

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP923007-URC001
Claimant:	Massachusetts Department of Environmental Protection
Type of Claimant:	STATE
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$75,165.43
Action Taken:	Offer in the amount of \$75,165.43

EXECUTIVE SUMMARY:

On December 31, 2022, the New Bedford Fire Department (Nbfd) reported spotting a 100 x 300 foot reddish colored diesel fuel sheen on the Eastern shoreline of the New Bedford Harbor; a navigable waterway of the United States.² The Nbfd contacted the National Response Center (NRC), requesting assistance from the Massachusetts Department of Environmental Protection (Mass DEP or Claimant) and the United States Coast Guard (USCG).³ On December 31, 2022, the NRC notified Sector Southeastern New England (Sector SENE or FOSC) of the incident;⁴ and Sector SENE arrived on scene to oversee cleanup operations on January 1, 2023.⁵ Patches of the suspected fuel release were spotted in multiple locations throughout the Eastern shoreline of New Bedford Harbor.⁶ The FOSC could not identify a responsible party, and the source of the spill remains a mystery.

On December 31, 2022, Mass DEP hired Frank Corp. Environmental Services, Inc. (Frank Corp. or OSRO) to conduct response actions and mitigate any damages incurred from the spill.⁷ Frank Corp. actively cleaned and mitigated the pollution threat using absorbents and placing sweeps in various locations throughout New Bedford Harbor near the Eastern shoreline.⁸ On January 1, 2023, Frank Corp. contained the spill within the harbor using boom⁹ and continued to remove and replace absorbents throughout various locations of New Bedford Harbor's Eastern shoreline between January 2, 2023 and January 5, 2023. Mass DEP dispatched a responder on scene to perform field oversight and site

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 MISLE Case Id: 1333233 Narrative Summary dated January 1, 2023 and National Response Center (NRC) report #1356513 dated December 31, 2022.

³ National Response Center (NRC) report # 1356513 dated December 31, 2022.

⁴ MISLE Case Case Id: 1333233 Narrative Summary dated January 1, 2023.

⁵ MISLE Case Timeline, page 1 of 1.

⁶ Mass DEP Release Ammendment Form 1 dated December 31, 2022, page 3 of 3.

⁷ Mass DEP Release Ammendment Form 1 dated December 31, 2022, page 3 of 3.

⁸ Mass DEP claim submission received March 22, 2023 Attachment D: Frank Corp. Environmental Services Invoice #25136, pages 1 and 5 of 17.

⁹ MISLE Case Timeline, page 1 of 1.

management during the cleanup operations, between December 31, 2022 and January 5, 2023.¹⁰ On January 5, 2023, Frank Corp. removed all oil soaked absorbents and officially ended their response.¹¹

On March 6, 2023, Mass DEP presented all incident costs to the National Pollution Funds Center (NPFC) in the amount of \$75,165.43.¹² The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that all costs, in the amount of \$75,165.43 are compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On December 31, 2022, a 100 x 300 foot reddish colored sheen was spotted by the Nbfd in the waters of New Bedford Harbor; a navigable waterway of the United States.¹³ The Nbfd contacted the NRC, requesting assistance from both the Mass DEP and the United States Coast Guard.¹⁴ Upon initial inspection, the Nbfd reported a diesel fuel smell stemming from the sheen. The Nbfd was unable to identify the source of the spill.

On December 31, 2022 at approximately 2053 hours, Sector SENE was notified of the incident.¹⁵ On the same day, Mass DEP arrived on scene and hired Frank Corp. Environmental Services, Inc. to conduct response actions and mitigate any damages incurred from the spill.¹⁶ On January 1, 2023, Mass DEP requested Sector SENE's assistance to oversee cleanup operations and Sector SENE arrived on scene to serve as Federal On Scene Coordinator (FOSC).¹⁷

Patches of the suspected fuel release similar to the initially discovered sheen were spotted in multiple locations throughout the Eastern shoreline of New Bedford Harbor.¹⁸ The areas impacted include Elm Ave, Seaport Inn, New Bedford Harbor Marina and an area near the Hurricane Barrier.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 The source of the spill could not be identified by Mass DEP, Sector SENE or the Nbfd.

