

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP922019-URC001
Claimant:	Gateway Marina, LLC
Type of Claimant:	Corporate
Type of Claim:	Removal Costs and Loss of Profits
Claim Manager:	(b) (6)
Amount Requested:	\$178,493.57
Action Taken:	Denial on Reconsideration

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 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.⁹ Later, on

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

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 renew (sic).”¹⁰ On December 19, 2022, Gateway Marina presented their costs to the RP.¹¹ The NPFC thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that the claim was not compensable under the Oil Pollution Act (OPA) and therefore was denied.

On July 1, 2023, Gateway timely sought reconsideration.¹² Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, information it obtained independently, and the applicable law and regulations. Upon reconsideration, the NPFC concludes the information in the administrative record does not support Gateway’s claim for entitlement to removal costs or loss of profits for the reasons outlined in the original determination and below. Therefore, this claim on reconsideration is denied.

I. CLAIM HISTORY:

On September 29, 2022, Gateway Marina presented its original claim to the NPFC for removal costs and loss of profits and earning capacity in the total amount of \$178,493.57. The NPFC thoroughly reviewed the original claim, all information provided by Gateway Marina and obtained independently, the relevant statutes and regulations, and ultimately denied the claim because the claimant did not provide any evidence supporting its claimed removal costs.¹³ With respect to the loss of profits portion of the claim, the 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.¹⁴

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. 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. The NPFC’s initial determination is hereby incorporated by reference.

II. REQUEST FOR RECONSIDERATION:

¹⁰ 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.

¹¹ Gateway Marina, LLC Demand for Payment letter with invoice # 2022 dated December 15, 2022.

¹² See, July 1, 2023, email from Gateway to NPFC requesting reconsideration.

¹³ See, various emails from NPFC to Claimant seeking evidence that it incurred the costs claimed in its submission.

¹⁴ See, Gateway Marina’s submission demonstrating three years of comparative sales for the month of February.

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim.¹⁵ The claimant has the burden of providing all evidence, information, and documentation deemed necessary by NPFC's Director to support the claim.¹⁶ When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final.¹⁷

On July 1, 2023, the NPFC received Gateway Marina's timely request for reconsideration.¹⁸ On July 3, 2023, NPFC responded to the claimant, corrected the claim number as referenced by the claimant and advised the link provided by the claimant to access its documents was inoperable. On July 8, 2023, the claimant provided an Adobe .pdf document of all invoices associated with its request for reconsideration.¹⁹ Upon receipt of the reconsideration documentation, the NPFC requested clarification of the sum certain along with the legal and factual basis for the claimant's request for reconsideration.²⁰

In the request for reconsideration, the claimant reiterated its sum certain of \$178,493.57 and stated the reason for requesting reconsideration is "because the owner of the vessel that burned did not have environmental insurance and was unable to pay for any of the expenses incurred."²¹ The claimant provided 64-pages of receipts/invoices, spreadsheets, and proofs of payment.²²

After reviewing the documents provided, the NPFC has determined that that the documentation provided was insufficient to establish OPA compensable removal costs on the following bases:

1. **Warren Environmental** - The claimant again failed to provide employee names, third party invoices and/or receipts, proof of payment for any third party costs, a rate sheet for Warren Environmental that demonstrates what the published tariff rates were for its personnel, materials, and equipment at the time of response, specific dates of service for each day billed, a daily description of duties performed by each worker to identify oil pollution response vice fire response, or any explanations of work performed after the pollution threat was mitigated, and no explanation on why part of the payment for Warren's costs was paid to Alpha Omega Training & Compliance instead of Warren;
2. **Equipment costs** – The claimant failed to provide the exact dates of service equipment was used, no rate sheet to explain or show how the rate charged was established, no names of equipment operator(s) working the equipment, no start and stop times provided, and no detailed descriptions specifying what exactly the equipment was being used for and why;

¹⁵ 33 CFR 136.115(d).

¹⁶ 33 CFR 136.105(a).

¹⁷ *Id.*

¹⁸ *See*, email from claimant to NPFC requesting reconsideration dated July 1, 2023.

¹⁹ *See*, email from claimant to NPFC providing documentation for reconsideration July 8, 2023.

²⁰ *See*, email from NPFC to claimant requesting clarification of sum certain on reconsideration and the factual or legal basis for the request for reconsideration dated July 10, 2023.

²¹ *Id.*

²² *See*, email from claimant to NPFC providing documentation for reconsideration dated July 8, 2023.

3. **Payroll costs** – The claimant did not provide the labor category for each employee claimed, the claimant did not provide exact dates of service for each employee or detailed descriptions of what each employee was doing each day, and no rate sheet or actual payroll records were provided to support the rates claimed;
4. **Misc. Invoices and Loss of Profit costs** – The claimant provided no new information for the alleged \$20k in loss of profits therefore the NPFC only has what was originally submitted. The claimant provided \$18,817.21 in miscellaneous costs however the claimant provided no explanations, details or information on how the additional expenses are OPA compensable regardless of the claim category; and
5. **Landfill** – The invoice presented stated it was for (4) dumpsters used between February 14th and February 24th, 2022, at a rate of \$350.00 per dumpster. The claimant did not provide additional information supporting these charges other than stating they were used for fire debris.

