

## CLAIM SUMMARY / DETERMINATION<sup>1</sup>

<b>Claim Number:</b>	UCGP923013-URC001
<b>Claimant:</b>	Daniel J. Keating Company
<b>Type of Claimant:</b>	Corporate
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$89,510.23
<b>Action Taken:</b>	Offer in the amount of \$70,707.77

### **EXECUTIVE SUMMARY:**

On August 23, 2022, at approximately 12:00 local time, Mr. (b) (6) of the United States Environmental Protection Agency (USEPA) Region III Superfund Division, made a report to the National Response Center (NRC) that a sheen was discovered coming from a large construction site due to unknown reasons.<sup>2</sup>

At approximately, 1300 local time, United States Coast Guard (USCG) Sector Delaware Bay, in its capacity as the Federal On Scene Coordinator (FOSC) for the incident, received a National Response Center (NRC) notification of a large oil discharge that appeared to be emanating from a construction site at the intersection of Delaware Avenue and Spring Garden Avenue.<sup>3</sup> The oil was coming from a storm drain which leads to the Delaware River, a navigable waterway of the United States.<sup>4</sup> The FOSC, Philadelphia Fire and Hazmat, and Philadelphia Water Department (PWD) responded to the scene. PWD took samples of the water and contractors began clean-up operations.<sup>5</sup>

United States Coast Guard Sector Delaware Bay, Philadelphia Fire and Hazmat, and Philadelphia Water Department were unable to identify a responsible party for this incident. No responsible party (RP) has been identified.

Daniel J. Keating submitted a removal cost claim to the National Pollutions Funds Center (NPFC) in the amount of \$89,510.23 on April 25, 2023.<sup>6</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable laws and regulations, and after

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<sup>1</sup> 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.

<sup>2</sup> NRC Report # 1345295 dated August 23, 2022.

<sup>3</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>4</sup> *Id.*

<sup>5</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>6</sup> *See*, Daniel J. Keating claim submission dated April 13, 2023, pages 1-2, OSLTF Claim Form.

Careful consideration has determined that \$70,707.77 is compensable and offers this amount as full and final compensation of this claim.

## **I. INCIDENT AND RECOVERY OPERATIONS:**

### ***Incident***

On August 23, 2022, at approximately 12:00 local time, Mr. (b) (6) of the United States Environmental Protection Agency (USEPA) Region III Superfund Division, made a report to the National Response Center (NRC) that a sheen was discovered coming from a large construction site due to unknown reasons.<sup>7</sup>

At approximately, 1300 local time, United States Coast Guard (USCG) Sector Delaware Bay, in its capacity as the Federal On Scene Coordinator (FOSC) for the incident, received a National Response Center (NRC) notification of a large oil discharge from a construction site at the intersection of Delaware Avenue and Spring Garden Avenue.<sup>8</sup> The oil was coming from a storm drain which leads to the Delaware River, a navigable waterway of the United States.<sup>9</sup> The FOSC, Philadelphia Fire and Hazmat and Philadelphia Water Department (PWD) responded to the scene. PWD took samples of the water and contractors began clean-up operations.<sup>10</sup>

The supervisor informed Sector Delaware Bay that the construction contract included removing a section of a storm drain. Once removal began, the construction workers noticed a black substance releasing from the storm drain that lead to the Delaware River. The construction workers immediately ceased their work and called their environmental contractors for clean-up.<sup>11</sup>

### ***Recovery Operations***

The FOSC held joint conferences with contractors to ensure all parties were on the same page and observed the pollution mitigation actions to determine that the actions taken were consistent with the National Contingency Plan (NCP).<sup>12</sup> On August 23, 2022, clean-up operations began as response contractors, Fredrick Construction Co., Inc (Fredrick) and JnJ Environmental Inc (JnJ), arrived on scene to pump oil into a vacuum (vac) truck and deploy sorbents in the water.<sup>13</sup>

On August 24, 2022, JnJ removed and replaced absorbents as needed. Upon completion of their site activities, all contaminated absorbents were containerized.<sup>14</sup> On August 25, 2022, sorbent boom was placed was placed around the opening of the stormwater outfall to catch any

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<sup>7</sup> NRC Report # 1345295 dated August 23, 2022.

