

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 on Reconsideration

EXECUTIVE SUMMARY:

On June 15, 2022, at approximately 08:00 local time, Michigan State Police reported to the United States Coast Guard's ("USCG") 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", "EPA" 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

USEPA Federal On-Scene Coordinators (FOSC) arrived on site with 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.⁶ The Genesee County Hazmat Team contacted Michigan Spill Response ("MSR" or "Claimant"). to clean up the spill.⁷ The RP hired MSR to respond to the incident.⁸ MSR hired subcontractors to assist.⁹

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 *Id.*

⁵ *Id.* Several FOSCs were identified in the POLREP.

⁶ United States Environmental Protection Agency (USEPA) POLREP #1, section 4, dated June 18, 2022.

⁷ *See*, Optional OSLTF Claim Form submitted by claimant dated December 12, 2022. *See also*, Genesee County letter dated March 10, 2023.

⁸ MSR Work Authorization and Acknowledgment to Proceed Agreement signed by the RP dated June 16, 2022.

⁹ *See*, MSR OSLTF Claim Form, question 2, dated December 12, 2022.

The claimant alleged that the source of the oil was a holding tank at Lockhart's property in Flint, Michigan.¹⁰ An investigation by Michigan EGLE traced the oil back to Lockhart Chemical Company (Lockhart).¹¹ Lockhart's secondary containment system appears to be the pathway of the discharge of oil to the outfall and, in turn, the river.¹² In accordance with the Oil Pollution Act of 1990 (OPA),¹³ Lockhart, the owner and operator of the facility that discharged the oil, was identified as the responsible party (RP) for the incident.¹⁴

After several days into the spill response, the RP released MSR from the job on June 20, 2022. MSR demobilized the same day.¹⁵

MSR submitted its costs to the RP totaling \$393,188.61 on July 8, 2022. The RP paid MSR \$200,000 and the RP's insurer paid MSR \$104,958.65, leaving an unpaid balance of \$88,229.96. MSR tried to obtain payment of the balance from both Lockhart and its insurer but Lockhart declared Chapter 7 bankruptcy¹⁶ and the insurer denied payment. Subsequently, 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 on reconsideration.

I. CLAIM HISTORY:

On December 13, 2022, MSR presented its original claim to the NPFC for uncompensated removal costs totaling \$88,229.96. The NPFC thoroughly reviewed the original claim, all information provided by MSR and obtained independently, the relevant statutes and regulations, and ultimately denied the claim because MSR did not show that any of its response actions were either directed by the USEPA FOSC or were determined by the USEPA FOSC to be consistent with the NCP.¹⁷ The NPFC's initial determination is hereby incorporated by reference.

II. REQUEST FOR 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.¹⁸ The claimant has the burden of providing

¹⁰ MSR initial claim submission, Optional OSLTF Claim Form, question 10, dated December 12, 2022.

¹¹ United States Environmental Protection Agency POLREP #3 dated June 24, 2022, p.3.

¹² United States Environmental Protection Agency POLREP #1 dated June 18, 2022.

¹³ 33 U.S.C. § 2701(32).

¹⁴ United States Environmental Protection Agency POLREP #3 dated June 24, 2022.

¹⁵ MSR Daily Field Notes attached to initial claim submission dated December 13, 2022. It is unclear when the response ended, as no final POLREP was issued, but work according to the USEPA site profile provided by the claimant, continued at least through the beginning of July 2022.

¹⁶ 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.

¹⁷ See, 33 CFR 136.203(c); 136.205. See also, NPFC determination issued June 28, 2023.

¹⁸ 33 CFR 136.115(d).

all evidence, information, and documentation deemed necessary by NPFC's Director to support the claim.¹⁹ 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.²⁰

On August 24, 2023, the NPFC received MSR's timely request for reconsideration.²¹ MSR did not provide any new documentation but requested an extension of time to obtain and provide information. MSR and the NPFC executed a tolling agreement to allow more time for MSR to communicate with the USEPA and to provide additional information supporting the claim.²² This agreement allowed MSR until March 7, 2024 to provide documentation to support its request for reconsideration.. MSR did not provide any additional documentation.

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). The claimant provided arguments but no additional support for its request for reconsideration. The NPFC thoroughly reviewed and considered the Claimant's arguments in its request for reconsideration.

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, but 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.

In its request for reconsideration, MSR posits several arguments. It first argues that USEPA FOSC, (b) (6), was on-scene and "was integrally involved in supervising and directing the work of all parties involved in the spill cleanup" while MSR was on site.²⁵ MSR references a

¹⁹ 33 CFR 136.105(a).

²⁰ *Id.*

²¹ Email from (b) (6) to NPFC dated August 24, 2023. The intent of the claimant's email was initially unclear, so the NPFC requested clarification. *See*, email from NPFC to (b) (6) dated August 24, 2023. The claimant responded stating that the email was a request for reconsideration.

²² Tolling agreement dated September 13, 2023.

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).

