

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP921019-URC001
Claimant:	Buckeye Terminals, LLC
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$445,383.68
Action Taken:	Offer in the amount of \$442,921.27

EXECUTIVE SUMMARY:

On September 20, 2017, during a scheduled monitoring operation, a contractor for Buckeye Terminals, LLC. (“Buckeye”, “Buckeye Terminals” or “Claimant”) discovered a sheen in the Wayne County Sewer System on Marion Avenue in River Rouge, Michigan.² During periods of heavy rain,³ the Wayne County Sewer System discharges directly into the Detroit River, a navigable waterway of the United States.⁴ Buckeye notified the National Response Center (NRC). The NRC notified the United States Environmental Protection Agency Region 5 (“USEPA” or “FOSC”), the United States Coast Guard (USCG) Sector Detroit and Michigan Department of Environment, Great Lakes and Energy (“Michigan EGLE”),⁵ which responded to the incident as the State On Scene Coordinator (SOSC). Samples taken from the sewer system were later confirmed to be diesel oil.⁶ Based on the circumstances, the FOSC determined that the incident posed a substantial threat of discharge of oil into the Detroit River; a navigable waterway of the United States.⁷

Buckeye initially deployed booms to mitigate the release, and then hired Young’s Environmental Cleanup (Young’s), Antea Group, Aaron Oil, Usher Oil, and Pace Analytical to perform response and removal operations.⁸ A “responsible party” as that term is defined in the Oil Pollution Act of 1990 (OPA) has not been identified.⁹ Buckeye presented its removal costs

¹ This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant’s rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant’s rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

² National Response Center Report #1191225 dated September 20, 2017.

³ The area was experiencing heavy rainfall in September 2017.

⁴ Email from Michigan EGLE to the NPFC dated March 19, 2021.

⁵ Michigan EGLE was also referred to in correspondence as Michigan Department of Environmental Quality (DEQ) at the time of the incident.

⁶ Letter from Antea Group to Buckeye Terminals, LLC dated October 11, 2017.

⁷ Email from USEPA to NPFC dated March 31, 2021.

⁸ Buckeye claim submission dated March 5, 2021.

⁹ 33 U.S.C. § 2701(32).

to Michigan Marine Terminals (MMT) as that is the entity the claimant believed was the responsible party.¹⁰ After ninety days, having not reached a settlement with the MMT,¹¹ Buckeye presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) for \$445,539.01.¹² Subsequently, Buckeye withdrew costs totaling \$155.33, reducing its sum certain from \$445,539.01 to \$445,383.68.¹³

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$442,921.27 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:

Incident

On September 20, 2017, during a scheduled monitoring operation, a contractor for Buckeye Terminals, LLC. (“Buckeye” or “Claimant”) discovered a sheen in the Wayne County Sewer System on Marion Avenue in River Rouge, Michigan.¹⁴ The unidentified product was later identified as weathered diesel fuel that appeared to be 6-8 years old.¹⁵ Michigan EGLE responded and noted that normally the sewer system discharges into the local wastewater treatment facility, but during heavy rain conditions, as they were experiencing at the time, the sewer system will discharge directly into the Detroit River.¹⁶ Based on the circumstances, the FOSC determined that the incident posed a substantial threat of the discharge of oil into the Detroit River; a navigable waterway of the United States.¹⁷

Buckeye initially deployed booms to mitigate the release and then hired Young’s Environmental Cleanup (Young’s), Antea Group, Aaron Oil, Usher Oil, and Pace Analytical to perform response and removal operations.¹⁸

Young’s conducted booming operations, provided vacuum truck services, sewer videography services, and traffic control since all work was performed in a public-right-of-way and within the sewer system. Antea Group performed project management, sampling work and air monitoring services. It also prepared work response plans, created photo logs of work performed and assisted with the identification of the petroleum product. Aaron Oil provided bulk absorbent

¹⁰ Email from Buckeye Terminals to Michigan Marine Terminals dated May 13, 2021.

¹¹ 33 CFR 136.103(c).

¹² Buckeye Terminals claim submission dated March 5, 2021. Buckeye Terminals subsequently requested a tolling agreement which provided it additional time to support its claim and extended NPFC’s deadline to issue a determination to April 8, 2022.

¹³ Email from Buckeye Terminals to NPFC dated July 15, 2021.

¹⁴ National Response Center Report #1191225 dated September 20, 2017.

¹⁵ Letter from Antea Group to Buckeye Terminals dated October 11, 2017.

¹⁶ Email from Michigan EGLE to NPFC dated March 19, 2021.

¹⁷ Email from USEPA to the NPFC dated March 31, 2021.

