

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP922019-URC001
Claimant:	Gateway Marina, LLC
Type of Claimant:	Small Business Owner
Type of Claim:	Removal and Loss of Profits
Claim Manager:	(b) (6)
Amount Requested:	\$181,174.00
Action Taken:	Denied

EXECUTIVE SUMMARY:

On February 14, 2022, the National Response Center (NRC) notified United States Coast Guard (USCG) Sector St. Petersburg Incident Management Division (IMD) that the recreational vessel, *CHEROKEE*, caught fire while docked at Gateway Marina in Suwannee, Florida, and discharged an unknown quantity and type of oil into the Suwannee River, a navigable waterway of the United States.² In its role as Federal On Scene Coordinator (FOSCR), Sector St. Petersburg conducted a telephone investigation with Gateway Marina personnel and the Oil Spill Response Organization (OSRO), Warren Environmental (Warren).³ On February 15, 2022, the FOSCR issued a Notice of Federal Interest (NOFI) to Mr. (b) (6) and generated an enforcement summary on March 30, 2022.⁴

In accordance with the Oil Pollution Act of 1990 (OPA),⁵ Mr. (b) (6), the owner and operator⁶ of the vessel *CHEROKEE*, was identified as a potential responsible party (RP).⁷ Mr. (b) (6) asserted that he did not have pollution insurance coverage for his vessel and could not pay for the cleanup costs.⁸

On February 14, 2022, Dixie County Fire & Rescue responded to the fire at 0413 local time and extinguished the fire within the hour.⁹ Gateway Marina hired Warren to provide removal activities.

On September 29, 2022, the National Pollution Funds Center (NPFC) received Gateway Marina's claim submission for \$181,174.00. Gateway Marina sought \$161,174.00 in removal costs and \$20,000 in loss of profits and earning capacity.¹⁰ Later, on October 24, 2022, Gateway Marina sent an invoice to the

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 with 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 NRC Report Numbers 1328935 and 1329036.

³ USCG Sector St. Petersburg Pollution Responder Statement dated March 28, 2022.

⁴ See, Notice of Federal Interest dated February 15, 2022, and Enforcement Summary dated March 30, 2022.

⁵ 33 U.S.C. § 2701(32).

⁶ See, Dixie County Fire & Rescue Fire Investigation Report Case # 22F00118 dated February 14, 2022. See also, Email from RP to NPFC regarding the boat fire and his loss dated October 15, 2022.

⁷ USCG Notice of Federal Interest (NOFI) dated February 15, 2022.

⁸ Statement by RP indicating that he cannot pay for cleanup dated March 28, 2022.

⁹ Dixie County Fire & Rescue Fire Investigation Case Report # 22F00118 dated February 14, 2022.

¹⁰ See, Optional OSLTF Claim Form dated September 19, 2022.

NPFC that outlined the nature of its costs in the amount of \$178,493.57 which included a reference to “Misc. Invoices/loss of revenue (sic).”¹¹

Before it adjudicated the claim, the NPFC notified the claimant that the claimed costs had not yet been presented to the RP as required by law.¹² On December 19, 2022, Gateway Marina presented their costs to the RP.¹³ Additionally, on multiple occasions during this period, the NPFC notified the claimant that it was required to submit documentation to evidence that it actually incurred the costs in their submission.¹⁴ Despite these requests, the claimant did not provide any documentation to the NPFC supporting its claimed costs.

The NPFC has thoroughly reviewed all documentation that was submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that the claim must be denied because the claimant has not provided sufficient evidence proving it incurred any of the costs that are subject of this claim.¹⁵

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS

Incident

At approximately 2:00 a.m. on February 14, 2022, an anonymous caller notified the NRC that a recreational vessel docked in the marina caught fire and released an unknown quantity and type of oil into Gateway marina’s waterway, which created a rainbow sheen. The caller also reported that the release caused a strong petroleum odor in the neighborhood.¹⁶ On February 16, 2022, a second caller contacted the NRC reporting a vessel that caught fire and discharged an unknown quantity and type of oils into the Suwannee River.¹⁷