²⁵ OSLTF Response and Request for Extension letter dated August 24, 2023.

written statement it previously provided in its initial claim, from the Genesee County Emergency Manager attesting that the USEPA supervised and directed all work including MSR's.²⁶ The claimant did not provide any documentation from the EPA. The NPFC communicated with the EPA on multiple occasions during the adjudication of this claim, specifically asking whether or not the EPA directed the actions of the claimant or whether it could conclude that the actions taken by the claimant were consistent with the NCP.²⁷ Despite acknowledging the request, the EPA opted not to provide a statement that it directed the claimant's actions or that the actions the claimant took were consistent with the NCP.

The NPFC analyzed the statement of the claimant and the letter it provided as evidence to support its claim and weighed it against the other evidence in the administrative record. Notably, the USEPA did not mention the claimant or the claimant's actions in any of its pollution reports. Also, importantly, the claimant did not provide any documentation from the EPA to support its claim that its actions were directed by the EPA, or that their actions were consistent with the NCP. Moreover, when the NPFC contacted the USEPA to discuss the claimant's actions, the FOSC opted not to provide a statement that it directed the claimant's actions or that the claimant's actions were consistent with the NCP.²⁸ The county's manager statement is insufficient proof that the FOSC directed the actions of the claimant when weighed against the remainder of the administrative record. The claimant has not carried its burden of proof in accordance with the claim regulations.

MSR next challenges the NPFC's reliance on "hearsay allegations" by (b) (6) (USEPA FOSC) regarding issues with MSR's response since Mr. (b) (6) did not arrive on scene until after MSR had been released.²⁹ However, the NPFC accepted Mr. (b) (6) statement because the NPFC found that Mr. (b) (6)'s statement carried substantial weight as a representative of the USEPA corps of FOSCs who responded to the incident in person. Since the regulations specifically require a determination that a claimant's removal actions are directed by the FOSC or were found by the FOSC to be consistent with the NCP, similar to the analysis above, the NPFC must rely both on the contemporaneous and concomitant pollution reports made by the USEPA, but also place weight on the absence of any other documentation provided by the EPA to support the claimant's submission. Again, notably, the NPFC inquired with the EPA on whether it would submit a statement regarding the claimant's actions and their consistency with the NCP. It did not. In an effort to ensure it further probed the claimant's assertions, the NPFC asked the USEPA for a statement from (b) (6) or any other FOSC who oversaw the response while MSR was working. The USEPA opted not to provide any additional statements.

MSR also argues that the USEPA reports contain false statements and flawed timelines.³⁰ MSR argues that it was involved in every Unified Command meeting, which included the USEPA. NPFC considered this information and weighed it against the information in the

²⁶ OSLTF Response and Request for Extension letter dated August 24, 2023 referencing a Genesee County Hazmat Team Letter dated March 10, 2023, attached to April 11, 2023 email from claimant to NPFC.

²⁷ See, email exchanges from December 2022 to March 2023.

²⁸ If the claimant's actions were not found by the FOSC to be consistent with the NCP, it would be illogical to conclude that those very same actions were directed by the FOSC.

²⁹ OSLTF Response and Request for Extension letter dated August 24, 2023.

³⁰ OSLTF Response and Request for Extension letter dated August 24, 2023.

numerous USEPA POLREPs. The pollution reports represent the official records of the response. None of the pollution reports mention the claimant.

MSR further argues that the RP did not have the authority to direct the remediation and implies that only the USEPA had the authority to release MSR from the job.³¹ The RP is responsible for the incident. The FOSC oversees the response of the RP but unless necessary, does not control who the RP hires and fires. The NPFC finds this argument has no bearing on the issue of whether or not the EPA directed the claimant's removal actions. If anything, assuming MSR's position is accurate, then it would follow that since the EPA did not communicate with the claimant, then it likely was not directing the claimant's removal actions.

The primary reason for the NPFC's initial denial of MSR's claim was that there was no evidence that the USEPA FOSC directed MSR's actions for which it claimed uncompensated costs, nor did the FOSC determine that these actions were performed in accordance with the NCP. MSR provided no additional documentation in support of its request for reconsideration and the initial claim lacked the requisite documentation regarding FOSC direction or a determination by the FOSC that MSR's actions were performed in accordance with the NCP. As this issue has not been remedied by the claimant on reconsideration, the claim must remain denied.

Since MSR provided no additional documentation regarding FOSC direction or a determination by the FOSC that MSR's actions were performed in accordance with the NCP, the claim still lacks the required evidence to support payment. Therefore, the initial claim determination stands and the claim is denied on reconsideration.

IV. CONCLUSION:

The NPFC has thoroughly reviewed the entirety of the administrative record, analyzed the applicable law and regulations, and as discussed in detail above and previously, has concluded that the claimant has not demonstrated by a preponderance of the evidence, that it is entitled to compensation from the OSLTF. NPFC specifically finds that MSR failed to provide evidence that the claimed costs for the actions performed were at the direction of the USEPA FOSC or were determined by the FOSC to be consistent with the NCP. As such, the claim must be denied on reconsideration.

Claim Supervisor:	(b) (6) (b) (6)	R	<i>Russell C. Proctor</i>
Date of Supervisor's review: 9/20/2024			
Supervisor Action: <i>Denial Approved</i>			

³¹ OSLTF Response and Request for Extension letter dated August 24, 2023, p. 2 of 3.