¹⁰ Mass DEP claim submission received March 22, 2023 Attachment F: Mass DEP Timeslip Detail Report, page 1 of 1.

¹¹ Mass DEP claim submission received March 22, 2023 Attachment D: Frank Corp. Environmental Services Invoice #25136, pages 4 and 12 of 17.

¹² Mass DEP claim submission received March 22, 2023.

¹³ MISLE Case Id: 1333233 Narrative Summary dated January 1, 2023.

¹⁴ National Response Center (NRC) report # 1356513 dated December 31, 2022.

¹⁵ MISLE Case Id: 1333233 Narrative Summary dated January 1, 2023.

¹⁶ Mass DEP Release Amendment Form 1 dated December 31, 2022, page 3 of 3.

¹⁷ MISLE Case Timeline, page 1 of 1.

¹⁸ Mass DEP Release Amendment Form 1 dated December 31, 2022, page 3 of 3.

¹⁹ Mass DEP Release Amendment Form 3 dated January 2, 2023, page 3 of 3.

²⁰ 33 U.S.C. § 2701(32).

Recovery Operations

On December 31, 2022, Frank Corp. arrived on scene to serve as the Oil Spill Recovery Organization (OSRO). The pollution responders began actively cleaning up and mitigating the pollution threat using absorbents and placing sweeps in various locations throughout New Bedford Harbor, near the Eastern shoreline.²¹ On January 1, 2023, Frank Corp. contained the spill within the harbor using booms.²² A total of 21 drums of solvent material was recovered on January 1, 2023. On January 2, 2023, Sector SENE noted the initial sheen had been removed, and the FOSC closed the case and left the scene.²³ The FOSC confirmed that oil still remained in the waters after January 2, 2023 and they concluded the actions performed between January 3, 2023 and January 5, 2023 were in accordance with the National Contingency Plan (NCP).²⁴ Although the volume of oil in New Bedford Harbor had greatly reduced, there was still oil remaining in various locations across the Eastern shoreline, including areas beneath the pier.²⁵

Frank Corp. continued to remove and replace absorbents throughout various locations of the New Bedford Harbor's Eastern shoreline between January 3, 2023 and January 5, 2023. On January 5, 2023, the OSRO removed all oil soaked absorbents and placed the absorbents in drums for disposal before officially leaving the scene with all contaminated items on January 5, 2023.²⁶

Mass DEP dispatched a responder on scene to perform immediate response actions and to perform field oversight and site management between December 31, 2022 through January 5, 2023.²⁷

II. CLAIMANT AND NPFC:

On March 22, 2023, the NPFC received a claim for \$75,165.43 from Mass DEP.²⁸ Mass DEP provided the NPFC with a Cover Letter citing the link to the Commonwealth of Massachusetts Energy & Environmental Affairs data portal and offered an explanation on how to retrieve Mass DEP Release Log and Release Amendment Forms associated with the spill incident, an OSLTF Claim Form, a Standard Form 1081, Frank Corp. Invoice #25136, Frank Corp.'s Contract Rate Schedule and a Mass DEP Timeslip Detail Report.²⁹

On March 31, 2023, the NPFC requested additional information from Mass DEP relative to their costs claimed,³⁰ and on April 3, 2023, the NPFC added further details to that request.³¹ On April 11, 2023, Mass DEP replied to the NPFC's request, providing a copy of the Commonwealth of Massachusetts Standard Contract Form between MassDEP and Frank Corp. for all emergency response and immediate response action support services, a copy of the Contract Amendment that extends the initial contract through October 11, 2024, verification of Mass DEP's payment to Frank Corp. for costs totaling \$73,119.42 on February 28, 2023, the attachment to the New Bedford Fire Department's letter dated January 3, 2023 which provides detail regarding the costs associated with the services provided and the

²¹ Mass DEP claim submission received March 22, 2023 Attachment D: Frank Corp. Environmental Services Invoice #25136, pages 1 and 5 of 17.

²² MISLE Case Timeline, page 1 of 1.

²³ MISLE Case Timeline, page 1 of 1.

²⁴ FOSC email to NPFC dated April 3, 2023.

²⁵ Mass DEP Release Amendment Form 3 dated January 2, 2023, page 3 of 3.

