

CLAIM SUMMARY / DETERMINATION

Claim Number:	N18023-0008
Claimant:	City of Kenova
Type of Claimant:	Government
Type of Claim:	Public Services
Claim Manager:	[REDACTED]
Amount Requested:	\$31,706.38
Action Taken:	Offer in the amount of \$6,918.55

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 (OPA), 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 and River Marine are both owned Mr. [REDACTED].

The City of Kenova's Water Treatment Plant closed its water intakes due to the incident. Because of this, they could not produce or treat river water to maintain water tanks at sufficient levels to provide their customers with clean water. The City of Kenova ("Kenova" or "Claimant") presented its claim to the RP. Having not received payment from the RP after ninety days,⁴ Kenova presented its claim to the National Pollution Funds Center (NPFC) for \$73,446.26.⁵ Kenova initially sought reimbursement for increased personnel costs, additional water supply, lost water sales, miscellaneous supplies, fuel costs, and legal fees. Subsequently, Kenova withdrew its lost water sales costs totaling \$39,739.88 and deducted \$2,000.00 from the legal expenses costs from the claim, which reduced its claimed costs from \$73,446.26 to \$31,706.38.⁶ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$6,918.55 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:

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 33 CFR 136.103(c).

⁵ City of Kenova claim submission dated August 26, 2019.

⁶ Letter from Claimant to NPFC dated October 23, 2019.

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.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.

Responsible Parties

Western Rivers and River Marine are responsible parties and 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

In response to the UTV GATE CITY oil spill, the City of Kenova shut down its water intakes on the date of the spill, January 10, 2018. Kenova obtained approval to re-open its intakes from the WV Department of Environmental Protection and WV Department of Health and Human Resources on Saturday evening, January 13, 2018. Claimant states the Kenova Water Department got its water system completely back on-line on Monday evening, January 15, 2018.¹¹ Kenova initially claimed loss of water sales revenue, personnel costs, extra fuel costs and miscellaneous supply costs.¹²

II. CLAIMANT AND RPs:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)¹³ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.¹⁴ The claimant presented its claims to Western River Assets, LLC on December 31, 2018. On January 2, the claimant presented its costs to River Marine Enterprises.¹⁵ Neither RP has settled the claim.

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

⁸ SITREP-Pol One.

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 August 27, 2019, and River Marine Enterprises dated August 27, 2019.

¹¹ Email from Claimant to NPFC dated September 3, 2019.

¹² Claimant did not identify a specific compensation category under the OPA in its claim submission. The NPFC placed a majority of these costs under Public Services, because the majority of the claimed costs fell under this OPA damage category. The remaining costs were treated as removal costs.

¹³ 33 U.S.C. § 2701 *et seq.*

¹⁴ 33 CFR 136.103.

¹⁵ Taylor and Price PLLC payment demand letters dated December 31, 2018 and January 2, 2019.

III. CLAIMANT AND NPFC:

When a 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.¹⁶ On August 27, 2019, the claimant submitted its claim to the NPFC for \$73,446.26. On October 23, 2019, the claimant submitted a withdrawal of legal expenses costs in the amount of \$2,000.00 from its claim, reducing its legal costs from \$6,100.00 to \$4,100.00. The claimant also submitted a withdrawal of its claimed lost water sales revenue in the amount of \$39,739.88. Subsequently, the claimant verified its new claimed sum of \$31,706.38.¹⁷

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 evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.¹⁹ The NPFC may rely upon, but 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.

¹⁶ 33 CFR 136.103.

¹⁷ Email from Claimant to NPFC dated October 24, 2019.

¹⁸ 33 CFR Part 136.

¹⁹ 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)).

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).

OPA provides a mechanism for compensating parties who have incurred removal costs or damages where the responsible party has failed to do so. Removal Costs include any costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.²⁴ Increased Public Service 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.”²⁵

The NPFC is authorized to pay claims for uncompensated removal costs determined to be consistent with the National Contingency Plan or uncompensated damages including public services costs.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

With regard to claims for removal and public services, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for removal costs and public services claims in, 33 CFR 136.201 and 33 CFR 136.237, respectively.

Before reimbursement can be authorized for these types of claims, the claimant must demonstrate by a preponderance of the evidence that the proof criteria under 33 CFR 136.203 and 33 CFR 136.239 have been met.

The NPFC analyzed each of these factors and determined that some of the costs incurred by the City of Kenova and submitted herein are compensable costs under OPA, 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, daily reports, signed letters and fuel log consumption reports.

On October 23, 2019, Claimant withdrew all lost water sales costs totaling \$39,739.88²⁹ while providing more details for the remaining claimed costs of \$31,706.38. The amount of compensable costs is \$6,918.55, while \$26,587.83 was deemed not compensable as further explained below.

A. Non-Police Personnel Costs

²⁴ 33 U.S.C. § 2702(b)(1)(B).

²⁵ 33 U.S.C. § 2702(b)(2)(F).

²⁶ 33 U.S.C. § 2712(a)(4).

²⁷ 33 CFR Part 136.

²⁸ 33 CFR 136.105.

