

## CLAIM SUMMARY / DETERMINATION

<b>Claim Numbers:</b>	N18023-0005 and N18023-0006
<b>Claimant:</b>	City of Kenova
<b>Type of Claimant:</b>	Local Government
<b>Type of Claims:</b>	Public Services
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$135,412.03 (N18023-0005) and \$15,535.44 (N18023-0006)
<b>Action Taken:</b>	<b>Total Approved in the Amount of \$149,867.45</b>

### **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 C<sup>1</sup> 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 (OPA), Western Rivers Assets and River Marine Enterprises were identified as the responsible parties (RPs) for the GATE CITY.<sup>2</sup> Western Rivers Assets was identified as the responsible party for the ANNA C.<sup>3</sup>

The City of Kenova (“Kenova” or “Claimant”) was forced to shut down its water plant as a result of this incident and, therefore, could not provide both its bulk and city customers with water. To ensure that these customers maintained water service, Kenova outsourced and purchased its water service in bulk, increasing its costs to maintain these public services as a result. The NPFC has thoroughly reviewed all documentation submitted with the claims, analyzed the applicable law and regulations, and after careful consideration, has determined that \$149,867.45 of the requested \$150,947.45<sup>4</sup> is compensable and offers this amount as full and final compensation of these claims.<sup>5</sup>

### **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 Big Sandy River, a navigable waterway of the United States near Kenova, West Virginia.<sup>6</sup> 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

<sup>1</sup> 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.

<sup>2</sup> Western Rivers Assets was the owner. River Marine Enterprises was the operator.

<sup>3</sup> Western Rivers Assets was the owner. There was no discernible operator.

<sup>4</sup> Original claim submissions (N18023-0005 for \$135,412.03 and N18023-0006 for \$15,535.44) received by the NPFC on February 13, 2019. The claimant later amended its sum certain for claim N18023-0005 to \$135,412.01 via email dated May 28, 2019.

<sup>5</sup> 33 CFR 136.115.

<sup>6</sup> Marine Safety Unit Huntington Administrative Order IMD-001 dated December 5, 2017.

with the Order, the GATE CITY sank at its mooring and discharged oil into the Big Sandy River.<sup>7</sup> The ANNA C did not sink, but remained a substantial threat of discharge, which required response activities to mitigate.

### ***Responsible Parties***

Western Rivers Assets and River Marine Enterprises are jointly and severally liable under OPA.<sup>8</sup> The NPFC issued Notice of Designation letters to each of them.<sup>9</sup> 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.<sup>10</sup>

As a result of this incident, the City of Kenova's water plant was forced to shut down from January 10 through January 15, 2018.<sup>11</sup> During that time, the Kenova water plant could not produce or treat new water to maintain water tanks at sufficient levels to provide all customers with water. Kenova's water system has many bulk water accounts, particularly manufacturing facilities located near the rivers, that depend on water to operate and function safely. These facilities would have had to shut down if water had been unavailable for an extended period of time.<sup>12</sup>

To ensure its commercial and residential customers maintained water service, the City of Kenova outsourced and purchased water in bulk from the City of Ashland, KY (via water line), the City of Lavalette, WV (through a bypass), and West Virginia American Water (via Ace Services trucks)<sup>13</sup> to keep the clear well<sup>14</sup> at the plant full.<sup>15</sup>

## **II. CLAIMANT AND RP:**

Absent limited circumstances, the Federal Regulations implementing the OPA<sup>16</sup> require all claims for removal costs or damages must be presented to the RP before seeking compensation from the NPFC.<sup>17</sup>

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<sup>7</sup> SITREP-POL One.

<sup>8</sup> See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> Kenova Volunteer Fire Department Spill Report dated January 29, 2018.

<sup>12</sup> Claim Explanation Letter dated March 29, 2019.

<sup>13</sup> The West Virginia American Water Invoice makes up the entirety of NPFC Claim # N18023-0006.

<sup>14</sup> A clear well is a component of a municipal drinking water purification system. It refers to the final storage stage in the system, following the [filtration](#) and disinfection stages.

<sup>15</sup> Claim Explanation Letter dated March 29, 2019.

<sup>16</sup> 33 U.S.C. § 2701 *et seq.*

<sup>17</sup> 33 CFR 136.103.

The claimant initially presented its claims to Western River Assets, LLC on February 15, 2018 and February 21, 2018.<sup>18</sup> However, at the time it submitted its claim to the NPFC, Kenova had yet to present to River Marine Enterprises. On January 2, 2019, the claimant presented its costs via USPS Certified Mail<sup>19</sup> to River Marine Enterprises.<sup>20</sup> After the regulatory ninety-day waiting period had elapsed, the NPFC began adjudicating the claim which included personnel, equipment, and materials in the amount of \$150,947.47.

