

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPE22509-URC001
Claimant:	Michigan Spill Response
Type of Claimant:	OSRO
Type of Claim:	Removal Cost
Claim Manager:	(b) (6)
Amount Requested:	\$88,229.96
Action Taken:	Denial

EXECUTIVE SUMMARY:

On June 15, 2022, Michigan State Police reported to the National Response Center (NRC) a release of oil from a stormwater outfall into the Flint River, a navigable waterway of the United States.² The NRC notified the United States Environmental Protection Agency Region 5 (“USEPA” or “FOSC”) and Michigan Department of Environment, Great Lakes and Energy (“Michigan EGLE” or “SOSC”), which responded to the incident as the State On Scene Coordinator (SOSC).³ Michigan State Police completed a flyover and found that the sheen traveled about twelve miles downstream from the outfall.⁴

The USEPA, in its capacity as the Federal On-Scene Coordinator (FOSC) for the incident, arrived on site with its Superfund Technical Assessment and Response Team (START) contractors late in the afternoon of June 15, 2022.⁵ In addition to federal and state authorities, local authorities also responded. The Genesee County Hazmat Team called out Michigan Spill Response (“MSR” or “Claimant”) to clean up the spill.⁶ Boom was deployed on the Flint River in several locations. MSR brought on subcontractors to assist.

An investigation by Michigan EGLE traced the oil back to Lockhart Chemical Company (Lockhart).⁷ Lockhart’s secondary containment system appears to be a source of the discharge of oil to the outfall and, in turn, the river. The claimant alleged that the source of the oil was a holding tank at Lockhart’s property in Flint, Michigan.⁸ In accordance with the Oil Pollution

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 NRC Report Number 1338866 dated June 15, 2022.

³ United States Environmental Protection Agency (USEPA) POLREP #1 dated June 18, 2022.

⁴ United States Environmental Protection Agency (USEPA) POLREP #1 dated June 18, 2022.

⁵ *Id.*

⁶ Genesee County Hazmat letter dated March 10, 2023 confirms that Genesee called MSR to respond to the incident. The letter further states all work performed was directed by both the FOSC and the SOSC.

⁷ United States Environmental Protection Agency POLREP #3 dated June 24, 2022, p.3.

⁸ Initial claim submission, Optional OSLTF Claim Form dated December 12, 2022.

Act of 1990 (OPA),⁹ Lockhart, the owner and operator of the facility and its secondary containment system that discharged the oil, was identified as the responsible party (RP) for the incident.¹⁰

After several days into the spill response, Lockhart relieved MSR of the job on June 20, 2022. MSR demobilized the same day.¹¹ It is unclear when the response ended, as no final Polrep was issued, but work continued at least through the beginning of July 2022.¹²

Via Invoice dated July 8, 2022, MSR submitted its costs to Lockhart totaling \$393,188.61. The RP paid MSR \$200,000 and the RP's insurer, Chubb, paid MSR \$104,958.65, leaving a balance of \$88,229.96 unpaid. MSR tried to obtain payment of the balance from both Lockhart and Chubb, but Lockhart declared Chapter 7 bankruptcy¹³ and Chubb denied payment. Therefore, MSR submitted this claim to the NPFC for reimbursement.

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that the claim must be denied.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On June 15, 2022, Michigan State Police reported to the National Response Center a release of oil from a stormwater outfall in the Flint River, a navigable waterway of the United States. Michigan State Police performed a flyover and determined that the sheen traveled about twelve miles downstream from the outfall. The United States Environmental Protection Agency (USEPA), in its capacity as the Federal On-Scene Coordinator (FOSC) for the incident, arrived on site with Superfund Technical Assessment and Response Team (START) contractors late in the afternoon of June 15, 2022. The claimant alleged that the source of the oil was a holding tank at Lockhart Chemical Company (Lockhart) in Flint, Michigan.¹⁴ A Michigan EGLE investigation determined that the source of the oil was Lockhart's secondary containment system.¹⁵

Responsible Party

Both the owner and operator of a facility that discharges oil are Responsible Parties as defined by OPA.¹⁶ The FOSC and the SOSOC identified Lockhart Chemical Company, the owner and operator of the facility and its secondary containment system, as the Responsible Party (RP)

⁹ 33 U.S.C. § 2701(32).

¹⁰ United States Environmental Protection Agency POLREP #3 dated June 24, 2022.

¹¹ MSR Daily Field Notes attached to initial claim submission dated December 13, 2022.

¹² USEPA site profile attached to the initial claim submission dated December 13, 2022.

¹³ Notice of Chapter 7 Bankruptcy Case, U.S. Bankruptcy Court, Western District of Pennsylvania, filed October 10, 2022. According to the Optional OSLTF claim form submission, MSR filed as a creditor with no priority in the bankruptcy case on December 12, 2022.

¹⁴ Initial claim submission, Optional OSLTF Claim Form dated December 12, 2022.

¹⁵ United States Environmental Protection Agency POLREP #3 dated June 24, 2022.

¹⁶ 33 U.S.C. § 2701(32).

for the incident.¹⁷ On December 14, 2022, the National Pollution Funds Center (NPFC) issued an RP Notification Letter to Lockhart Chemical Company via certified mail.¹⁸ 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.