²⁹ During the adjudication of this claim, Claimant withdrew its claimed lost water sales costs, totaling \$39,739.88, apparently because it decided it could not prove a loss of profits as required under 33 CFR 136.233. However, as a courtesy, the NPFC notes that, if resubmitted, these costs might be compensable as a loss of government revenue under 33 CFR 136.225 and 33 CFR 136.227.

Kenova claimed \$22,202.40 in personnel costs to the NPFC. Claimant cited that all personnel whose hours were attributed to these costs, are hourly employees.³⁰ Rates of pay, time reports, and earnings reports were provided from Kenova's payroll system.

Upon review of the supporting documentation provided by the claimant, the NPFC requested Kenova explain how these costs differentiated from the usual costs incurred in the course of the normal duties of the identified personnel in accordance with the requirements found at 33 CFR 136.239.³¹ In response, Kenova explained that the personnel for which Kenova is seeking reimbursement were pulled off their regular jobs to perform spill-related work including shutting down the Big Sandy River water intakes, monitoring the spill and the intakes by boat, communicating with federal, state, and local officials about the spill, communicating with customers about the spill, identifying other potential sources of water, coordinating the provision of water from various sources, transferring water from other sources into the Kenova system, obtaining and distributing bottled water to customers, and traveling to various locations to purchase supplies, reopening water intakes, and bringing the Kenova water system back online.³²

Despite the claimant's explanation, the NPFC finds the claimant has not met its burden of proof to be compensated for increased public services. There was no evidence provided that indicated that employees worked additional hours because of the incident. A claimant who merely reassigns its employees from their normal course of duties to incident response without increasing their hours or wages, does not meet criteria for compensation under the regulations. Therefore, the NPFC denies all non-police personnel costs, totaling \$22,202.40.

B. Kenova Police Costs

Kenova claimed \$1,680.00 in increased Police Department costs. Claimant attributed costs to the Police Department for providing additional security and other public safety activities. The NPFC requested an explanation of how these costs were incurred, and supporting documents demonstrating how the costs were reached.³³

In response to the NPFC requests, Claimant stated that the Kenova Police Chief served on behalf of the City of Kenova as the primary point of contact with federal and state officials responding to the spill. The Claimant also stated that police department employees helped to distribute water in a heavily-trafficked area which included a railroad crossing which raised public safety concerns. The claimant also indicated the police department provided security that was necessary because of the location of the transfer of water from tankers to its facilities, as well as ensuring that vehicular traffic was safety routed in and around the transfer site so that trucks and tankers could get in and out quickly.³⁴

In support of their costs, Claimant provided time sheets of all the police department personnel in support of the hours police personnel worked during the closure of the water plant

³⁰ Letter from Claimant to NPFC dated October 23, 2019.

³¹ Email from NPFC to Claimant dated September 4, 2019.

³² Letter from Claimant to NPFC dated October 23, 2019.

³³ Summary of September 4, 2019 phone conversation between NPFC and Claimant.

³⁴ Letter from Claimant to NPFC dated October 23, 2019.

between January 10, 2018 through January 14, 2018.³⁵ The overtime hours cited on the time reports of the five police personnel defined by “State of Emergency”, “Water Detail” or “Security-Water Plant,” matched the police personnel hours cited in the original claim, and all hours documented fell within the dates of the oil spill incident. Claimant also provided earnings reports for the month of January 2018 to support the costs paid to police personnel for their services during the hours worked between January 10, 2018 through January 14, 2018.³⁶ Claimant explained how all personnel are hourly employees with the exception of the Police Chief, who is a salaried employee. While the earnings reports provide paycheck information for each pay period during January 2018, they fail to explain the rates used to reach the totals provided. Specifically, the \$25.50 per overtime hour rate claimed for four of the five personnel, and the \$37.50 per overtime hour rate claimed for the Chief of Police could not be validated by any of the supporting information provided by Kenova. While the NPFC requested validation of these costs, the claimants failed to provide it. The NPFC finds that the claimant failed to meet its burden of proof in accordance with 33 CFR 136.239³⁷ As such, all claimed police department costs, totaling \$1,680.00, are denied.

C. Water Costs

Kenova claimed \$1,798.20 in water costs and supported its claim with a receipt dated January 15, 2018.³⁸ Kenova stated that its customers were under a boil water advisory during and after the incident, and claimed that not all customers maintained water service during the spill.³⁹ These costs constituted the distribution of bottled water directly to its verified customers who were affected by the water shutdown. As such, Kenova supports the water costs in this claim and the NPFC approves these costs, totaling **\$1,798.20**.

D. Misc. Supply Costs

Kenova claimed \$595.41 in miscellaneous costs, supported by a written statement claiming the need for two kerosene heaters to keep the temporary water pumps, which pumped water into the clear well, from freezing. Two heaters were purchased totaling \$439.98. Kenova supports its heater costs by providing evidence of temperatures well below freezing on January 13, 2018 and January 14, 2018. As such, the documentation provided, supports the Claimant’s explanation that the heaters were purchased to keep the water pumps from freezing. Therefore, the NPFC finds these heater costs compensable in the amount of **\$439.98**. Claimant did not explain nor produce supporting documentation for the remaining \$155.43 of claimed costs. As such, the NPFC must deny this remaining amount.