### **III. CLAIMANT AND NPFC:**

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.<sup>21</sup> The initial claims to the NPFC came in without confirmation that the claimed costs were presented to River Marine Enterprises. As a result, the NPFC notified the claimant that it could not adjudicate the claims until proper presentment was made to each of the RPs. Claimant's counsel confirmed River Marine Enterprises received the claimed costs on January 2, 2019<sup>22</sup> and as of April 2, 2019, had not settled the claim. At that point the claims were properly presented to each of the RPs, and the NPFC began adjudicating Kenova's claimed costs, totaling \$150,947.47.<sup>23</sup>

The claims were received by the NPFC as two distinct set of costs presented to the RP. Initially, the NPFC opened two separate claim files noting these dollar values. After further review of the claims, it became apparent that these costs are for the same type of OPA damage (Public Services) and, therefore, the NPFC has combined both costs into one determination here.<sup>24</sup>

The City of Kenova broke down its claims via the following invoicing/municipal costs:<sup>25</sup>

1. Kenova Volunteer Fire Department (VFD) (to include Ceredo, Prichard and England Hill VFDs): Services/Assistance provided to the Kenova Water Plant from January 11th thru January 14th, 2018. These VFD's provided engines to transfer water, including pumping water from tanker trucks with potable water that could go straight into the water system for use.

VFD personnel were also called by the City of Kenova to put its boat in the water to assist with water sampling on the river, around the intakes and also to document through photographs anything that might be a contaminate that would affect the water intake at the water plant.

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<sup>18</sup> Cover Letters dated February 15, 2018 for \$135,412.03 and February 21, 2018 for \$15,535.44.

<sup>19</sup> The Claimant also presented to Gate City River Transportation, LLC, as well, but at the time of adjudication, it was no longer considered an RP for this incident.

<sup>20</sup> Letter to River Marine Enterprises dated December 31, 2018.

<sup>21</sup> 33 CFR 136.103.

<sup>22</sup> Email from claimant's counsel dated June 11, 2019 with attached signed certified mail receipt card.

<sup>23</sup> Original claim submissions (N18023-0005 for \$135,412.03 and N18023-0006 for \$15,535.44) received by the NPFC on February 13, 2019. The claimant later amended its sum certain for claim N18023-0005 to \$135,412.01 via email dated May 28, 2019.

<sup>24</sup> 33 CFR 136.109(a).

<sup>25</sup> See the Summary of Costs spreadsheet as an enclosure to this determination for a further breakdown of claimed costs.

2. Ace: The City hired Ace Services to haul water to the water plant for the City of Kenova.
3. Perfection Rubber & Supply Company: The City purchased fittings and related items needed to hook up pumps to offload water from tanker trucks into the Kenova water plant's clear well, which would not been necessary but for the spill. (Kenova normally gets its water from intakes near where the M/V Gate City sank.)
4. Service Pump and Supply: The pump was rented for the purpose of offloading water from tanker trucks into the City of Kenova's clear well, which would not have been necessary but for the spill.
5. CI Thornburg, Inc: The \$175.55 invoice covered fittings purchased to hook up additional pumps to offload water into the clear well. The \$3,000 and \$1,520 invoices were for carbon, a tank, a mixer, a pump, and related supplies used to pump carbon into the water system after the spill. The City of Kenova was required to do this to satisfy West Virginia Division of Health requirements before the water plant could be brought back on line.
6. Lavalette Public Service District: During the emergency, the Lavalette Public Service District provided water and related services to the City of Kenova. They did this by putting in a bypass pump from their system to Kenova's system to help pump water to Kenova water customers in Kenova service areas near them.
7. City of Ashland: The City of Ashland, Kentucky, provides water to a neighboring service area. The Cities of Ashland and Kenova maintain a water line that connects the two water systems in case of a water emergency like this one. (Unfortunately, the line is insufficient by itself to support Kenova's customer base and thus the reason for obtaining water from the Lavalette Public Service District and West Virginia American Water, as well...)
8. Lowe's Pro Services: Bottled water for the crews.
9. WV American Water (For N18023-0006): West Virginia American Water Co. provided water for the City. This was brought in via the Ace trucks and made available through a fire hydrant and hauled by tanker trucks to the City's clear well so that water services could be maintained.

#### **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>26</sup> 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.<sup>27</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions,

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<sup>26</sup> 33 CFR Part 136.