Dixie County Fire & Rescue responded to the boat fire and extinguished it on February 14, 2022 at 5:00 a.m. Dixie County HAZMAT crews deployed containment buoys to control fuel and oil displacement. At the time of the fire, the *CHEROKEE* contained 50 gallons of fuel in its tanks and the amount of fuel that was recovered from the tanks, after the fire was extinguished, was estimated to be 35 gallons.¹⁸ The *CHEROKEE* also had two (2) five-gallon plastic fuel containers that were full at the time of recovery.¹⁹

The *CHEROKEE*’s upper and main decks were consumed by fire. The fire direction was from the centerline outward towards bow and stern. The wheelhouse deck collapsed onto the main deck.²⁰

Responsible Party

¹¹ The amount of loss of profits or earning capacity was not clearly articulated in the invoice submitted. However, the NPFC adjudicated the request for loss of profits or earning capacity and it is denied based on the claimant’s inability to meet the elements required to claim these damages as explained later in the determination.

¹² 33 U.S.C. § 2713(a). See, Email from NPFC to Ms. (b) (6) and Mr. (b) (6) dated December 15, 2022.

¹³ Gateway Marina, LLC Demand for Payment letter with invoice # 2022 dated December 15, 2022.

¹⁴ See, various emails from NPFC to Claimant seeking evidence that it incurred the costs claimed in its submission.

¹⁵ 33 CFR 136.105(a); 33 CFR 136.105(e)(6); 33 CFR 136(e)(13).

¹⁶ NRC Incident Report # 1328935.

¹⁷ NRC Incident Report # 1329036.

¹⁸ Dixie County Fire & Rescue Fire Investigation Case Report # 22F00118 dated February 14, 2022.

¹⁹ *Id.*

²⁰ Dixie County Fire & Rescue Fire Investigation Case Report # 22F00118 dated February 14, 2002.

Both the owner and operator of a vessel that discharges oil is a Responsible Party (RP) as defined by OPA.²¹ Mr. (b) (6), was the owner and operator of the *CHEROKEE* at the time of the incident.²² On October 6, 2022, the NPFC issued an RP Notification Letter to Mr. (b) (6) via certified mail.²³ An RP Notification letter notifies the owner/operator that a claim was presented to the NPFC seeking reimbursement of uncompensated removal costs incurred as a result of a discharge of oil to navigable waters of the United States.

After receiving the RP Notification Letter, Mr. (b) (6) emailed the NPFC indicating that Gateway Marina had not presented their costs to him and stated in his email that he only saw a cost summary that Ms. (b) (6) of Warren Environmental had prepared and reviewed with him at the early stages of the response.²⁴

Recovery Operations

On February 14, 2022, Dixie County Fire and Rescue extinguished the vessel fire. Its investigation concluded that the cause of the fire was “Accidental/Electrical.”²⁵ Warren responded to the vessel fire with their equipment, marina push boat, sock boom and absorbent pads.²⁶ Warren provided 17 hours of emergency response, materials, water and sediment sampling, deployed six cases of 5” sock boom, 12 cases of oil Pigs mat pads, and provided disposal.²⁷ Warren removed the vessel from the water. Response efforts concluded on February 16, 2022.²⁸

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²⁹ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.³⁰

On March 28, 2022, Mr. (b) (6) provided a written statement to Gateway Marina indicating that he did not have a pollution policy covering his vessel and did not have the financial means to pay for the cleanup at Gateway Marina.³¹

In accordance with 33 U.S.C. § 2713(a), Gateway Marina presented its claim to Mr. (b) (6) for \$178,493.57 on December 15, 2022.³²

III. CLAIMANT AND NPFC:

²¹ 33 U.S.C. § 2701(32).

²² See, Dixie County Fire & Rescue Fire Investigation Report Case # 22F00118 dated February 14, 2022. Also see, Email from RP to NPFC regarding the boat fire and his loss dated October 15, 2022.

²³ NPFC RP Notification Letter dated October 6, 2022.

²⁴ Email from RP to NPFC dated October 24, 2022.

²⁵ Email from Dixie County Fire Marshal to the NPFC dated October 6, 2022.

²⁶ Gateway Marina, LLC invoice # 2022 dated October 19, 2022.

²⁷ *Id.*

²⁸ USCG Sector St. Petersburg Pollution Responder Statement dated March 28, 2022.