²⁶ Mass DEP claim submission received March 22, 2023 Attachment D: Frank Corp. Environmental Services Invoice #25136, pages 4 and 12 of 17.

²⁷ Mass DEP claim submission received March 22, 2023 Attachment F: Mass DEP Timeslip Detail Report, page 1 of 1.

²⁸ Mass DEP claim submission dated March 6, 2023.

²⁹ Mass DEP claim submission received March 22, 2023.

³⁰ NPFC email to Claimant dated March 31, 2023.

³¹ NPFC email to Claimant dated April 3, 2023.

Payment Terms and Conditions for MassDEP's contract with Frank corp., which supports the 5% mark-up found on page 1 of Invoice #25136.³²

The Claimant provided an itemized spreadsheet of billable hours for its internal staff.³³ The rates have two components, regular, overtime straight, and telework hours are regular pay rate, and overtime premium is 1.5 x regular rate. Claimant provided a rate calculation that explains the calculations for fringe and direct rates.³⁴ They also provided proof of personnel salary³⁵ and evidence supporting the calculations described in their explanation.³⁶

The NPFC contacted the FOSC who was on-site during the incident cleanup operations and has confirmed Mass DEP and Frank Corp. personnel were present on the dates claimed and confirmed all actions were performed in accordance with the National Contingency Plan (NCP).³⁷

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁸ 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.³⁹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁴⁰ 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.⁴¹ An RP's liability is strict, joint, and several.⁴² 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,

³² Mass DEP email to NPFC dated April 11, 2023.

³³ Mass DEP claim submission received March 22, 2023 Attachment F: Mass DEP Timeslip Detail Report, page 1 of 1.

³⁴ Mass DEP email to NPFC dated May 5, 2023.

³⁵ See, Massachusetts Office of the Comptroller's website. The Financial Records Transparency Platform (CTHRU) provides salary information for Commonwealth employees located within the View State Payroll section.

³⁶ See, Collective Bargaining Agreement (Section 7.2) between the Commonwealth of Massachusetts and the Massachusetts Organization of State Engineers and Scientists (MOSES), page 15 of 115.

³⁷ FOSC email to NPFC dated April 3, 2023.

³⁸ 33 CFR Part 136.

³⁹ 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)).

⁴⁰ 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).

⁴¹ 33 U.S.C. § 2702(a).

⁴² See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

corporate forms, and burdens of proof unfairly favoring those responsible for the spills.”⁴³ 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.”⁴⁴ 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.”⁴⁵

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁷ 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.⁴⁸

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.⁴⁹
- (d) That the removal costs were uncompensated and reasonable.⁵⁰

The NPFC analyzed each of these factors and determined all of the costs incurred and submitted by Mass DEP 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 pricing⁵¹ and all costs were supported by adequate documentation which included invoices and/or proof of payment⁵² where applicable.

Based on the location of this incident, the FOSC is the United States Coast Guard Sector Southeastern New England (Sector SENE).⁵³ All approved costs are supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).⁵⁴

V. CONCLUSION:

⁴³ *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).

⁴⁴ 33 U.S.C. § 2701(31).

⁴⁵ 33 U.S.C. § 2701(30).

⁴⁶ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁷ 33 CFR Part 136.

⁴⁸ 33 CFR 136.105.

⁴⁹ FOSC email to NPFC dated April 3, 2023.

⁵⁰ 33 CFR 136.203; 33 CFR 136.205.

⁵¹ Mass DEP claim submission received March 22, 2023 Attachment E: Frank Corp. Environmental Services Emergency Response Contract Rate Schedules.

⁵² Mass DEP claim submission received March 22, 2023 Attachment C: Standard Form 1081.

⁵³ 40 CFR 300.120(a)(2).

⁵⁴ FOSCR email to NPFC dated April 3, 2023.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Mass DEP's request for uncompensated removal costs is approved in the amount of \$75,165.43.

This determination is a settlement offer,⁵⁵ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁵⁶ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵⁷ 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: 5/09/2023</p> <p>Supervisor Action: Approved.</p>
--

⁵⁵ 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).

⁵⁶ 33 CFR § 136.115(b).

⁵⁷ 33 CFR § 136.115(b).