<sup>8</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>9</sup> *Id.*

<sup>10</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>11</sup> *Id.*

<sup>12</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>13</sup> *See*, June 26, 2023 email to NPFC including an attachment containing a Daniel J. Keating daily log for actions on Tuesday, August 23, 2022; see pages 50-51 of 63.

<sup>14</sup> *See*, June 26, 2023 email to NPFC including an attachment containing a letter dated June 13, 2023 from JnJ to Daniel Keating outlining services provided; see page 35 of 63.

discharge directly from the storm drain.<sup>15</sup> On August 26, 2022, boom and sorbents remained in place since they were not overly contaminated. On August 30, 2022, Walker Diving removed the river's turbidity curtain for decontamination and was reinstalled the following day on August 31, 2022.<sup>16</sup>

## **II. CLAIMANT AND NPFC:**

Daniel J. Keating Company presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$89,510.23.<sup>17</sup> The claim included an OSLTF claim form, contractor invoices, contractor rate sheets, work orders, employee timecards, cost receipts, and proofs of payment.<sup>18</sup>

On May 23, 2023, the NPFC requested additional information from Daniel J. Keating Company relative to their costs claimed.<sup>19</sup> The NPFC offered a second tolling agreement to extend the timeframe to submit the necessary cost documentation.<sup>20</sup> On June 9, 2023 & June 26, 2023, Daniel J. Keating replied to the NPFC's request for additional information and provided an accounting system worksheet of costs and applicable vendor rate sheets.

On September 8, 2023, the NPFC issued a second additional information request.<sup>21</sup> The NPFC offered another tolling agreement to extend the timeframe to submit the necessary cost documentation.<sup>22</sup> On October 19, 2023, Daniel J. Keating replied to the NPFC's request for additional information and provided disposal manifest documentation, diver rates, D'Angelo Bros Inc 7958W related charges, energy & insurance surcharge rates, and a Grainger purchase explanation.<sup>23</sup>

## **III. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>24</sup> 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.<sup>25</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions,

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<sup>15</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>16</sup> Appendix B, D'Angelo Bros Extra Work order, pages 10, 12 of 21

<sup>17</sup> See, Daniel J. Keating claim submission dated April 13, 2023, pages 1-2, OSLTF Claim Form.

<sup>18</sup> See, Daniel J. Keating claim Submission dated April 13, 2023 and all additional information provided.

<sup>19</sup> Email to Claimant dated May 23, 2023.

<sup>20</sup> Executed NPFC Tolling Agreement signed June 5, 2023.

<sup>21</sup> Email to Claimant dated September 8, 2023.

<sup>22</sup> Executed NPFC Tolling Agreement signed September 18, 2023.

<sup>23</sup> Email from Claimant to NPFC dated October 19, 2023.

<sup>24</sup> 33 CFR Part 136.

<sup>25</sup> 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)).

or conclusions reached by other entities.<sup>26</sup> 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:**

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>27</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>31</sup>

The NPFC analyzed each of these factors and determined some of the costs incurred by Daniel J. Keating Company and submitted 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 pricing and all costs were supported by adequate documentation which included invoices and/or proof of payment where applicable.

The amount of compensable removal costs is \$70,707.77 while \$18,802.46 is denied by contractor as follows:

#### **JnJ Environmental – Invoice 1922 – Total denied \$3,832.00**

1. On August 24, 2022, JnJ invoiced (4) Field Technicians at 7 hours each, for a total amount of \$2,856.00.<sup>32</sup> The JnJ daily worksheet for 8/24/22, contained three unidentified Field Technicians that were listed as “Amigos (3)”.<sup>33</sup> Based on the lack of names for 3 of

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<sup>26</sup> 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).

<sup>27</sup> See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>28</sup> 33 CFR Part 136.

<sup>29</sup> 33 CFR 136.105.

<sup>30</sup> USCG Sector Delaware email to NPFC dated November 28, 2023.

<sup>31</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>32</sup> See, Appendix A, JnJ Environmental Inc Invoice #1922 dated August 30, 2022; and Encl (3) Summary of Costs spreadsheet, JnJ Environmental tab, line 23.