<sup>27</sup> 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).

or conclusions reached by other entities.<sup>28</sup> 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:**

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.<sup>29</sup> A responsible party's liability is strict, joint, and several.<sup>30</sup> When enacting the 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."<sup>31</sup> OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred increased public services costs where the responsible party has failed to do so. Increased public services costs are defined as, "[d]amages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State."<sup>32</sup>

The NPFC is authorized to pay claims for public services damages.<sup>33</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>34</sup> 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.<sup>35</sup> OPA and its implementing regulations prescribe the conditions of payment, as well as restrictions on the types of costs appropriate for payment.

Before reimbursement can be authorized for public services costs, the claimant must establish:

- a) The nature of the specific public services provided and the need for those services;
- b) That the services occurred during or after removal activities;
- c) That the services were provided as a result of a discharge of oil and would not otherwise have been provided; and
- d) The net cost for the services and the methods used to compute those costs.<sup>36</sup>

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<sup>28</sup> 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).

<sup>29</sup> 33 U.S.C. § 2702(a).

<sup>30</sup> See, H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

<sup>31</sup> *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).

<sup>32</sup> 33 U.S.C. § 2702(2)(f).

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

<sup>34</sup> 33 CFR Part 136.

<sup>35</sup> 33 CFR 136.105.

<sup>36</sup> 33 CFR 136.239.

The NPFC analyzed each of these factors and determined that most of the costs incurred by the City of Kenova and submitted herein are compensable additional public services costs based on the supporting documentation provided. The NPFC determined all approved costs were invoiced to and paid by the claimant. Additionally, all approved costs were supported by adequate documentation that included invoices, affidavits, signed statements, rate schedules, salaries, proofs of payment, and FOSC statements.

The amount of compensable costs for claim N18023-0005 is \$134,332.01, while \$1,080.00 was deemed not compensable for the following reasons:

1. Kenova Volunteer Fire Department Invoice dated January 13, 2018 – The NPFC denied a total of \$587.50 as follows:
  - a. The Kenova Volunteer Fire Department invoiced five sections of 2.5” x 50’ hose damaged beyond use; each hose was invoiced at \$235.00 for a total cost of \$1,175.00. However, no depreciation of the used hoses was applied to the cost of the invoiced hoses. When asked, Mr. [REDACTED], Fire Chief for the Kenova Volunteer Fire Department, provided a signed statement which estimated the value of each of the claimed fire hoses (pre-spill) to be \$117.50. Therefore, the NPFC approved the pre-spill value of the hoses; which results in a denial of \$117.50 ( $\$235 - \$117.50 = \$117.50$ ). Therefore, the NPFC denies \$587.50 in claimed hose costs. (See the attached Summary of Costs spreadsheet).
2. Kenova Volunteer Fire Department Invoice dated January 13, 2018 – The NPFC denied a total of \$117.50 as follows:
  - a. The Kenova Fire Department, who was supervising the Ceredo Volunteer Fire Department, invoiced one section of Ceredo Volunteer Fire Department 3” x 50’ hose damaged beyond use; for a total cost of \$235.00. However, no depreciation of the used hose was applied to the cost of the invoiced hose. When asked, Mr. [REDACTED], Fire Chief for the Kenova Volunteer Fire Department, provided a signed statement which estimated the value of the hose (pre-spill) to be \$117.50. Therefore, the NPFC approved the pre-spill value of the hose; which results in a denial of \$117.50 ( $\$235 - \$117.50 = \$117.50$ ). . Therefore, the NPFC denies \$117.50 in claimed hose costs. (See the attached Summary of Costs spreadsheet).
3. Lavalette Public Service District Invoice 48458 dated 1/19/18 – The NPFC denied a total of \$375.00 (the full cost of the invoice) as follows:
  - a. The Lavalette Public Service District invoiced one section of 1.75” x 50’ hose and two sections of 2.5” x 50’ hose damaged beyond use; for a total cost of \$375.00. However, no depreciation of the used hose was applied to the cost of the invoiced hoses. When asked, Mr. [REDACTED], General Manager of the Lavalette Public Service District, provided a signed affidavit which states that it is unknown when the fire hoses were purchased or what their useful life might

be. Additionally, no pre-spill value was provided. Therefore, the NPFC denies this \$375.00 invoice in full. (See the attached Summary of Costs spreadsheet).

The NPFC approves all of the \$15,535.44 costs for claim N18023-0006. The amount compensable for the combined costs of N18023-0005 and N18023-0006 is \$149,867.45.

**VII. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Kenova's request for additional public services is approved in the amount of **\$149,867.45**.

This determination is a settlement offer;<sup>37</sup> the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>38</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>39</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: [REDACTED] [REDACTED]

Date of Supervisor's review:

Supervisor Action: *Offer Approved*

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<sup>37</sup> 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).

<sup>38</sup> 33 CFR § 136.115(b).

<sup>39</sup> 33 CFR § 136.115(b).