

CLAIM SUMMARY / DETERMINATION

Claim Number:	920017-0001
Claimant:	Port Authority of New York & New Jersey
Type of Claimant:	State Government
Type of Claim:	Removal Costs
Claim Manager:	(b) (6), (b)
Amount Requested:	\$670,013.95
Action Taken:	Offer in the amount of \$667,359.45

EXECUTIVE SUMMARY:

On October 30, 2019 at approximately 0835 local time, the United States Coast Guard (USCG) Sector New York received notification from the National Response Center (NRC), that an unknown sheen was discovered surrounding Berths 14 and 16 of the Port Authority New York & New Jersey, New Jersey Marine Terminal (PANYNJ NJMT) and was reported to appear to be originating from somewhere around berth 12 of the Port Newark Channel, a navigable waterway of the United States.¹ USCG Pollution Responders from Sector New York responded to the incident and discovered approximately 100 gallons of diesel fuel in the Port Newark Channel between several Week's barges.² The Port Authority of New York & New Jersey ("Port Authority" or "Claimant") took the initiative and began funding the response efforts by hiring Miller Environmental Group to perform containment and mitigation of the discharge.³

Sector New York took samples from all vessels present and all vessels that were in the vicinity of the location the morning of the discharge. From the sixteen samples taken, there were no positive matches and none were derived from a common source of petroleum oil; therefore, no Responsible Party (RP) has been identified by the Federal On Scene Coordinator (FOSC) for this incident.⁴

Port Authority presented its uncompensated costs claim to the National Pollution Funds Center (NPFC) for \$670,013.95.⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$667,359.45 of the requested \$670,013.95 is compensable and offers this amount as full and final compensation of this claim.⁶

I. INCIDENT, RESPONSIBLE PARTY, AND RECOVERY OPERATIONS:

Incident

On October 30, 2019, the Port Authority's New Jersey Marine Terminal received a call from one of its tenants, describing a diesel sheen on the south side of the Newark Channel in the vicinity of Berths 12-16. Port Authority staff arrived on scene and reported that the sheen and

¹ National Response Center Report # 1262581 dated October 30, 2019.

² MST1 (b) (6), (b), Federal On Scene Coordinator's Representative (FOSCR) undated coordination statement.

³ MST1 (b) (6), (b), Federal On Scene Coordinator's Representative (FOSCR) undated coordination statement.

⁴ Letter from P.O. (b) (6), (b), USCG Sector New York FOSC-R, to the NPFC, undated.

⁵ 33 CFR 136.103(c).

⁶ 33 CFR 136.115.

smell of diesel extended from Berth 8 to Berth 18, and that the highest concentration of diesel was in the vicinity of Berths 10 and 12. Initial observations from Port Authority staff suggested that the sheen was caused by red-dyed diesel fuel. Port Authority staff also observed red-dyed diesel fuel in the water.⁷

Sector New York Incident Management Division (IMD) team personnel conducted an initial investigation and observed an estimated 200 gallons of red dye diesel around three Weeks Marine construction barges, between Berths 10 and 14 on the south side of Port Newark Channel. A dock walk was conducted between Berths 2 through 22, and it was found that the affected area spanned from Berths 8 to 20. IMD conducted investigations on each barge and observed no apparent signs of fresh diesel discharge. Oil samples were taken from the EMORY B, Weeks 524, Weeks 536, and the spill location.⁸

IMD personnel surveyed each barge and determined they had no evidence of a diesel discharge. The barges were ordered to be decontaminated for Coast Guard approval prior to departure from the scene.⁹

A thorough, multi-day investigation was conducted but the source of the diesel discharge was unable to be identified. None of the oil samples that were processed came back as a positive match against the potential sources identified. As a result, the USCG has not yet determined a Responsible Party for this incident.¹⁰

Responsible Party

Personnel from USCG Sector New York conducted an investigation into suspected vessels/operators but was unable to determine a viable source, and as such, no responsible party was identified.

Recovery Operations

Port Authority staff talked with Weeks, Bouchard, and Donjon, all of whom had marine vessels on-site at or around the time the sheen was discovered, to sound tanks and locate the source of the spill. Personnel from USCG Sector New York arrived on scene and also took fuel samples.¹¹

Port Authority hired Miller Environmental (Miller), an Oil Spill Response Organization (OSRO) for cleanup and removal activities. It arrived on scene and began to place containment boom and utilized vac truck equipment and absorbents pads around the spill site. Miller then began product recovery via pump truck vacuuming operations, continuing into the evening. Miller maintained the boom throughout the night.¹²

⁷ PANYNJ NJMT Narrative of Events, dated January 13, 2020.

⁸ USCG Sector New York Case Activity 6845258, opened October 30, 2019.

⁹ USCG Sector New York Case Activity 6845258, opened October 30, 2019.