<sup>33</sup> See, email and associated attachment from Daniel J. Keating dated June 26, 2023; see JnJ daily worksheet for 8/24/22 on page 46 of 63.

the 4 technicians claimed, the NPFC must deny the costs for three Field Technicians in the total amount of \$2,142.00 as unsubstantiated;<sup>34</sup>

2. On August 24, 2022, JnJ invoiced Drum Solids for disposal in the amount of \$1,650.00.<sup>35</sup> The JnJ rate schedule does not have Drum Solids for Disposal as an identified cost.<sup>36</sup> On October 20, 2023, JnJ sent an email to NPFC stating that the Drum Solids for disposal is not a time and materials type of item and therefore not included as part of their rate sheet. JnJ stated the charge varies based on the quantity of drums.<sup>37</sup> The NPFC used the Eldridge invoice provided by JnJ on October 20, 2023- in order to determine a documented cost amount therefore, the NPFC allowed \$75.00 per drum charged by Eldridge to JnJ for drum disposal on its invoice. All amounts in excess of \$75.00 per drum is denied as not supported by the record. The total amount denied is \$900.00;<sup>38</sup>
3. On August 24, 2022, JnJ invoiced, Transportation to Disposal Facility in the amount of \$540.00.<sup>39</sup> The JnJ rate schedule provided does not list Transportation to Disposal Facility as an identified cost.<sup>40</sup> On October 19, 2023, Daniel J. Keating responded to the NPFC's requests for additional information and stated that JnJ Environmental has failed to respond and has failed to provide an explanation on how the transportation costs were determined.<sup>41</sup> The NPFC denies the cost of Transportation to the Disposal Facility since no documentation or justification for how the price was determined has been provided. The total amount denied is \$540.00.<sup>42</sup>
4. On August 24, 2022, JnJ invoiced, Chest Waders at a price of \$135.00 each x 2 in the total amount of \$270.00.<sup>43</sup> The JnJ rate schedule identifies the daily price of chest waders at \$10.00 each or the replacement price of chest waders at \$175.00 each.<sup>44</sup> Based on the JnJ Environmental rate sheet pricing for daily rental of chest waders, the NPFC allows \$10.00 each and denies the price differential of \$250.00.<sup>45</sup>

***D'Angelo Bros. – Invoice 7958W-00105 – Total denied \$2,954.91***

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<sup>34</sup> See, Encl (3) Summary of Costs spreadsheet, JnJ Environmental tab, line 23.

<sup>35</sup> See, Appendix A, JnJ Environmental Inc Invoice #1922 dated August 30, 2022.

<sup>36</sup> See, email and associated attachment from Daniel J. Keating dated June 26, 2023; see JnJ rate sheet on pages 41-44 of 63.

<sup>37</sup> See, email from JnJ to NPFC dated October 20, 2023 @ 11:53am; and a second email to NPFC @ 11:56am with a drum disposal receipt from Eldridge that shows the disposal and price by drum.

<sup>38</sup> See, email from JnJ to NPFC dated October 20, 2023 @ 11:56am with a drum disposal receipt from Eldredge Inc. invoice; and See, Encl (3) Summary of Costs spreadsheet, JnJ Environmental tab, line 38.

<sup>39</sup> See, Appendix A, JnJ Environmental Inc Invoice #1922 dated August 30, 2022.

<sup>40</sup> See, email and associated attachment from Daniel J. Keating dated June 26, 2023; see JnJ rate sheet on pages 41-44 of 63.

<sup>41</sup> See, email from Daniel J. Keating dated October 19, 2023 that states next to heading JnJ Environmental, left several emails, texts and voice mails but received no response.

<sup>42</sup> See, Encl (3) Summary of Costs spreadsheet, JnJ Environmental tab, line 39.

<sup>43</sup> Appendix A, JnJ Environmental Inc Invoice #1922

<sup>44</sup> See, email and associated attachment from Daniel J. Keating dated June 26, 2023; see JnJ rate sheet on page 43 of 63.

See, email and associated attachment from Daniel J. Keating dated June 26, 2023; see JnJ rate sheet on pages 41- 44 of 63.

<sup>45</sup> See, Encl (3) Summary of Costs spreadsheet, JnJ Environmental tab, line 42.