Recovery Operations

The Genesee County Hazmat Team called out MSR to clean up the spill.¹⁹ MSR brought on subcontractors to assist. MSR responded from June 15, 2022 through June 20, 2022, when it was released by Lockhart.²⁰

Containment and/or sorbent boom was deployed and maintained on the Flint River at five locations, including at the storm sewer outfall and four other sites downstream. Oil recovery activities included the use of oil skimmers, containment/sorbent boom, sorbent pads and vacuum trucks through the beginning of July, recovering over 14,000 gallons of oil/water mixture. All visible oil product was removed from containment at the outfall location until the source was secured and no more product leaked from the outfall. Contractors cleaned the embankment using high volume, low pressure wash. It is unclear when the response ended; however, EPA transitioned oversight of the spill response to the state at the beginning of July.²¹

II. CLAIMANT AND RP:

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

Via Invoice dated July 8, 2022, MSR submitted its costs to Lockhart totaling \$393,188.61. Lockhart paid MSR \$200,000 and their insurer, Chubb, paid MSR \$104,958.65, denying the remaining balance of \$88,229.96 as not covered by the insurance policy.²² Lockhart later declared Chapter 7 bankruptcy²³.

III. CLAIMANT AND NPFC:

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. After more than 90 days passed without payment, on December 13, 2022, Claimant presented its claim to the National Pollution Funds Center (NPFC) for alleged removal costs totaling \$88,229.96.²⁴

¹⁷ United States Environmental Protection Agency POLREP #3 dated June 24, 2022.

¹⁸ NPFC RP Notification Letter dated December 14, 2022 sent via certified mail receipt # 7017 1450 0001 9566 0154.

¹⁹ Initial claim submission, Optional OSLTF Claim Form dated December 12, 2022.

²⁰ MSR Daily Field Notes attached to initial claim submission dated December 13, 2022.

²¹ USEPA site profile attached to the initial claim submission dated December 13, 2022.

²² Email from Chubb to MSR dated October 5, 2022, submitted with the initial claim submission to NPFC.

²³ Notice of Chapter 7 Bankruptcy Case, U.S. Bankruptcy Court, Western District of Pennsylvania, filed October 10, 2022. According to the Optional OSLTF claim form submission, MSR filed as a creditor with no priority in the bankruptcy case on December 12, 2022.

²⁴ MSR original claim submission dated December 13, 2022.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁵ 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.²⁶ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁷ 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.²⁸ An RP's liability is strict, joint, and several.²⁹ 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."³⁰ 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."³¹ 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."³²

²⁵ 33 CFR Part 136.

²⁶ 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)).

²⁷ 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).

²⁸ 33 U.S.C. § 2702(a).

²⁹ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³⁰ *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).

³¹ 33 U.S.C. § 2701(31).

³² 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).³³ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁴ 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.³⁵

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 (NCP).
- (d) That the removal costs were uncompensated and reasonable.³⁶

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.”³⁷

In its claim submission to the NPFC, MSR stated that it had not yet obtained a copy of the FOSC final report and had reached out to the two USEPA officials who oversaw the spill response in order to obtain it. MSR suggested that it might be more expedient if the NPFC reached out to the USEPA FOSCs and provided the contact information for them.³⁸ Since MSR was unable to obtain FOSC coordination, NPFC reached out to the USEPA FOSCs on several occasions querying whether MSR’s actions were directed by the FOSC or were determined to be consistent with the NCP.³⁹

The Lead USEPA FOSC, Mr. (b) (6), informed the NPFC that he was not on-scene until after MSR was released from the spill response, but it is his understanding that there was mismanagement of resources, personnel and a lack of response efficiency by MSR.⁴⁰ The NPFC was not able to obtain the FOSC’s official position regarding MSR’s response actions. The NPFC notified MSR of this and explained that MSR bears the burden of demonstrating that the actions undertaken were directed by the FOSC or were determined by the FOSC to be consistent with the National Contingency Plan (NCP). The NPFC further explained that without the

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

³⁴ 33 CFR Part 136.

³⁵ 33 CFR 136.105.

³⁶ 33 CFR 136.203; 33 CFR 136.205.

³⁷ 33 U.S.C. § 2701(30).

³⁸ MSR claim submission email to NPFC dated December 13, 2022.

³⁹ NPFC sent emails to the USEPA FOSCs on December 14, 2022, January 11, 2023, January 30, 2023, February 10, 2023, and March 8, 2023, in an effort to obtain an opinion as to MSR’s response actions.

⁴⁰ Email from USEPA FOSC to NPFC dated January 12, 2023.

required FOSC coordination, the claim would be denied.⁴¹ In response, the Claimant provided a letter from the Genesee County Hazmat Team dated March 10, 2023. The letter confirms that Genesee County called MSR to respond to the incident. The letter further states that all work performed was directed by both the FOSC and the SOSC. However, given the contradiction in the Lead FOSC's previous statement regarding issues with MSR's response and the lack of direct evidence of such FOSC coordination, the county hazmat team's statement carries little evidentiary weight. The NPFC does not accept this letter as sufficient documentation of FOSC direction or determination regarding MSR's actions.

While it is possible that some of MSR's actions may have been consistent with the NCP, MSR has not shown which of its response actions were either directed by the USEPA FOSC or were determined by the USEPA FOSC to be consistent with the NCP. As such, any actions undertaken that were associated with the mismanagement of resources or based on a lack of response efficiency as asserted by the USEPA FOSC, would not be compensable.

Based on the foregoing, MSR has failed to prove all elements of its claim⁴² and has failed to provide evidence that the claimed costs for the actions performed were at the direction of the FOSC or were determined by the FOSC to be consistent with the NCP.⁴³

VI. CONCLUSION:

Based on the NPFC's comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Michigan Spill Response's request for uncompensated removal costs is denied.

	(b) (6)
Claim Supervisor:	(b) (6)
Date of Supervisor's review:	6/28/23
Supervisor Action:	<i>Denial Approved</i>
Supervisor's Comments:	

⁴¹ Email from NPFC to MSR dated April 4, 2023.

⁴² 33 CFR §136.105(a).

⁴³ 33 CFR §§136.203(c) & 205.