

CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	921006-0001
<b>Claimant:</b>	Guilford County Department of Health and Human Services
<b>Type of Claimant:</b>	Local Government
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$5,267.24
<b>Action Taken:</b>	Offer in the amount of \$5,144.05

**EXECUTIVE SUMMARY:**

On March 13, 2020, an unknown amount of petroleum fuel spilled from the Pantry Shop 11 gasoline station located at 1421 W. English Road, High Point, North Carolina.<sup>12</sup> The fuel entered the High Point stormwater system by way of catch basins on W. English Road, which led to the oil's discharge into a tributary of the Payne Creek; a navigable waterway of the United States.<sup>3</sup>

The Guilford County Department of Health and Human Services (“HERA” or “Claimant”) was notified of the spill and hired the oil spill removal organization, Zebra Environmental & Industrial Services (“Zebra” or “OSRO”) to the spill scene.<sup>4</sup> The OSRO directed personnel and equipment for removal activities and deployed boom in order to contain the spill.<sup>5</sup> Aarya 12, Inc. (“Aarya 12” or “RP”), is the listed owner of the Pantry Shop 11 and responsible party (RP) as defined by the Oil Pollution Act of 1990.<sup>67</sup> HERA presented its uncompensated removal costs to the RP. Having not received payment from the RP after ninety days,<sup>8</sup> HERA presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$5,267.24.<sup>9</sup>

The United States Environmental Protection Agency (“EPA”) Region IV’s representative, in his capacity as a Federal On Scene Coordinator (FOSC) for the spill location, concluded that Payne Creek is a navigable waterway of the United States, and found that all actions performed by the OSRO were determined to be consistent with the National Contingency Plan.<sup>10</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$5,144.05 of the requested amount is compensable and offers this amount as full and final compensation of the claim.

**I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

<sup>1</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>2</sup> Guilford County Emergency Response Incident Report dated March 18, 2020.

<sup>3</sup> IDDE Incident Memorandum dated March 13, 2020.

<sup>4</sup> HERA letter to the NPFC dated November 23, 2020.

<sup>5</sup> Zebra Invoice #96642 with daily reports dated March 13, 2020, and March 19, 2020.

<sup>6</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>7</sup> 33 U.S.C. § 2701(32).

<sup>8</sup> 33 CFR 136.103(c).

<sup>9</sup> HERA claim submission received November 24, 2020.

<sup>10</sup> Email from the EPA Region IV to the NPFC dated December 9, 2020.

## ***Incident***

On March 13, 2020, a driver lost control of their vehicle while driving south on W. English Road as their vehicle drove over a patch of oil during inclement weather that covered a quarter mile of road in High Point, North Carolina.<sup>11</sup> The vehicle slid off the road and collided with a utility pole, leading to a Guilford County emergency response investigation which exposed the oil's release point as the Pantry 11 gasoline station located at 1421 W. English Road, High Point, North Carolina.<sup>12</sup> Further analysis of the gasoline station confirmed petroleum leakage from the fuel dispensers 1 and 2, and 19.69 tons of petroleum impacted soil lying beneath dispensers 1 and 2, and alongside Pantry 11's underground storage tanks (UST's).<sup>13</sup>

The City of High Point's Fire Department were first on scene to investigate the oil spill, and contacted the City of High Point's Stormwater Services Division, who arrived on the scene on March 13, 2020 to investigate the possibility of contamination of the storm drains.<sup>14</sup> The Stormwater Services Division determined the petroleum entered the cities stormwater system by way of catch basins on W. English Road, and discharged into an intermittent tributary to Payne Creek.<sup>15</sup>

## ***Responsible Party***

The owner of the Pantry 11 gasoline station that leaked the oil is Aarya 12 Inc., and Mr. (b) (6) is the company owner.<sup>16</sup> As such, Claimant has identified Aarya 12, Inc. as the responsible party for the incident.<sup>17</sup>

On November 25 2020, the NPFC issued a Responsible Party Notification Letter to Aarya 12, Inc.<sup>18</sup> On November 25, 2020, the RP had a phone conversation with the NPFC affirming its status as the owner of the gasoline station located at 1421 W. English Road, High Point, North Carolina, but asserting that they were not responsible for the spill.<sup>19</sup> The RP stated they would like to provide evidence to the NPFC in support of their denial of RP status. The NPFC agreed to accept any information in association with the oil spill incident. On November 30, 2020, the RP submitted a copy of the letter from the City of High Point's Stormwater Services Division to Aarya 12, Inc., which claims discharge of an unknown amount of gasoline from an unknown source had indeed spilled from the Pantry 11 gasoline station on or before March 13, 2020, and traveled for an approximate quarter mile down W. English Road, and into the stormwater system.<sup>20</sup>

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<sup>11</sup> Traffic Accident Report #202009442 dated March 13, 2020.