E. Fuel Costs

³⁵ Letter from Claimant, Exhibit 2 citing Department of Public Safety Time Reports.

³⁶ Letter from Claimant, Exhibit 3 citing City of Kenova Current Earnings Report for January 1, 2018 to January 31, 2018.

³⁷ Email from NPFC to claimant dated September 4, 2019, and summary of phone conversation on the same date.

³⁸ Original Claim Submission Exhibit C (receipt dated January 15, 2018).

³⁹ Letter from Claimant to NPFC dated October 23, 2019.

Kenova claimed \$1,330.37 in fuel costs and, provided a Fuel Log Consumption Report for January 10, 2018 through January 15, 2018⁴⁰ and corresponding receipts for kerosene, totaling \$203.49. Claimant also provided a Gasoline Log which cites 400.80 gallons of gasoline usage and 120 gallons of diesel fuel usage.⁴¹ Costs for gasoline were submitted as \$2.08 per gallon, totaling \$834.08, and costs for diesel fuel were submitted as \$2.44 per gallon, totaling \$292.80. The totals of gasoline and diesel fuel were cited on the Fuel Log Consumption report as totaling \$1,126.88.

In support of these costs, Claimant provided a written statement stating all kerosene fuel costs totaling \$203.49 were used to maintain kerosene heaters where water would otherwise freeze during the process of transferring water to the clear well. Additionally, the claimant submitted an affidavit that stated that all diesel and gasoline costs totaling \$1,126.88 were directly related to activities in support of response and recovery activities directly related to the incident between January 10, 2018 and January 15, 2018.⁴² As such, the NPFC approves the kerosene, gasoline and diesel fuel costs, totaling **\$1,330.37**.

F. Legal Costs

Claimant's original submission claimed \$6,100.00 in legal costs supported by an invoice from the law firm of Bellomy, Turner & Bartram, L.C.⁴³ On October 23, 2019, the Claimant withdrew legal expenses in the amount of \$2,000.00, lowering their claimed legal expenses from \$6,100.00 to \$4,100.00.⁴⁴ The NPFC requested documentation to support what activities counsel performed in support of the oil spill incident. In response, Kenova submitted a letter from the law firm identifying daily legal services provided to the claimant relating to the incident and documenting a total of 19.6 hours of legal services at \$250.00 per hour, for a total of \$4,900.00.⁴⁵ The Claimant explained that the claimed legal services were for research of specific laws, regulations and statutes; research into governmental agency notification requirements; preparation for meetings; meetings and conferences regarding the incident; site visits of the water plant; discussions with water department employees and review of invoices whose purchases are related to the spill.⁴⁶

Claimant did not provide an explanation as to why the costs totaling \$4,100.00 do not match the \$4,900.00 noted in its revised claim amount. Upon review of the descriptions cited in the letter signed by [REDACTED], the NPFC finds these costs compensable, with the exception of the 6.2 hours claimed on January 11, 2018 which provided the following description: "research environmental law and statute. Research done in contemplation of which governmental agencies were required to be notified. Determination of the controlling agency in charge of the spill site. Research as to what notification responsibility the City of Kenova had to the public authorities."

⁴⁰ Original Claim Submission Exhibit C citing Fuel Log Consumption Report dated January 10, 2018 through January 15, 2018.

⁴¹ Original Claim Submission Exhibit C citing City of Kenova Gasoline Log.

⁴² Letter from Claimant to NPFC dated October 23, 2019 which specifically details how the fuel was used.

⁴³ Original Claim Submission Exhibit C citing Invoice #9849 dated July 12, 2018.

⁴⁴ Letter from Claimant to NPFC dated October 23, 2019.

⁴⁵ Letter from Bellomy, Turner & Bartram, L.C. to claimant dated October 2, 2019.

⁴⁶ *Id.*

The NPFC finds these costs describe actions counsel took to educate himself on the law and administrative procedures required during a spill incident; not actions that directly influenced response efforts.⁴⁷ However, the legal work that took place from January 12th through January 15th were directly effected stakeholder response efforts and activities, which allow them to be OPA-compensable costs. As such, the NPFC approves payment for legal costs totaling \$3,350.00, but denies payment for the remaining legal costs claimed.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, The City of Kenova’s request for compensation of its OPA claimed costs is approved in the amount of **\$6,918.55**.

This determination is a settlement offer;⁴⁸ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁴⁹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵⁰ 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: 2/24/2020	
Supervisor Action: <i>Offer Approved</i>	

⁴⁷ For example, the Coast Guard had already been notified and the Coast Guard had already been in contact with Kenova’s water treatment plant the day before the research was conducted on the very topic of notification. Without more information on how this research conducted on January 11 directly influenced response efforts, it must be denied.

⁴⁸ 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).

⁴⁹ 33 CFR § 136.115(b).

⁵⁰ *Id.*