

CLAIM SUMMARY / DETERMINATION

Claim Number:	N18023-0003
Claimant:	Weavertown Environmental Group
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$662,064.48
Action Taken:	Offer in the amount of \$609,576.66

EXECUTIVE SUMMARY:

In January 2018 the Uninspected Towing Vessel (UTV) GATE CITY sank in the Big Sandy River, a navigable waterway of the United States, near Kenova, West Virginia. The UTV ANNA C¹ was determined to pose a substantial threat of discharge of oil into the Big Sandy River. Both vessels required oil pollution response activities and both are relevant to this claim.

In accordance with the Oil Pollution Act of 1990, Western Rivers Assets and River Marine Enterprises were identified as the responsible parties (RPs) for the GATE CITY.² Western Rivers Assets was identified as the responsible party for the ANNA C.³ Western Rivers Assets and River Marine Enterprises are both owned Mr. [REDACTED].

River Marine Enterprises hired Weavertown Environmental Group (Claimant) to perform oil pollution response activities. After performing its activities, Claimant presented its costs to each of the RPs.⁴ Having not received payment from either RP, Claimant presented its uncompensated costs claim to the National Pollution Funds Center (NPFC) for \$662,064.48.⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$609,576.66 of the requested \$662,064.48 is compensable and offers this amount as full and final compensation of this claim.⁶

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On December 5, 2017, the Coast Guard issued an Administrative Order to Western Rivers Assets, the owner of the GATE CITY and ANNA C identifying both vessels as substantial threats to discharge oil into the Big Sandy River, a navigable waterway of the United States near Kenova, West Virginia.⁷ The Order required the owner to take several mitigation actions to avoid an oil pollution incident from its vessels. On January 10, 2018, before the owner complied with the Order, the GATE CITY sank at its mooring and discharged oil into the Big Sandy River.⁸ The ANNA C did not sink, but remained a substantial threat of discharge which required response activities to mitigate.

¹ The ANNA C was renamed JO RENEE on November 7, 2008. However, all of the incident documentation refers to the vessel as the ANNA C. This determination will refer to it as such to avoid any potential confusion.

² Western Rivers Assets was the owner. River Marine Enterprises was the operator.

³ Western Rivers Assets was the owner. There was no discernible operator.

⁴ Letter from Claimant to River Marine Enterprises and Western Rivers Assets dated March 26, 2019.

⁵ 33 CFR 136.103(c).

⁶ 33 CFR 136.115.

⁷ Marine Safety Unit Huntington Administrative Order IMD-001 dated December 5, 2017.

⁸ SITREP-POL One.

Responsible Parties

Western Rivers Assets and River Marine Enterprises are jointly and severally liable under OPA.⁹ The NPFC issued Notice of Designation letters to each of them.¹⁰ A Notice of Designation letter notifies the owners and/or operators of vessels or facilities that their vessel or facility was designated as the source of a discharge or substantial threat of a discharge of oil to navigable waters of the United States.

Recovery Operations

United States Coast Guard Marine Safety Unit (MSU) Huntington was the Federal On-Scene Coordinator (FOSC) and oversaw the response and removal operations.¹¹ River Marine Enterprises called Weavertown Environmental Group on January 10, 2018 at 9:30am to report that the GATE CITY was sinking and spilled oil, after which Weavertown Environmental Group responded to provide emergency clean-up and containment services for the GATE CITY.¹²

II. CLAIMANT, RPs, and the NPFC:

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)¹³ require all claims for removal costs or damages to be presented to the RP before seeking compensation from the NPFC.¹⁴ When an RP denies a claim or has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.¹⁵

The claimant stated that it presented its claim to River Marine Enterprises on February 26, 2018.¹⁶ However, at the time it submitted its claim to the NPFC, it had yet to present to the other designated RP, Western Rivers Assets. As a result, the NPFC notified the claimant that it could not adjudicate the claim until proper presentment was made to each of the RPs. In July 2019, the NPFC received information that neither of the RPs had paid the claim.¹⁷ The claimant originally requested \$668,872.00 as its sum certain.¹⁸ On August 19, 2019, the claimant amended its claimed amount to \$662,064.48,¹⁹ which included Claimant's invoices for its personnel, equipment, materials, subcontracted costs and accrued interest on the invoices.