²⁹ 33 U.S.C. § 2701 *et seq.*

³⁰ 33 CFR 136.103.

³¹ Statement by RP indicating that he cannot pay for cleanup dated March 28, 2022.

³² See, Gateway Marina’s Demand for Payment letter dated December 15, 2022.

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.³³ On September 29, 2022, the National Pollution Funds Center (NPFC) received Gateway Marina's claim submission for \$181,174.00. Gateway Marina sought \$161,174.00 in removal costs and \$20,000 in loss of profits and earning capacity.³⁴ Later, on October 24, 2022, Gateway Marina sent an invoice to the NPFC that outlined the nature of its costs in the amount of \$178,493.57 which included a reference to "Misc. Invoices/loss of revenue (sic)."³⁵

Before it adjudicated the claim, the NPFC notified the claimant that the claimed costs had not yet been presented to the RP as required by law.³⁶ On December 15, 2022, the NPFC held a conference call with the claimant discussing its requirement under OPA to present its costs to the RP.³⁷ Gateway Marina presented their costs to Mr. (b) (6) on December 19, 2022.³⁸ On December 19, 2022, Gateway Marina presented their costs to the RP.³⁹ Additionally, on multiple occasions during this period, the NPFC notified the claimant that it was required to submit documentation to evidence that it actually incurred the costs in their submission.⁴⁰ Despite these requests, the claimant did not provide any documentation to the NPFC supporting its claimed costs.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁴¹ 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.⁴² The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁴³ 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:

Under OPA, a 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.⁴⁴ An RP's liability is

³³ 33 CFR 136.103.

³⁴ See, Optional OSLTF Claim Form dated September 19, 2022.

³⁵ The amount of loss of profits or earning capacity was not clearly articulated in the invoice submitted. However, the NPFC adjudicated the request for loss of profits or earning capacity and it is denied based on the claimant's inability to meet the elements required to claim these damages as explained later in the determination.

³⁶ 33 U.S.C. § 2713(a). See, Email from NPFC to Ms. (b) (6) and Mr. (b) (6) dated December 15, 2022.

³⁷ Email from NPFC to Ms. (b) (6) and Mr. (b) (6) dated December 15, 2022.

³⁸ Gateway Marina, LLC Demand for Payment letter and Invoice # 2022 dated December 15, 2022.

³⁹ *Id.*

⁴⁰ See, various emails from NPFC to Claimant seeking evidence that it incurred the costs claimed in its submission.

⁴¹ 33 CFR Part 136.

⁴² 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)).

⁴³ 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).

⁴⁴ 33 U.S.C. § 2702(a).

strict, joint, and several.⁴⁵ 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.”⁴⁶ 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.”⁴⁷ 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.”⁴⁸

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁵⁰ 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.⁵¹

OPA defines “compensation allowable” to mean “the amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC.”⁵²

OPA defines “removal costs” to mean “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 a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.”⁵³

OPA defines a “claim” to mean “a request made in writing for a sum certain, for compensation for damages or removal resulting from an incident.”⁵⁴ An “incident” under OPA is defined as any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.⁵⁵

OPA defines “oil” as “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with the wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section

⁴⁵ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

⁴⁶ *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).

⁴⁷ 33 U.S.C. § 2701(31).

⁴⁸ 33 U.S.C. § 2701(30).

⁴⁹ See generally, 33 U.S.C. § (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁵⁰ 33 CFR Part 136.

⁵¹ 33 CFR 136.105.

⁵² 33 CFR 136.205.

⁵³ 33 U.S.C. § 2701(31).

⁵⁴ 33 U.S.C. § 2701(14).

⁵⁵ *Id.*

101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601) and which is subject to the provisions of that Act [42 USCA Section 9601 et seq.].”⁵⁶

No Evidence of Removal Costs Incurred by Claimant

The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.⁵⁷ The claimant merely submitted its claim and a spreadsheet outlining the specifics of its claimed costs but provided no evidence such as cancelled checks or other proofs of payments as evidence to support those costs. Numerous requests were sent to the claimant between September 2022 and December 2022 requesting additional support documentation for its claimed costs.⁵⁸ The claimant did not provide any evidence supporting its claimed costs. Gateway Marina has not proven to the NPFC they have incurred any of the removal costs that are the subject of this claim and as such, the removal costs portion of this claim must be denied.