No new information was provided in support of the loss of profits component of this claim. For the reasons articulated in the initial determination and below, the claim is denied because the claimant (1) lacked supporting documentation for all its claimed removal costs and (2) the claimant did not demonstrate a loss of profits and earning capacity. As such, the claim must be denied upon reconsideration.

III. ANALYSIS ON RECONSIDERATION:

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim in accordance with our governing claims regulations at 33 CFR 136.115(d).

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.²³ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁴ 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. The NPFC has thoroughly reviewed and considered the claimant's request for reconsideration.

²³ 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)).

²⁴ 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).

The claimant's request for reconsideration was broken down into five (5) categories of costs with an amount claimed for each category, however the claimant did not specify which categories were considered removal costs or which category was for loss of profits.²⁵ As a factual matter and as discussed in detail below, the NPFC finds that the claimant has not properly supported the costs claimed or provided detailed explanations for the services provided, including but not limited to, explanations regarding payment made to Alpha Omega Training & Compliance for services invoiced by Warren Environmental Services, names and labor categories of personnel costs claimed and/or incurred, detailed descriptions of the primary purpose of duties performed, demonstrating the response actions were "removal costs" as defined by OPA.

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."²⁶ 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."²⁷

The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.²⁸ Although the claimant submitted an additional 64 pages of information accompanying its request for reconsideration, very little of it purported to be evidence supporting its claimed costs. The claimant provided Gateway Marina invoice #2022 broken down in five categories, total amount for each category, and then attached various excel spreadsheets, various invoices, copies of checks, credit card receipts, and copies of timecards. NPFC meticulously reviewed and analyzed each of these documents yet could not establish a compensable removal cost under OPA. As explained in the initial determination, the claimant needed to provide rate sheets for pricing and terms and conditions for various charges like fuel surcharges, administrative markups, third party costs, daily field logs with names of employees, labor categories for employees, dates of service for all costs claimed, and daily detailed descriptions of work and actions performed per day, per person, per activity, and additional financial data or information to demonstrate an actual loss of profits for the amount claimed, to prove, by a preponderance of the evidence, their entitlement to compensation from the OSLTF.²⁹

As a factual matter and discussed in detail below, the NPFC finds that the claimant has not provided sufficient evidence to establish compensable removal costs nor has the claimant provided any new evidence to support its loss of profits.

Five Categories of costs presented on reconsideration:

²⁵ See, July 10, 2023 email to claimant requesting clarification of sum certain on reconsideration and the factual or legal basis for the request.

²⁶ 33 U.S.C. § 2701(31).

²⁷ 33 U.S.C. § 2701(30).

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

²⁹ See, initial determination dated May 22, 2023. See also, 33 CFR 136.105, 33 CFR 136.207.

1. Equipment Costs - \$85,653.50³⁰ – denied as unsupported by the record

- a. **Excavator costs equate to \$25,200.00** – the claimant did not provide a rate sheet to establish the published daily rate for this item nor did the claimant provide a detailed description for the daily use of this item; the claimant did not specify the exact dates this equipment was used; the claimant failed to provide an explanation or rate sheet to support a fuel surcharge for the excavator nor did the claimant provide sufficient fuel receipts per day to establish fuel costs for which to impose a fuel surcharge; and the claimant failed to provide the name of who operated the piece of equipment daily or how it arrived at the day rate for labor.
- b. **Skid Steer Bobcat costs equate to \$12,297.50** - the claimant did not provide a rate sheet to establish the published daily rate for this item nor did the claimant provide a detailed description for the daily use of this item; the claimant did not specify the exact dates this equipment was used; the claimant failed to provide an explanation or rate sheet to support a fuel surcharge for the excavator nor did the claimant provide sufficient fuel receipts per day to establish fuel costs for which to impose a fuel surcharge; and the claimant failed to provide the name of who operated the piece of equipment daily or how it arrived at the day rate for labor.
- c. **John Deere Backhoe costs equate to \$13,860.00** - the claimant did not provide a rate sheet to establish the published daily rate for this item nor did the claimant provide a detailed description for the daily use of this item; the claimant did not specify the exact dates this equipment was used; the claimant failed to provide an explanation or rate sheet to support a fuel surcharge for the excavator nor did the claimant provide sufficient fuel receipts per day to establish fuel costs for which to impose a fuel surcharge; and the claimant failed to provide the name of who operated the piece of equipment daily or how it arrived at the day rate for labor.
- d. **Marina Push Boat costs equate to \$6,576.00** - the claimant did not provide a rate sheet to establish the published daily rate for this item nor did the claimant provide a detailed description for the daily use of this item; the claimant did not specify the exact dates this equipment was used; the claimant failed to provide an explanation or rate sheet to support a fuel surcharge for the excavator nor did the claimant provide sufficient fuel receipts per day to establish fuel costs for which to impose a fuel surcharge; and the claimant failed to provide the names of the two personnel who operated the piece of equipment daily or how it arrived at the day rate for labor.