<sup>12</sup> Guilford County Emergency Response Incident Report dated March 18, 2020.

<sup>13</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>14</sup> IDDE Incident Memorandum dated March 13, 2020.

<sup>15</sup> Letter from High Point Stormwater Services Division to Aarya 12, Inc. dated March 20, 2020.

<sup>16</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>17</sup> Letter from HERA to Aarya 12, Inc. dated September 21, 2020.

<sup>18</sup> NPFC RP Notification Letter to Aarya 12, Inc. dated November 25, 2020.

<sup>19</sup> Summary of Phone Conversation between the NPFC and Aarya 12, Inc. dated November 25, 2020.

<sup>20</sup> Letter from High Point Stormwater Services Division to Aarya 12, Inc. dated March 20, 2020.

On December 8, 2020, Claimant submitted a Site Check and Initial Abatement Action Report recorded by Paragon Environmental Consultants, Inc., which confirms Aarya 12 as the owner of the Pantry 11 gasoline station, and as owner of the UST's located beneath the facility.<sup>21</sup> The report submitted on December 8, 2020 also confirms petroleum leakage from Pantry 11's above ground dispensers 1 and 2, and petroleum contamination of 19.69 cubic yards of soil alongside Pantry 11's UST's; which led to the removal of 14 cubic yards of contaminated soil.<sup>22</sup>

### ***Recovery Operations***

On March 13, 2020, Claimant notified Zebra Environmental & Industrial Services of the spill, and hired Zebra for oil spill removal activities.<sup>23</sup>

On March 13, 2020, Zebra sent personnel, vehicles and equipment to the spill site and began removal activities.<sup>24</sup> Specifically, Zebra dammed the waterway, and flushed and vacuumed the road that led to the tributary, with assistance from the Fire Department.<sup>25</sup> They removed all equipment with exception to the boom on March 13, 2020, and returned on March 19, 2020 to remove the boom and perform final inspection of the spill location. Zebra submitted all costs to HERA totaling \$5,267.24,<sup>26</sup> and HERA paid Zebra in full on October 8, 2020.<sup>27</sup>

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

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>28</sup> require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.<sup>29</sup>

HERA states that Mr. (b) (6), owner of Aarya 12, denied costs submitted by HERA in response to the letter sent on September 21, 2020.<sup>30</sup> On November 25, 2020, the RP asserted his denial of the costs.<sup>31</sup>

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

When a RP has not settled a claim after 90 days of receipt or denies a claim, a claimant may elect to present its claim to the NPFC.<sup>32</sup> On November 24, 2020, the NPFC received a claim for uncompensated removal costs from the Guilford County Department of Health and Human Services, dated November 23, 2020.<sup>33</sup>

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<sup>21</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>22</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>23</sup> HERA claim submission dated November 24, 2020.

<sup>24</sup> Zebra daily reports dated March 13, 2020 and March 19, 2020.

<sup>25</sup> IDDE Incident Memorandum dated March 13, 2020

<sup>26</sup> Zebra Invoice #96642.

<sup>27</sup> HERA Check #716197 dated October 8, 2020.

<sup>28</sup> 33 U.S.C. § 2701 *et seq.*

<sup>29</sup> 33 CFR 136.103.

<sup>30</sup> Letter from HERA to Aarya 12, Inc. dated September 21, 2020.

<sup>31</sup> Summary of Phone Conversation between the NPFC and Aarya 12, Inc. dated November 25, 2020.

<sup>32</sup> 33 CFR 136.103.

<sup>33</sup> HERA claim submission dated November 23, 2020.

