

CLAIM SUMMARY / DETERMINATION

Claim Number:	UCGPN18023-URC010
Claimant:	West Virginia Department of Environmental Protection
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$4,440.63
Action Taken:	Offer in the amount of \$4,440.63

EXECUTIVE SUMMARY:

On January 10, 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. (b) (6).

West Virginia Department of Environmental Protection (“WVDEP” or “Claimant”) responded to the incident in its capacity as the State On-Scene Coordinator (SOSC). WVDEP incurred removal costs as an integral member of the Unified Command (UC), working closely with the United States Coast Guard in its role as the Federal On-Scene Coordinator (FOSC). Representatives from WVDEP participated in stakeholder meetings and monitored the response operations to ensure the discharge did not affect the local drinking water system.⁴ WVDEP presented its claim to the RP on September 24, 2018. Having not received payment from the RP after ninety days,⁵ WVDEP presented its claim to the National Pollution Funds Center (NPFC) for \$4,440.63.⁶

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$4,440.63 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 NPFC Optional OSLTF Claim Form dated November 11, 2021.

⁵ 33 CFR 136.103(c).

⁶ WVDEP claim submission dated November 9, 2021.

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

U.S. Coast Guard Marine Safety Unit (MSU) Huntington was the Federal On-Scene Coordinator (FOSC) and oversaw the response and removal operations.¹¹ WVDEP was the State On-Scene Coordinator (SOSC). As such, representatives from the WVDEP participated in all facets of the Unified Command including performing a joint assessment with the FOSC and monitoring the response operations to ensure the discharge did not affect the local drinking water system.¹²

II. CLAIMANT, RP and the NPFC:

Although claims for removal costs or damages may be presented directly to the Fund by the Governor of a State for costs that are incurred by the State,¹³ the claimant first presented its costs to the RP. The RP did not settle the claim. The claimant then submitted the claim to the NPFC.¹⁴

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 January 17, 2018, and River Marine Enterprises dated August 3, 2018.

¹¹ Letter of Delegation – Incident Specific Federal On-Scene Coordinator (FOSC), from CAPT. M.B. Zamperini, CG Sector Ohio Valley to CDR. [REDACTED], U.S. Coast Guard dated, December 4, 2017.

¹² WVDEP narrative description of duties performed between January 12, 2018 and February 8, 2018.

¹³ See, 33 U.S.C. § 2712(a)(4); 33 CFR 136.203.

¹⁴ On November 15, 2021, the NPFC sent Responsible Party Notification Letters to Western Rivers and River Marine. A Responsible Party Notification letter notifies the owner and/or operator 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.

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁵ 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.¹⁶ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁷ 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.

IV. 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.¹⁸ An RP's liability is strict, joint, and several.¹⁹ 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."²⁰ 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."²¹ 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

¹⁵ 33 CFR Part 136.

¹⁶ 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)).

¹⁷ 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).

¹⁸ 33 U.S.C. § 2702(a).

¹⁹ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²⁰ *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).

²¹ 33 U.S.C. § 2701(31).

damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”²²

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²³ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁴ 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.²⁵

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.²⁶
- (d) That the removal costs were uncompensated and reasonable.²⁷

The NPFC analyzed each of these factors and determined that all costs incurred and submitted by WVDEP herein are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced at the appropriate FEMA published rates and all approved costs were supported by adequate documentation.²⁸

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, WVDEP’s request for uncompensated removal costs is approved in the amount of **\$4,440.63**.

²² 33 U.S.C. § 2701(30).

²³ *See generally*, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁴ 33 CFR Part 136.

²⁵ 33 CFR 136.105.

²⁶ SITREP-Pol One. As the SOSC, WVDEP worked directly with the FOSC at the UC.

²⁷ 33 CFR 136.203; 33 CFR 136.205.

²⁸ WVDEP claim submission dated November 9, 2021.

This determination is a settlement offer,²⁹ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁰ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.³¹ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

	(b) (6)
Claim Supervisor:	(b) (6)
Date of Supervisor's review:	3/8/2022
Supervisor Action:	<i>Offer Approved</i>

²⁹ 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).

³⁰ 33 CFR 136.115(b).

³¹ *Id.*