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁰ 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.

⁹ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

¹⁰ Notice of Designation letters to Western Rivers Assets dated January 17, 2018, River Marine Enterprises dated August 3, 2018, and Gate City Transportation dated August 3, 2018.

¹¹ Letter of Delegation – Incident Specific Federal On-Scene Coordinator (FOSC), from CAPT. [REDACTED], CG Sector Ohio Valley to CDR. [REDACTED], U.S. Coast Guard dated December 4, 2017.

¹² Claimant's Summary of Initial Response dated January 10, 2018.

¹³ 33 U.S.C. § 2701 *et seq.*

¹⁴ 33 CFR 136.103.

¹⁵ *Id.*

¹⁶ Claimant's self-made claim form. Claimant provided Invoice # 7166147B dated February 26, 2018 and Invoice # 7167253 dated March 23, 2018. All invoices were made out and sent to River Marine Enterprises.

¹⁷ Email from Claimant to NPFC dated July 19, 2019.

¹⁸ Original OSLTF Claim form, question #3, undated.

¹⁹ Email from Claimant to NPFC dated August 19, 2019.

²⁰ 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.²¹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²² 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.

IV. 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.²³ An RP's liability is strict, joint, and several.²⁴ 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."²⁵ 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."²⁶ 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."²⁷

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁸ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁹ 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.³⁰

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

²¹ 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)).

²² 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).

²³ 33 U.S.C. § 2702(a).

²⁴ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²⁵ *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).

²⁶ 33 U.S.C. § 2701(31).

²⁷ 33 U.S.C. § 2701(30).

²⁸ See generally, 33 U.S.C. § 2712(a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁹ 33 CFR Part 136.

³⁰ 33 CFR 136.105.

- (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.³¹

The NPFC analyzed each of these factors and determined the majority the costs incurred by Claimant and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined all approved costs invoiced at the appropriate rate sheet pricing were billed in accordance with the rate schedule provided.³² All approved costs were supported by adequate documentation which included invoices, proofs of payment, daily work reports and/or FOSC statements.

The amount of compensable costs is \$609,576.66, while \$52,487.82 was deemed not compensable for the following reasons:

1. Accrued interest – The NPFC denies the accrued interest totaling \$36,369.00.

Claimant seeks \$36,369.00 for one year of accrued interest on the invoiced costs. Nothing in OPA allows the Fund to pay interest on claims for removal costs. Thus, the claim for \$36,369.00 in accrued interest is denied.

2. Invoice # 7166147B – The NPFC denies a total of \$16,118.82, as follows:

- a) On Wednesday, January 10, 2018, two technicians were charged at the \$126.00 overtime rate for 10 hours. The rate schedule only allows for overtime to be paid for hours worked outside of 7:30am to 4:00pm on non-holiday weekdays. These two employees began work at 2:00pm and worked for 10 hours. The NPFC will compensate for two hours at standard time (2:00pm to 4:00pm) at \$84.00 per hour for each technician and eight hours each at \$126.00 per hour of overtime (4:00pm to 12:00am). The resulting difference of \$168.00 is denied because it was not invoiced in accordance with the rate schedule.
- b) The NPFC denies the claimed fuel surcharges of \$4,015.35. The NPFC denies the fuel surcharges because the claimant did not provide documentation to demonstrate how it calculated the amount the charged.
- c) The claimant charged \$40.00 per day for nine rolloff boxes. The rate schedule allows \$35.00 a day per rolloff box. The NPFC denies a total of \$45.00 for overcharges on the nine rolloff boxes in accordance with the rate schedule.
- d) On Thursday, January 11, 2018, the claimant charged for a marine insurance surcharge of \$19.00/hour for 84.5 personnel labor hours. Only 84 hours of labor were invoiced for this date, therefore the NPFC denies \$9.50 for the additional half hour charged that is not supported by daily records.
- e) On Sunday, January 14, 2018, the claimant charged a daily rate of \$720.00 each for two pontoon boats totalling \$1,440.00 . The rate schedule only allows a rate of \$95.00 per hour for pontoon boats. The NPFC allowed the two pontoon boats at \$95.00 per hour. The maximum amount of time that any employee worked this day was 5.5 hours. As a result, the

³¹ 33 CFR 136.203; 33 CFR 136.205.