¹⁰ See both, USCG Sector New York Case Activity 6845258, opened October 30, 2019 and Letter from P.O. (b) [REDACTED]

(b) [REDACTED] USCG Sector New York FOSC-R, to the NPFC, undated.

(b) [REDACTED] PANYNJ NJMT Narrative of Events, dated January 13, 2020.

¹² PANYNJ NJMT Narrative of Events, dated January 13, 2020.

On the morning of October 31, 2019, additional accumulation of product around Berth 10 and 12 was evident. Port Authority inspected Berths 4 and 6 (west of the spill) and found no diesel. It also inspected Berths 16, 18 and 20 (east of the spill) and found only sheening at Berths 16 and 18. Port Authority staff re-checked catch basins in the vicinity of the spill. Miller continued to conduct vac recovery operations. The USCG was also on scene throughout the morning and afternoon providing response oversight.¹³

Over the next several days, both Port Authority staff and Miller personnel continued to monitor and perform cleanup activities. This included dropping and monitoring absorbent socks and replacing them as needed, as well as continuing vac efforts.

On November 12, 2019, Port Authority met with USCG personnel on site, the FOSCRs determined that they would monitor the boomed area for one more day before removing containment, and additionally requested extension of the booming to include Berth 14 for the night, which had some sheening. The following day, the FOSCR cleared the site for full removal of the booming.¹⁴

Miller Environmental's final estimate of "pure" product removed was approximately 500 gallons.¹⁵

III. CLAIMANT AND NPFC:

Port Authority presented its uncompensated costs claim to the National Pollution Funds Center (NPFC) for \$670,013.95.¹⁶

Port Authority broke down its claim via the following invoiced costs:¹⁷

1. \$368,379.86 for Invoice # 10005149
2. \$301,634.09 for Invoice # 10005168

Total claimed costs: \$670,013.95

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁸ 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.

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

¹³ PANYNJ NJMT Narrative of Events, dated January 13, 2020.

¹⁴ See both, USCG Sector New York Case Activity 6845258, opened October 30, 2019 and PANYNJ NJMT Narrative of Events, dated January 13, 2020.

¹⁵ PANYNJ NJMT Narrative of Events, dated January 13, 2020.

¹⁶ 33 CFR 136.103(c).

¹⁷ See the Summary of Costs spreadsheet as an enclosure to this determination for a further breakdown of claimed costs.

¹⁸ 33 CFR Part 136.

evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.¹⁹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁰ 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.

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.²¹ An RP's liability is strict, joint, and several.²² 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."²³ 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."²⁴ 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."²⁵

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁷ 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.²⁸

¹⁹ See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2001 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).

²⁰ 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).

²¹ 33 U.S.C. § 2702(a).

²² See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²³ *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).

²⁴ 33 U.S.C. § 2701(31).

²⁵ 33 U.S.C. § 2701(30).

²⁶ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁷ 33 CFR Part 136.

²⁸ 33 CFR 136.105.

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.²⁹

The NPFC analyzed each of these factors and determined the majority of the costs incurred by Port Authority 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.³⁰ All approved costs were supported by adequate documentation which included invoices, proofs of payment, and/or FOSC statements.

The amount of compensable costs is \$667,359.45, while \$2,654.50 was deemed not compensable for the following reasons:

- 1. Several personnel worked both on and off-shore, straight and overtime hours over the duration of the spill response. While this is allowable, some entries on the dailies resulted in overlapping hours on the invoicing. As such, the difference has been denied in each instance that this occurred, for a total of \$2032.00 in denied costs.³¹
- 2. A "Marine Personnel / Deckhand" on the invoice could not be identified on the daily for November 11, 2019. //While the Claimant was asked to identify this personnel via email,³² it did not prov//ide a clear answer as to who it was.³³ Therefore, costs in the amount of \$622.50 are denied. Should the Claimant seek reconsideration of this denied cost, it would need to provide a specific name of this employee.

Overall Denied Costs = \$2,654.50³⁴

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Port Authority' request for uncompensated removal costs is approved in the amount of **\$667,359.45**.

This determination is a settlement offer,³⁵ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁶ The NPFC reserves the right to revoke a

²⁹ 33 CFR 136.203; 33 CFR 136.205.

³⁰ Port Authority 2015 Rate Sheet.

³¹ Enclosure (3) NPFC Summary of costs spreadsheets.

³² Email to (b) (6), (b) (6), Port Authority, dated June 9, 2020.

³³ Email from (b) (6), (b) (6), Port Authority, dated June 11, 2020.

³⁵ 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

settlement offer at any time prior to acceptance.³⁷ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: (b) (6), (b)(b) (6), (b)

(b) (6), (b)(b) (6), (b)
(b) (6), (b)(b) (6), (b)

FOR

Date of Supervisor's review: 9/2/2020

Supervisor Action: Offer Approved: *Approved*

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 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 § 136.1156(a).

³⁶ 33 CFR § 136.115(b).

³⁷ 33 CFR § 136.115(b).