¹⁸ Buckeye claim submission dated March 5, 2021.

material for use during the response. Usher Oil performed disposal services. Pace Analytical provided a detailed fingerprint lab analysis of the samples taken from the site.

Response operations were completed on December 22, 2017.¹⁹

Responsible Party

In accordance with the Oil Pollution Act of 1990, the owner/operator of the source which caused the oil spill is the Responsible Party (RP) for the incident.²⁰ Based on the administrative record, an RP has not been identified for this discharge.²¹

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²² require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.²³

In this case, the claimant submitted all claims for removal costs to the purported responsible party on May 13, 2021.²⁴ Since the NPFC has not identified a RP under OPA, for this incident, further discussion here is moot.

III. CLAIMANT AND NPFC:

When a RP (or purported RP in this case) has not settled a claim after ninety days of receipt or denies a claim, a claimant may elect to present its claim to the NPFC.²⁵

Buckeye provided the NPFC with a costs breakdown document explaining the costs claimed, invoices associated with costs, photo documentation of the spill incident, a spill response summary, various figures and a sample analysis.

On July 15, 2021, Buckeye withdrew costs pertaining to meal expenditures in the amount of \$155.33, which reduced its claimed costs total from \$445,539.01 to \$445,383.68.²⁶

¹⁹ Young's Invoice 265733.

²⁰ 33 U.S.C. § 2701(32).

²¹ This is not to say that an RP may not later be identified under OPA for cost-recovery or other purposes, based on the receipt of additional information. This determination is for the sole purpose of adjudicating the claim presented by Buckeye based on the administrative record attendant to its submission.

²² 33 U.S.C. § 2701 *et seq.*

²³ 33 CFR 136.103.

²⁴ Email from Buckeye Terminals to Michigan Marine Terminals dated May 13, 2021.

²⁵ 33 CFR 136.103.

²⁶ Email from Buckeye Terminals to the NPFC dated July 15, 2021.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁷ 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.²⁸ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁹ 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.³⁰ An RP's liability is strict, joint, and several.³¹ 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."³² 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."³³ 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."³⁴

²⁷ 33 CFR Part 136.

²⁸ 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)).

²⁹ 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).

³⁰ 33 U.S.C. § 2702(a).

³¹ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³² *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).

³³ 33 U.S.C. § 2701(31).

³⁴ 33 U.S.C. § 2701(30).

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁵ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁶ 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.³⁷

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;³⁸
- (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.³⁹
- (d) That the removal costs were uncompensated and reasonable.⁴⁰

The NPFC analyzed each of these factors and determined the majority of the costs incurred by Buckeye 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 following table is a summary⁴¹ of claimed costs and services performed between September 20, 2017 and December 22, 2017:

<u>Contractor/Company</u>	<u>Invoice # / Tab #</u>	<u>Dates of service</u>	<u>Amount Claimed</u>	<u>Service provided</u>
Buckeye – Labor S/T	Tab #1	9/20 – 12/5/17	\$2,859.26	Sewer investigation
Buckeye – Labor O/T	Tab #2	9/17-10/17/17	\$477.50	Sewer investigation
Buckeye – Labor O/T	Tab #3	9/17/17	\$934.25	Denied – pre-spill costs

³⁵ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³⁶ 33 CFR Part 136.

³⁷ 33 CFR 136.105.

³⁸ As a threshold matter, since an RP has not been identified, the NPFC must make a factual determination on whether it finds by a preponderance of the evidence that the oil discharged from a facility as defined by OPA. Based on the totality of the circumstances and the circumstantial evidence in the administrative record, the NPFC concludes that the oil discharged more likely than not came from a facility. As such, the claim is compensable.

³⁹ To ensure that Buckeye met its burden with respect to the cleanup activity, the NPFC coordinated with the EPA as the Federal On-Scene Coordinator (FOSC) for this incident. After analyzing the incident and the actions taken by Buckeye, the FOSC opined that the response actions undertaken by Buckeye and its subcontractors were consistent with the National Contingency Plan. See, email from USEPA to NPFC dated July 19, 2021.

⁴⁰ 33 CFR 136.203; 33 CFR 136.205.

⁴¹ Enclosure 3 provides a detailed breakdown of these costs.