³² Claimant's 2018 Emergency Response Time and Material Rates.

NPFC will compensate for eleven total hours at \$95.00 per hour for a total amount approved of \$1,045.00. The NPFC denies the \$395.00 difference in accordance with the rate schedule.

- f) On Monday, January 15, 2018, the claimant charged a daily rate of \$720.00 each for two pontoon boats totalling \$1,440.00 . The rate schedule only allows a rate of \$95.00 per hour for pontoon boats. The NPFC allowed the two pontoon boats at \$95.00 per hour. The maximum amount of time that any employee worked this day was six hours. As a result, the NPFC will compensate for twelve total hours at \$95 per hour for a total amount approved of \$1,140.00. The NPFC denies the \$300.00 difference in accordance with the rate schedule.
- g) On Monday, January 15, 2018, the claimant charged \$35,000.00 for five days of containment boom rental for 1,000 feet of boom beginning on January 11, 2018. The claimant had already invoiced for the first day of boom rental (January 11) for \$7,000.00. Therefore, the NPFC denies \$7,000.00 for the overcharge for boom rental that was previously allowed for January 11, 2018.
- h) On Monday, January 15, 2018, the claimant charged \$250.00 for miscellaneous hand tools. The rate schedule allows \$175.00 per day for hand tools. The NPFC denies the \$75.00 difference in accordance with the claimant's rate schedule.
- i) On Thursday, January 18, 2018, the claimant charged \$252.00 for three hours of labor for a technician. The daily work report only shows two hours worked. Therefore, the NPFC denies \$84.00 for the one hour of invoiced labor that was not supported by contemporaneous daily work records.
- j) On Friday, January 19, 2018, the claimant charged \$15,400.00 for 2,200 feet of containment boom rental at a rental rate of \$7.00 per foot per day. The claimant's daily records show that 500 feet of the 2,200 feet of boom had been removed from the water on the previous day. Therefore, the NPFC reduced the amount of compensable boom to only 1,700 feet that remained in the water on January 19th. At \$7.00 per foot, the amount approved is \$11,900.00. The difference of \$3,500.00 is denied since 500 feet of containment boom was removed on the previous day.
- k) On February 3, 2018, the claimant invoiced \$950.00 for a vacuum truck washout. The rate schedule only allows \$600.00 for a washout. The NPFC denies the \$350.00 difference in accordance with the rate schedule.
- l) On February 19, 2018, the claimant invoiced \$607.50 for "solidification, trans[portation], and disposal" based on \$125.00 per ton for 4.86 tons. The claimant only provided documentation of disposal and payment to waste facilities amounting to \$358.77. Thus, the NPFC allows the documented costs plus the 20% markup allowed by the rate schedule and denies the difference of \$176.98.

Overall Denied Costs = \$52,487.82³³

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Weavertown Environmental Group's request for uncompensated removal costs is approved in the amount of **\$609,576.66**.

³³ Enclosure 3 Summary of Costs spreadsheet.

This determination is a settlement offer,³⁴ and the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁵ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.³⁶ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

<p>[REDACTED]</p> <p>Claim Supervisor: [REDACTED]</p> <p>Date of Supervisor's review: <i>12/6/19</i></p> <p>Supervisor Action: <i>Offer Approved</i></p> <p>Supervisor's Comments:</p>
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³⁴ 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).

³⁵ 33 CFR 136.115(b).

³⁶ *Id.*