On December 8, 2020, HERA provided the NPFC with documentation of sample analysis confirming petroleum as the spilled substance and evidence of Aarya 12, Inc.'s role as owner of the Pantry 11 gasoline station; including the above ground dispensers, and UST's responsible for the spill.<sup>34</sup> On December 9, 2020, an EPA Region VI representative, in his capacity as the Federal On Scene Coordinator (FOSC) for the incident, confirmed the spill posed a substantial threat to a navigable waterway, and that the actions taken in response to the spill were consistent with the National Contingency Plan.<sup>35</sup>

The costs presented to the NPFC in the amount of \$5,267.24 matched those denied by the RP on September 21, 2020.<sup>36</sup> As such, the NPFC began adjudication of the claim on November 24, 2020.

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

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>37</sup> 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.<sup>38</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>39</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 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>40</sup> An RP's liability is strict, joint, and several.<sup>41</sup> 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

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<sup>34</sup> Site Check and Initial Abatement Action Report dated July 2, 2020.

<sup>35</sup> Email from the EPA Region IV to the NPFC dated December 9, 2020.

<sup>36</sup> Letter from HERA to Aarya 12, Inc. dated September 21, 2020.

<sup>37</sup> 33 CFR Part 136.

<sup>38</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)).

<sup>39</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>40</sup> 33 U.S.C. § 2702(a).

<sup>41</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

favoring those responsible for the spills.”<sup>42</sup> 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.”<sup>43</sup> 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.”<sup>44</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>45</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>46</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>47</sup>

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.<sup>48</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>49</sup>

The NPFC analyzed each of these factors and determined the majority of the costs incurred by HERA and submitted 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 \$5,144.05 while \$123.19 was deemed non-compensable for the following reasons:

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<sup>42</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>43</sup> 33 U.S.C. § 2701(31).

<sup>44</sup> 33 U.S.C. § 2701(30).

<sup>45</sup> See generally, 33 U.S.C. §2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>46</sup> 33 CFR Part 136.

<sup>47</sup> 33 CFR 136.105.

<sup>48</sup> There was not proof of a FOSC assigned to this incident. To ensure that HERA met its burden with respect to this factor, the NPFC 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 both HERA and the OSRO hired by HERA, the EPA opined that the actions taken were consistent with the National Contingency Plan. We agree.

<sup>49</sup> 33 CFR 136.203; 33 CFR 136.205.

1. HERA submitted a request for Zebra's personnel costs for 3/19/2020, totaling \$220.00.<sup>50</sup> Specifically, 2 Foremen were cited for 2 hours of on scene activity per Foreman, at a rate of \$55.00 per hour. The rate schedule supports the rate of \$55.00 per hour, as \$2.00 below the standard rate of \$57.00.<sup>51</sup> However, only 1 employee is cited on Zebra's daily report for 2 hours of work on 3/19/2020.<sup>52</sup> As such, the supported personnel costs are approved totaling \$110.00, while the unsupported personnel costs totaling \$110.00 are denied.<sup>53</sup>
2. HERA submitted a request for Zebra's 12% Energy, Insurance and Security surcharge fee totaling \$564.34.<sup>54</sup> The rate schedule supports the 12% surcharge fee.<sup>55</sup> After reviewing all costs invoiced, the NPFC found that \$4,592.90 in costs are supported by the rate schedule and daily reports as submitted in association with the claim.<sup>56</sup> As such, 12% of \$4,592.90, totaling \$551.15, is approved for payment, while the additional \$13.19, is denied.<sup>57</sup>

**Overall Denied Costs:** \$123.19

## **VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, USFS, LLC.'s request for uncompensated removal costs is approved in the amount of **\$5,144.05**.

This determination is a settlement offer,<sup>58</sup> the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>59</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>60</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

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<sup>50</sup> Zebra Invoice #96642.

<sup>51</sup> Zebra Environmental & Industrial Services Rate Schedule.

<sup>52</sup> Zebra daily report, dated March 19, 2020.

<sup>53</sup> Summary of Costs spreadsheet, dated December 11, 2020.

<sup>54</sup> Zebra Invoice #96642.

<sup>55</sup> Zebra Environmental & Industrial Services Rate Schedule.

<sup>56</sup> Summary of Costs spreadsheet, dated December 11, 2020.

<sup>57</sup> Summary of Costs spreadsheet, dated December 11, 2020.

<sup>58</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>59</sup> 33 CFR § 136.115(b).

<sup>60</sup> 33 CFR § 136.115(b).

(b) (6)

Claim Supervisor:

(b) (6)

Date of Supervisor's review: *12/11/2020*

Supervisor Action: *Offer Approved*