1. D'Angelo Bros., Inc. invoice #7958W-00105, invoiced Walker Diving under its Subcontractors section in the total amount of \$11,190.00.<sup>46</sup> Upon adjudication of the itemized costs, the NPFC has determined that only \$10,724.51 is supported by appropriate documentation and as such, the NPFC is denying the unidentified difference of \$465.49 as unsupported by the record.<sup>47</sup>
2. D'Angelo Bros., Inc. invoice # 7958W-00105, invoiced Overhead & Profit on subcontractor invoicing at a rate of 5% markup based on total subcontractor costs invoiced which resulted in the total amount of \$1,374.50.<sup>48</sup> Since no contracted rate sheet was provided that outlined terms and conditions with a provision for Overhead & Profit markup on subcontractor invoicing, \$1,374.50 is denied as unsupported by the record.<sup>49</sup>
3. D'Angelo Bros., Inc. invoice # 7958W-00105, invoiced Overhead & Profit markup on its own total invoiced costs at a rate of 15% in the total amount of \$1,114.78.<sup>50</sup> Since no contracted rate sheet was provided that outlined terms and conditions with a provision for Overhead & Profit markup on D'Angelo Bros. invoiced costs in the total amount of \$1,114.78 is denied as unsupported by the record.<sup>51</sup>
4. D'Angelo Bros., Inc. invoice # 7958W-00105 requested a total amount of \$37,702.00 however upon adjudication, the invoice total comes to \$37,701.86 and as such, the NPFC added the unidentified difference of \$.14 which it subsequently denied as unsupported by the record.<sup>52</sup>

***Daniel Keating – Total denied \$3,395.29***

1. Daniel J. Keating requested reimbursement of the labor costs for (b) (6) in the amount of \$3,278.80.<sup>53</sup> The claimant has failed to provide a time card for (b) (6) and as such, all labor costs claimed are denied.<sup>54</sup> Lastly, the NPFC denies \$116.49 in undocumented labor costs.<sup>55</sup>

***(b) (6) (ACV) – Total denied \$117.54***

<sup>46</sup> See, Appendix B, D'Angelo Bros Invoice #7958W-00105, page 9 of 21.

<sup>47</sup> See, Encl (3) Summary of Costs spreadsheet, D'Angelo Bros tab, line 57.

<sup>48</sup> Appendix B, D'Angelo Bros Invoice #7958W-00105, page 9 of 21.

<sup>49</sup> See, Encl (3) Summary of Costs spreadsheet, D'Angelo Bros tab, line 33.

<sup>50</sup> Appendix B, D'Angelo Bros Invoice #7958W-00105, page 9 of 21.

<sup>51</sup> See, Encl (3) Summary of Costs spreadsheet, D'Angelo Bros tab, line 34.

<sup>52</sup> See, Encl (3) Summary of Costs spreadsheet, D'Angelo Bros tab, line 35.

<sup>53</sup> Appendix F, Daniel J. Keating Company Labor Costs, page 1 of 6.

<sup>54</sup> See, Encl (3) Summary of Costs spreadsheet, Daniel J. Keating Tab, line 8.

<sup>55</sup> See, Encl (3) Summary of Costs spreadsheet, Daniel J. Keating Tab, line 14.

1. Daniel J. Keating submitted a request for Santucci's Pizza in the amount of \$117.54.<sup>56</sup> The claimant stated food was for all employees working however there is no justification for the meal expense for local response workers and as such, meal expenses are denied.<sup>57</sup>

***ACV Environmental – Invoice 1332166 – Total denied \$8,502.72***

1. ACV Environmental invoice # 1332166, invoiced personnel, materials and equipment costs in the amount of \$8,502.72.<sup>58</sup> The services rendered occurred on November 29, 2022, and are associated with a separate incident, therefore the costs are denied.<sup>59</sup>

**V. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Daniel J. Keating Company request for uncompensated removal costs is approved in the amount of **\$70,707.77**.

This determination is a settlement offer,<sup>60</sup> the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>61</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>62</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

**(b) (6)**

Claim Supervisor: **(b) (6)**

Date of Supervisor's review: *1/23/24*

Supervisor Action: *Offer Approved*

**ACCEPTANCE / RELEASE AGREEMENT**

<sup>56</sup> Appendix G, Santucci's Pizza receipt dated August 24, 2022.

<sup>57</sup> See, Encl (3) Summary of Costs spreadsheet, **(b) (6)** tab, line 3.

<sup>58</sup> Appendix H, ACV Environmental Invoice #1332166, page 2 of 3.

<sup>59</sup> See, Encl (3) Summary of Costs spreadsheet, ACV Environmental tab.

<sup>60</sup> 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).

<sup>61</sup> 33 CFR § 136.115(b).

<sup>62</sup> 33 CFR § 136.115(b).