Usher Oil	Inv # 541535 / Tab #4	9/23/17	\$1,440.00	Disposal
Buckeye	Tab #6	10/17/17	\$93.05	Meals
Young's	Inv # 264704 / Tab #6	9/20-9/30/17	100,436.15	Response
Young's	Inv # 265015 / Tab #6	10/1-10/30/17	\$178,446.00	Response
Young's	Inv # 265733 / Tab #6	12/4-12/21/17	\$18,055.00	Response
Usher Oil	Inv # 543781 / Tab #6	10/30/17	\$150.00	Liquid Disposal
Aaron Oil	Inv # 88182-V / Tab #6	10/31/17	\$3,725.00	Response materials
Aaron Oil	Inv # 88181 -V / Tab #6	10/31/17	\$3,725.00	Response materials
Aaron Oil	Inv # 88207 - V / Tab #6	12/28/17	\$3,725.00	Response materials
Aaron Oil	Inv # 88206 - V / Tab #6	12/13/17	\$3,725.00	Response materials
Aaron Oil	Inv # 88201 - V / Tab #6	12/13/17	\$3,725.00	Response materials
Usher Oil	Inv #541478 / Tab #7	9/22/17	\$1,933.20	Disposal
Antea Group	Inv # 178857 / Tab #7	9/20-9/28/17	\$13,786.88	Project management
Pace Analytical	Inv # 24972 / Tab #7	10/2/17	\$450.00	Fingerprint analysis
Young's	Inv # 265396 / Tab #7	11/6-11/12/17	\$40,752.00	Response
Young's	Inv # 265395 / Tab #7	10/31-11/30/17	\$41,340.00	Response
Young's	Inv # 265397 / Tab #7	13-11/30/17	\$23,615.00	Response
Antea Group	Inv # 1730982 / Tab #7	10/2-10/24/17	\$1,990.39	Project management
CLAIM TOTAL			\$445,383.68	

The amount of compensable costs is \$442,921.27 while \$2,462.41 was denied as follows:

1. \$934.29 is denied as unsupported payroll expenses. Buckeye submitted a request for costs described as Payroll Labor Distribution totaling \$4,271.01.⁴² The NPFC requested additional information from Buckeye to verify these costs.⁴³ The Claimant submitted sufficient evidence to support the costs⁴⁴ with the following exceptions: there were no daily reports, invoices or timesheets to support costs totaling \$934.25⁴⁵. There was also an unaccounted for \$.04 difference between what was claimed and what was submitted, which the NPFC also denies.
2. \$1,288.00 is denied for unreasonable⁴⁶ lodging expenses. Buckeye submitted a request for hotel and per diem costs included as part of Young's Invoice 265733

⁴² Buckeye claim submission dated March 5, 2021.

⁴³ Email from NPFC to Buckeye Terminals dated June 29, 2021.

⁴⁴ Buckeye claim submission dated March 5, 2021; email from Buckeye Terminals to NPFC dated July 26, 2021.

⁴⁵ Enclosure 3, Tab 3 identified as 375, all lines.

⁴⁶ See, 33 CFR 136.205.

in the amount of \$1,600.00 and as part of Young's Invoice 265395 in the amount of \$800.00.⁴⁷ The NPFC requested additional information from Buckeye to verify all hotel and per diem costs claimed.⁴⁸ Buckeye provided daily reports with hotel receipts⁴⁹ and payment records.⁵⁰

The NPFC utilizes rates outlined by the General Services Administration (GSA) for per diem and lodging to determine reasonableness.⁵¹ The GSA approved lodging and per diem rate was \$126.00 per day for River Rouge, Michigan during the incident period. Thus, based on the information submitted, the NPFC denies \$592.00 of Young's Invoice 265733, and \$696.00 of Young's Invoice 265395 as unreasonable.

3. \$46.12 is denied as unsupported food expenses. Buckeye submitted a request related to Young's Invoice 264704 for September 21, 2017, which consisted of \$46.12 in food expenses not supported by a receipt.⁵² As such, they are denied.
4. \$194.00 is denied as unsupported miscellaneous expenses. Buckeye submitted a request related to Young's Invoice 265015 for October 23, 2017, which consisted of a \$194.00 in unidentified costs.⁵³ As such, they are denied.

Overall Denied Costs: \$2,462.41

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Buckeye's request for uncompensated removal costs is approved in the amount of **\$442,921.27**.

⁴⁷ Young's Invoices 265733 and 265395.

⁴⁸ Email from NPFC to Buckeye Terminal dated July 7, 2021.

⁴⁹ Young's River Rouge Cleanup Hotel Detail.

⁵⁰ Young's Hotel Activity Report.

⁵¹ *See generally*, GSA per diem rates *available at* <https://www.gsa.gov/travel/plan-book/per-diem-rates> (last visited March 15, 2022).

⁵² Enclosure 3, Tab 6 identified as 615, line 36.

⁵³ Enclosure 3, Tab 6 identified as 615, line 384.

This determination is a settlement offer,⁵⁴ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁵⁵ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵⁶ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

<p>(b) (6)</p> <p>Claim Supervisor: (b) (6)</p> <p>Date of Supervisor's review: 3/18/2022</p> <p>Supervisor Action: <i>Offer Approved</i></p>

⁵⁴ 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).

⁵⁵ 33 CFR 136.115(b).

⁵⁶ *Id.*