Claim of Profits & Earning Capacity

Gateway also claimed \$20,000.00 in loss of profits and earning capacity damages. As discussed above, it later submitted a spreadsheet claiming a specified amount for ““Misc. Invoices/loss of revenue (sic).” However, Gateway did not provide detail as to how they came to its original claim for \$20,000 or this later amount. However, despite the lack of granularity as to the amount of these costs, they must be denied because the claimant failed to meet its burden of proof to receive compensation for these claimed damages under the relevant regulations.

In addition to meeting the criteria in other sections of 33 CFR 136, a claimant seeking damages for a loss of profits and earning capacity must establish the following:

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.⁵⁹

If these criteria are established by a preponderance of the evidence, then a claimant could be entitled to compensation as indicated at 33 CFR 136.235:

⁵⁶ 33 U.S.C. § 2701(23).

⁵⁷ 33 CFR 136.105(a); 33 CFR 136.105(e)(6); 33 CFR 136(e)(13).

⁵⁸ See, various emails from NPFC to Claimant seeking evidence that it incurred the costs claimed in its submission.

⁵⁹ See, 33 CFR 136.233.

The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for -

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.⁶⁰

As evidence to support its loss of profits/reduced earning capacity portion of the claim, Gateway Marina provided comparative data for February 2020, February 2021, and February 2022 to establish that their income was reduced as a consequence of the boat fire at their Marina by providing their amount of gross earnings in comparable periods and during the time of their claimed loss.⁶¹ Based on the data Gateway Marina provided, they have shown that February 2022, was their overall best February by making \$47,824.81 in gross sales. Also, Gateway Marina showed that on average, they grossed \$39,516.56 in sales, from February 2020 through February 2022. During the month of February 2022, Gateway Marina averaged \$8,308.25 more in gross sales than February 2020 and February 2021.

	<i>Feb-20</i>		<i>Feb-21</i>		<i>Feb-22</i>
Bait & Tackle	\$ 9,950.88		\$ 11,453.31		\$ 11,525.87
Beer	\$ 2,311.24		\$ 1,923.19		\$ 2,626.67
Clothing & Merch	\$ 4,089.51		\$ 3,711.74		\$ 2,431.99
Food/Bev	\$ 2,264.31		\$ 1,878.71		\$ 2,256.27
Fuel	\$ 2,715.49		\$ 4,553.81		\$ 4,925.54
Misc.	\$ 13.69		\$ 31.41		\$ 24.27
Parts	\$ 2,003.32		\$ 1,693.65		\$ 2,226.89
Propane	\$ 459.00		\$ 499.50		\$ 329.00
Ramp fee	\$ 340.00		\$ 524.00		\$ 540.00
RV Electric	\$ 12.15		\$ 205.72		\$ 90.00
Sharkys	\$ 22.66		\$ 941.39		\$ 327.95
Slips	\$ 10,241.50		\$ 8,243.00		\$ 20,245.00
Transient Boat Slip	\$ 133.00		\$ 285.00		\$ 141.00
Wine	\$ 161.82		\$ 61.88		\$ 134.36
TOTAL GROSS SALES PER YEAR	\$ 34,718.57		\$ 36,006.31		\$ 47,824.81
Total Three-Year Sales	\$ 118,549.69				
Total Average of Gross Sales	\$ 39,516.56				

⁶⁰ 33 CFR 136.235.

⁶¹ See, Gateway Marina's submission demonstrating three years of comparative sales for the month of February.

February 2022 Best Year in Comparison on Average	\$ 8,308.25				
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Gateway Marina has not proven a loss of profits or earnings for February 2022. As such, the claimant has failed to meet its burden to establish it is entitled to damages under 33 CFR 136.233 and therefore is not entitled to compensation under 33 CFR 136.235 and the claim for these damages must be denied.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Gateway Marina's request for \$161,174.00 in removal costs and the \$20,000 in loss of profits and earning capacity costs are hereby denied.

<p>(b) (6)</p> <p>Claim Supervisor: (b) (6)</p> <p>Date of Supervisor's review: May 22, 2023</p> <p>Supervisor Action: Denial Approved.</p>
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