC coordinated with the regional office of the U.S. Environmental Protection Agency which serves as FOSC for this incident, and would have been the FOSC for the dates Lewis Environmental responded if one were assigned. After analyzing the spill and the actions taken by Lewis Environmental, the EPA opined that the actions taken were consistent with the National Contingency Plan. We Agree.

⁴⁴ 33 CFR 136.203; 33 CFR 136.205.

⁴⁵ Lewis Environmental, Inc. Rate Schedule revised January 2019.

⁴⁶ Enclosure 3 to this determination provides a detailed analysis of these costs.

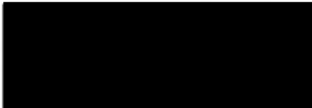

do not support the hours and costs claimed and as such, are deemed unsubstantiated. Total personnel costs for unsubstantiated time denied are \$194.00;

2. On Wednesday, 1/9/2019 Lewis Environmental billed at 1.5 times the listed rate for 1.5 hours of personnel time that fell within the standard workweek of 0700 to 1530 Monday through Friday and as such, these costs were reduced to the appropriate rates supported by the Lewis Environmental, Inc. Rate Schedule. Total personnel costs denied after reduction to the appropriate rates are \$42.75; and
3. All costs associated with equipment and materials requesting more than the rates specified in the Lewis Environmental, Inc. Rate Schedule are denied. Total overpriced equipment and materials costs denied are \$77.00.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Lewis Environmental's request for uncompensated removal costs in the amount \$67,174.04 is approved in the amount of \$66,860.29.

Because this determination is a settlement offer⁴⁷, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.⁴⁸ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁹ 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>6/11/19</i>
Supervisor Action: <i>Approved</i>

⁴⁷ 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).

⁴⁸ 33 CFR §136.115(b).

⁴⁹ *Id.*