

CLAIM SUMMARY / DETERMINATION

Claim Number:	920030-0001
Claimant:	Pennsylvania Department of Environmental Protection
Type of Claimant:	State Government
Type of Claim:	Removal Costs
Claim Manager:	(b) (6), (b)(b) (6), (b)
Amount Requested:	\$2,746.35
Action Taken:	Offer in the amount of \$2,376.53

EXECUTIVE SUMMARY:

On December 22, 2019, an equipment failure led to the release of fuel oil from a home heating oil tank located at (b) (6). The incident resulted in the release of approximately two hundred fifty gallons of kerosene into a storm drain on Josephine Avenue,¹ which ran off into Marsh Run, a tributary connecting to the Allegheny River; a navigable waterway of the United States.² The owner of the oil tank and the home where the tank was located, Mr. (b) (6), (b)(b) (6), (b) Mr. (b) (6), or RP), was identified as the responsible party (RP), as defined by the Oil Pollution Act of 1990.³

On December 23, 2019, the Pennsylvania Department of Environmental Protection (PA DEP or Claimant) arrived on scene and discovered oil in the storm drain's catch basin and a sheen on the waters of Marsh Run.⁴ PA DEP served as the State On-Scene Coordinator (SOSC). PA DEP hired McCutcheon Enterprises, Inc. (McCutcheon or Contractor) to assist with removal of the fuel oil from the storm drain's catch basin.⁵ On December 28, 2019, PA DEP concluded its removal of the oil from Marsh Run and removal of the oil from the storm drain leading to Marsh Run.⁶ PA DEP submitted all information pertaining to their cleanup and information associated with the oil spill incident to the United States Environmental Protection Agency (EPA) Region III on December 23, 2019.⁷ EPA Region III's representative, in his capacity as the Federal On Scene Coordinator (FOSC), concluded that PA DEP's responses were acceptable parameters for the size of the spill and consistent with the National Contingency Plan (NCP).⁸

On July 17, 2020, PA DEP presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$2,713.73.⁹ On July 30, 2020, PA DEP requested a change in the removal costs claim to the sum total of \$2,746.35.¹⁰ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after

¹ PA DEP Emergency Response Incident Report, dated December 23, 2019.

² PA DEP Emergency Response Incident Report, dated December 23, 2019.

³ 33 U.S.C. § 2701(32).

⁴ NRC Incident Report #1267185, dated December 23, 2019.

⁵ PA DEP claim submission, dated July 1, 2020.

⁶ PA DEP daily report, dated December 28, 2019.

⁷ Email from PA DEP to EPA Region III, dated December 23, 2019.

⁸ Email from EPA Region III to PA DEP, dated December 27, 2019.

⁹ PA DEP claim submission, dated July 10, 2020.

¹⁰ Email from PA DEP to the NPFC, dated July 30, 2020.

Careful consideration has determined that \$2,376.53 of the requested amount is compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On December 22, 2019 at 0200 hours, the Indiana County Emergency Management Agency (EMA) reported a release of oil from the heating oil tank at (b) (6), due to the tank rusting through its bottom. The fuel oil product ran into a storm drain on Josephine Avenue.¹¹ Indiana County's Hazardous Materials team responded and pumped an undisclosed amount from the storm drain into a 55-gallon drum.¹²

On December 23, 2019, the PA DEP arrived on scene and found that there was oil remaining in the storm drain's catch basin. PA DEP contacted the National Response Center (NRC) to report the oil spill on December 23, 2019.¹³ The storm drain day-lighted approximately ¾ miles from where the incident took place, and a steady sheen was discovered at this release location in the Marsh Run¹⁴; a tributary which connects to several navigable waterway's including the Allegheny River.

Responsible Party

The PA DEP identified the home heating oil tank located at (b) (6), (b) (6) as the point of actual discharge of kerosene and the continuing threat of discharge into navigable waters of the United States, on December 23, 2019.¹⁵ The EPA Region III FOSC agreed with the PA DEP's identification on December 27, 2019.¹⁶ Mr. (b) (6), (b) (6) Jr. is identified as the owner of the home heating oil tank.¹⁷

The NPFC issued a Responsible Party Notification Letter to the RP on July 22, 2020.¹⁸ The NPFC has received no notification or response from either RP. A Responsible Party Notification letter notifies the owners and/or operators that a claim was presented to the National Pollution Funds Center (NPFC) seeking reimbursement of uncompensated removal costs incurred as a result of response services performed that resulted from a vessel or facility that was identified as the source of a discharge or substantial threat of a discharge of oil to navigable waters of the United States.

Recovery Operations

¹¹ See photograph of storm drain, dated December 23, 2019.

¹² Email from PA DEP to EPA Region III, dated December 23, 2019.

¹³ NRC Incident Report #1267185, dated December 23, 2019.

¹⁴ See photograph of Marsh Run, dated December 23, 2019.

¹⁵ PA DEP Emergency Response Incident Report, dated December 23, 2019.

¹⁶ Email from EPA Region III to PA DEP, dated December 27, 2019.

¹⁷ PA DEP claim submission, dated July 1, 2020.

¹⁸ RP Notification Letter, dated July 22, 2020.