2. Payroll Costs - \$23,227.71³¹ – denied as unsupported by the record

This category of costs involves thirteen (13) individuals and payroll costs of \$23,227.71. The claimant has not provided the dates of service for each employee, the claimant has not provided the labor category for the pay rate paid to each person, the claimant has not provided a detailed description of duties performed by each

³⁰ See, Enclosure 2.

³¹ *Id.* at Payroll tab.

employee in order to establish that each person was performing OPA compensable response activities.

3. *Warren Invoiced Costs - \$29,395.15³² - denied as unsupported by the record*

This category involves alleged removal costs. The claimant provided a spreadsheet and a Warren Environmental invoice. The claimant did not provide a rate sheet for Warren Environmental that would establish Warren's published rates for personnel, material, and equipment. Notably, the claimant failed to provide the names and labor categories for any employees invoiced by Warren nor did the claimant provide a detailed description of duties performed daily by Warren, its employees, or subcontractors. Unfortunately, the NPFC is unable to determine if any of the costs invoiced were reasonable or necessary to mitigate the effects of the oil spill due to lack of supporting documentation and lack of details to determine the primary purpose of the actions performed or by whom and how the pricing was established.

Additionally, third party costs and disposal invoiced by Warren are equally not supported by the record. Lastly, while the claimant provided proofs of payment for Warren Environmental's invoiced costs, two of the three payments lack specificity for the specific costs the payments covered. Furthermore, check # 2615 in the amount of \$14,807.00 was stated to cover the first portion of Warren's costs however that check is made payable to Alpha Omega Training & Compliance vice Warren Environmental without explanation of why Warren was not paid directly. As such, the record is not clear on whether all the costs associated with Warren Environmental are in fact uncompensated removal costs since Warren Environmental did not receive \$14,807.00 directly for some of their services provided.

4. *Misc. Invoices /loss of revenue - \$38,817.21³³ - denied as unsupported by the record*

This category of costs involves various types of costs that lacked a detailed description of why these costs are claimed or how the claimant has determined they factor into the loss of profits category or how a given cost meets the definition of a compensable removal cost. The claimant originally requested \$20k in loss of profits which were denied as previously referenced.³⁴ As for the additional amount of \$18,817.21 claimed on reconsideration, the claimant did not provide any statements or narratives on the primary purpose for the increase therefore the NPFC is unable to determine what these costs represent and why. As such, these costs are denied in their entirety.³⁵

5. *Landfill costs - \$1,400.00³⁶ - denied as unsupported by the record*

This category of costs involves the cost associated with four (4) dumpsters that the claimant asserts in its submission were used for fire debris. The claimant has not provided an invoice for the dumpsters, pricing for each dumpster, dates the dumpsters

³² *Id.* at Warren Invoices tab.

³³ *Id.* at Misc. Invoices/loss of revenue tab.

³⁴ *See*, initial determination dated May 22, 2023.

³⁵ *See*, Enclosure 2 at Misc. Invoices/loss of revenue tab.

³⁶ *See*, Enclosure 2 at Landfill tab.

were used and charged, no proof of delivery or pick up and no proof of payment to whomever owned the dumpsters.

The initial determination explained what the claimant lacked in supporting documentation and what the NPFC required to prove by a preponderance of the evidence that it had a compensable claim. The reasons are consonant with the previous explanations about why the claim was denied. The information submitted by the claimant failed to provide the required proof that it had a compensable claim under OPA and its implementing regulations.

IV. CONCLUSION:

The authority for the NPFC to compensate claimants for removal costs and damages is found in OPA and its implementing regulations. Arterial to the claims adjudication process is the edict that the burden of proving compensability, at all times, rests with the claimant.³⁷ Despite a lengthy and robust iterative process between the NPFC and the claimant, there remained critical deficiencies in the materials submitted. Holistically, nearly all the costs claimed were not supported by evidence; and where some evidence to some costs was adduced, it was impossible to discern whether those specific costs were actually *uncompensated*³⁸ as the law requires.³⁹ As to the loss of profits portion of the claim, the claimant did not present any new evidence for the NPFC to consider.

As such, upon reconsideration, based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Gateway Marina's claim remains denied.

Claim Supervisor: ***Russell C. Proctor***



Date of Supervisor's review: ***8/11/23***

Supervisor Action: ***Denial Approved.***

³⁷ "The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim." 33 CFR 136.105.

³⁸ See, e.g., Enclosure 2 at Invoice Summary tab. With respect to payments made for the Warren Environmental invoiced costs totaling \$29,395.15, a total of three payments were made. Check # 2618 in the amount of \$17,202.89 and check # 2757 in the amount of \$3,780.15 were made payable to Warren Environmental however the third check # 2618 in the amount of \$14,807.00 was made payable to Alpha Omega Training & Compliance which consisted of costs invoiced by Warren that do not appear to have been paid to the correct business entity and as such, any remaining unpaid costs to Warren Environmental would not be considered uncompensated removal costs

³⁹ See, e.g., 33 U.S.C. § 2712(a)(4); 33 CFR Part 136.