

CLAIM SUMMARY / DETERMINATION

Claim Numbers:	N18023-0007
Claimant:	West Virginia Department of Transportation
Type of Claimant:	State
Type of Claims:	Public Services
Claim Manager:	[REDACTED]
Amount Requested:	\$34,218.65
Action Taken:	Denied

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

The City of Kenova was forced to shut down its water plant as a result of this incident and, therefore, could not provide its customers with water. To ensure its customers maintained water service, Kenova outsourced its water service. One of the entities the city engaged was the State of West Virginia. West Virginia Department of Transportation (“WV DOT” or “Claimant”), assisted Kenova by hauling water to the Kenova water plant. WV DOT submitted a damage claim to NPFC seeking \$34,218.65 for its personnel, equipment, and materials.

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that this claim must be denied in full because claimant failed to provide sufficient documentation to substantiate its claim.⁴

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

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 See, 33 CFR 136.239.

Kenova, West Virginia.⁵ 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.⁶ 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.⁷ The NPFC issued Notice of Designation letters to each of them.⁸ 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.⁹

As a result of the incident, the City of Kenova's water plant was forced to shut down from January 10 through January 15, 2018.¹⁰ 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 customers, particularly manufacturing facilities located near the rivers, that depend on water to operate and function safely. According to the city, these facilities would have had to shut down if water had been unavailable for an extended period of time.¹¹ Kenova asked the claimant, and the claimant agreed, to haul water to Kenova's water treatment plant.¹²

II. CLAIMANT AND RP:

Absent limited circumstances, the Federal Regulations implementing the OPA¹³ require all claims for removal costs or damages must be presented to the RP before seeking compensation from the NPFC.¹⁴

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

⁶ SITREP-POL One.

⁷ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

⁸ Notice of Designation letters to Western Rivers Assets dated August 27, 2019, and, River Marine Enterprises dated August 27, 2019.

⁹ 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.

¹⁰ Kenova Volunteer Fire Department Spill Report dated January 29, 2018.

¹¹ Claim Explanation Letter dated March 29, 2019.

¹² Original Claim Submission, received August 1, 2019.

¹³ 33 U.S.C. § 2701 *et seq.*

¹⁴ 33 CFR 136.103.

By August 2, 2019, the Claimant had presented its costs to River Marine Enterprises and Western Rivers Assets.¹⁵ After receiving confirmation from the RPs that they had denied the claim,¹⁶ the NPFC began adjudicating the claim in the amount of \$34,218.65.

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.¹⁷ After receiving confirmation that the claims were properly presented to each of the RPs, and the RPs denied them, the NPFC began adjudicating WV DOT's claimed costs.¹⁸

The WV DOT itemized its claim via the following invoicing/costs:¹⁹

1. \$25,093.59 in claimed personnel costs;
2. \$4,784.61 in claimed equipment costs;
3. \$3,277.43 in claimed material costs;
4. \$1,063.02 in claimed third-party costs.

Total claimed costs: \$34,218.65

Based on the nature of the claimed costs, they are properly characterized as "Government Public Services" damages.²⁰ NPFC analyzed them accordingly as detailed below.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²¹ 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.²² The NPFC may rely upon, is not bound by the findings of fact, opinions,

¹⁵ Email from WV DOT to Counsel for River Marine Enterprises and Western Rivers Assets dated August 2, 2019.

¹⁶ Email from RP's counsel dated August 2, 2019.

¹⁷ 33 CFR 136.103.

¹⁸ Original claim submission received by the NPFC on August 1, 2019.

¹⁹ See, Enclosure 3 for a further breakdown of claimed costs.

²⁰ See, 33 CFR 136.237-136.241.

²¹ 33 CFR Part 136.

²² 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.²³ 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.²⁴ A responsible party's liability is strict, joint, and several.²⁵ 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."²⁶ 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."²⁷

The NPFC is authorized to pay claims for public services damages.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 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.³¹

²³ 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).

²⁴ 33 U.S.C. § 2702(a).

²⁵ See, H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

²⁶ *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).

²⁷ 33 U.S.C. § 2702(2)(f).

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.

³¹ 33 CFR 136.239.

The amount of compensation allowable is the net cost of the increased or additional service provided by the State or political subdivision.³²

The NPFC analyzed each of these factors as applied to the claimant and must deny the claim. Initially, this claim was properly presented to the RPs by August 2, 2019, after which the NPFC began adjudication of the claim. The NPFC requested additional information from the Claimant on several occasions³³ to allow it the opportunity to supplement the claim submission.³⁴ The claimant did not produce adequate information that its claimed costs were reasonable, required, and increased or additional to the costs normally incurred by the claimant.³⁵ Specifically:

1. For all claimed Personnel costs totaling \$25,093.59, including straight and overtime costs, the NPFC requested an explanation as to how these costs were in addition to what each person would normally be paid. No evidence was provided to support increased or additional costs for the employees claimed.³⁶ Additionally, the number of hours claimed for each employee, multiplied by the rates provided, added up to less than the total amount claimed for each employee.³⁷ The Claimant was asked to explain this discrepancy multiple times from September, 2019 to November, 2019.³⁸ In response, Claimant stated that all personnel costs account for a proportionate share of benefit costs, plus a 10% assessment for administrative expenses. The example provided by the claimant stated that if an employee had a rate of \$24.698 per hour and worked for two hours straight time, it would be \$49.396; and with the additional benefit and related costs that total would be approximately \$68.35 (less 10% would be approximately \$62.00).³⁹

In its response, however, the claimant failed to provide evidence that these straight and overtime hours are increased or additional costs, above what is normally paid to its employees. Additionally, the claimant's explanation as to how the total costs per employee is derived lacks clarity. Likewise, the explanation for the "additional benefit" costs and its "10% assessment for administrative purposes", was not supported by any source documents, formula for how it is computed nor an explanation for what these benefits consist of. Finally, by Claimant's example above, it deducts the 10% assessment from the

³² 33 CFR 136.241.

³³ Emails from NPFC to WV DOT dated August 15, 2019, September 27, 2019, October 15, 2019, October 17, 2019, November 15, 2019, and November 27, 2019.

³⁴ On December 4, 2019, Claimant requested, and ultimately executed, a Tolling Agreement with the NPFC to provide more time for the Claimant to submit additional details and support for its claimed costs. By its terms, this agreement also extended the deadline for NPFC to provide the determination on this claim to April 22, 2020.

³⁵ During the adjudication of this claim, the NPFC explained that it required additional information on several occasions providing the claimant ample notice and opportunity to properly substantiate the costs in its claim submission.

³⁶ Email from NPFC to WV DOT dated August 15, 2019 and Email from NPFC to WV DOT dated November 15, 2019.

³⁷ Breakdown of Itemized Invoice for 18R-026 dated February 28, 2018.

³⁸ Emails from NPFC to WV DOT dated September 27, 2019, October 15, 2019, October 17, 2019 and November 15, 2019.

³⁹ Section 4-d of Affidavit of [REDACTED], WV DOT District 2 Comptroller, dated January 14, 2020.

claimed costs, where for its claimed equipment (analyzed below), it adds the 10% assessment costs to the equipment costs. Ultimately, there is no explanation why the 10% assessment is added in one instance and deducted in the other. For the reasons stated above, these personnel costs are denied.

2. For all claimed equipment and material costs totaling \$8,062.04,⁴⁰ the Claimant was asked to provide a rate sheet in support of the claimed rates/costs.⁴¹ Additionally, when the individual equipment and material costs submitted were multiplied by the amounts per item, the totals did not equal the sum presented for each cost. The Claimant was asked to explain this discrepancy multiple times from September, 2019 to November, 2019.⁴² In response, the Claimant explained that all equipment and material costs have a 10% assessment for administrative expenses and provided an example.⁴³ The example provided stated that a truck which had an hourly rate of \$3.70 multiplied by 19 hours would be \$70.30 plus the 10% assessment, which totals \$77.33. When you add the 10% assessment rate to each claimed equipment and material cost, the sum equals the total costs claimed.

The NPFC finds these equipment and material costs must be denied. Claimant failed to provide a rate schedule to validate the equipment and material costs claimed. Additionally, the material costs claimed have different prices per ton for the same type of material. Moreover, the 10% assessment for administrative purposes is not supported by supporting evidence.

3. The \$1,063.02 in claimed third-party costs consists of meals and motel rooms for three employees for \$847.50 and a JABO Supply Corporation invoice for \$215.52.⁴⁴ The Claimant provided the applicable per diem rate schedule to support its lodging, meals and incidentals.⁴⁵ The per diem rate schedule supports the claimed costs for lodging, meals, and incidentals as claimed. However, the costs submitted on the JABO invoice are illegible.

As such, the NPFC finds the lodging, meals and incidentals costs may be payable if the claimant can provide evidence to support the personnel costs claimed as stated above. Additionally, a JABO invoice with a legible description of items purchased would also be required to compensate that cost.

VI. CONCLUSION:

⁴⁰ Claimed equipment costs of \$4,784.61 and material costs of \$3,277.43.

⁴¹ Email from NPFC to WV DOT dated September 27, 2019.

⁴² Emails from NPFC to WV DOT dated September 27, 2019, October 15, 2019, October 17, 2019 and November 15, 2019.

⁴³ Section 4-d of Affidavit of [REDACTED], WV DOT District 2 Comptroller, dated January 14, 2020.

⁴⁴ JABO Supply Corporation invoice with paid receipt dated January 12, 2018.

⁴⁵ U.S. General Services Administration FY 2018 Per Diem Rates for West Virginia.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, WV DOT's claim is denied.

Claim Supervisor:

[REDACTED]

(b) (6)

[REDACTED]

Date of Supervisor's review: **2/27/2020**

Supervisor Action: *Denied*