On December 23, 2019, PA DEP was dispatched to assist with cleanup and removal of the oil spill release into the Marsh Run.¹⁹ PA DEP hired McCutcheon to assist with the response, and vac out the remaining fuel oil from the storm drain's catch basin.²⁰ McCutcheon arrived on-site and began oil cleanup operations on December 23, 2019.²¹

McCutcheon's cleanup operations entailed placing absorbent booms into the catch basin to absorb residual product, and pumping oil from the catch basin. McCutcheon removed one hundred gallons of product/water mix, three saturated booms and two saturated pads from the spill site.²² PA DEP removed three booms from the Marsh Run before leaving the spill location on December 23, 2019.²³

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²⁴ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.²⁵

PA DEP cites having conversation with the RP, and state that the RP claimed that he was unable to pay for oil spill removal, and that he planned on contacting the Indiana County assistance office to obtain more fuel and a replacement tank.²⁶

III. CLAIMANT AND NPFC:

When an RP denies payment on a claim, or fails to respond within the 90 day response time period, a claimant may elect to present its claim to the NPFC.²⁷ On July 17, 2020, the NPFC received a claim for \$2,713.73 from PA DEP, dated July 9, 2020.²⁸ The NPFC began the adjudication process of the claim submission on July 20, 2020. On July 30, 2020, the PA DEP requested a change to its sum total amount from \$2,713.73 to \$2,746.35.²⁹ The NPFC acknowledged the change to the amount requested, and continued adjudication of the claim in the amount of \$2,746.35 on August 3, 2020.³⁰

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³¹ 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.

¹⁹ PA DEP Emergency Response Incident Report, dated December 23, 2019.

²⁰ PA DEP Emergency Response Incident Report, dated December 23, 2019.

²¹ McCutcheon Enterprises, Inc. Invoice #IO118880.

²² McCutcheon Enterprises, Inc. Invoice #IO118880.

²³ PA DEP daily report, dated December 23, 2019.

²⁴ 33 U.S.C. § 2701 et seq.

²⁵ 33 CFR 136.103(c)(1).

²⁶ Email from PA DEP to EPA Region III, dated December 23, 2019.

²⁷ 33 CFR 136.103.

²⁸ PA DEP claim submission, dated July 9, 2020.

²⁹ Email from PA DEP to the NPFC, dated July 30, 2020.

³⁰ Email reply from the NPFC to PA DEP, dated August 3, 2020.

³¹ 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.³² The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³³ 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:

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.”³⁴ 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.”³⁵

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁷ 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.³⁸

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;

³² 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)).

³³ 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).

³⁴ 33 U.S.C. § 2701(31).

³⁵ 33 U.S.C. § 2701(30).

³⁶ See generally, 33 U.S.C. §2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³⁷ 33 CFR Part 136.

³⁸ 33 CFR 136.105.

- (c) That the actions taken were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.³⁹⁴⁰
- (d) That the removal costs were uncompensated and reasonable.⁴¹

The NPFC analyzed each of these factors and determined that the majority of costs incurred and submitted by PA DEP herein are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced at the appropriate rate sheet pricing and all costs were supported by adequate documentation which included invoices and/or proof of payment where applicable.

The amount of compensable costs is \$2,376.53, while \$369.82 is deemed non-compensable for the following reasons:

1. PA DEP submitted a request for a \$0.01 increase for costs affiliated with December 23, 2019, citing a rounding error.⁴² After reviewing the costs, the NPFC found no rounding error, and agreed with the total of \$2,376.53 cited on the daily report.⁴³ As such, the requested rounding error in the amount of \$0.01, is denied.⁴⁴
2. PA DEP submitted costs equaling \$105.66 for activities claimed on December 27, 2019,⁴⁵ and submitted costs equaling \$264.15 for activities claimed on January 28, 2020;⁴⁶ totaling \$369.81. PA DEP explained these costs as time to compile all the necessary paperwork to submit for the claim to the NPFC.⁴⁷ The actions did not directly influence the oil spill response efforts and are unnecessary to the response cleanup. As such, all costs for activities deemed unessential to the response efforts in the amount of \$369.81, are denied.⁴⁸

Overall Denied Costs: \$369.82

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, PA DEP's request for uncompensated removal costs is approved in the amount of \$2,376.53.

³⁹ Email from EPA Region III to PA DEP, dated December 27, 2019.

⁴⁰ There was not a FOSC assigned to this incident. To ensure that PA DEP met its burden with respect to this factor, the PA DEP coordinated with the regional office of the U.S. Environmental Protection Agency which would have been the FOSC for this incident if one were assigned. After analyzing the spill and the actions taken by PA DEP, the EPA opined that the actions taken were consistent with the National Contingency Plan. We agree.

⁴¹ 33 CFR 136.203; 33 CFR 136.205.

⁴² Email from PA DEP to NPFC, dated July 28, 2020.

⁴³ PA DEP daily report, dated December 23, 2019.

⁴⁴ Summary of Costs Spreadsheet, dated August 3, 2020.

⁴⁵ PA DEP daily report, dated December 27, 2019.

⁴⁶ PA DEP daily report, dated January 28, 2020.

⁴⁷ Email from PA DEP to NPFC, dated July 28, 2020.

⁴⁸ Summary of Costs Spreadsheet, dated August 3, 2020.

This determination is a settlement offer,⁴⁹ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁵⁰ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵¹ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

	(b) (6), (b)(b) (6), (b)(b) (6), (b) (b) (6), (b)(b) (6), (b)(b) (6), (b) (b) (6), (b)(b) (6), (b)(b) (6), (b)
Claim Supervisor:	(b) (6), (b)
Date of Supervisor's review:	<i>8/4/2020</i>
Supervisor Action:	<i>Offer Approved</i>

⁴⁹ 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).

⁵⁰ 33 CFR § 136.115(b).

⁵¹ 33 CFR § 136.115(b).