

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP923032-URC001
Claimant:	State of Rhode Island, Department of Environmental Management
Type of Claimant:	State
Type of Claim:	Removal Cost
Claim Manager:	(b) (6)
Amount Requested:	\$142,532.70
Action Taken:	Offer in the amount of \$122,737.23

EXECUTIVE SUMMARY:

On November 13, 2021, Reichert Oil delivered home heating oil to a residence on Hartford Pike in Foster, Rhode Island.² Four days later on November 17, the homeowner called Reichert to report having no heat. A Reichert technician investigated and discovered that the underground home heating oil tank was almost empty and presumably had a leak.³ A neighbor discovered oil in his pond. The oil reached the neighboring property's pond via underground and then aboveground flow of the oil. The pond is fed by Hannah Brook and drains to Windsor Brook,⁴ a navigable water of the United States.⁵

The Rhode Island Department of Environmental Management ("RIDEM" or "Claimant") received a report of an oil release⁶ and responded to the incident in its capacity as the State On Scene Coordinator (SOSC). The SOSC informed the homeowner of his responsibility for the oil spill.⁷ EPA Region 1 responded as the Federal On-Scene Coordinator (FOSC).⁸ The homeowner and his insurance were unable to pay for the response.⁹ RIDEM hired Newton B Washburn LLC ("OSRO" or "NBW") to remediate the release.¹⁰ The response lasted for months, ending August 19, 2022 when NBW demobilized the remaining equipment and

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 See, RIDEM Emergency Response Report dated November 18, 2021, Summary section, pages 2-4 of 4.

³ *Id.*

⁴ Email from EPA Region 1 to NPFC dated October 31, 2023.

⁵ See, December 16, 2021 Memo to File email for Oil Release at (b) (6) from USEPA Region 1 to RIDEM.

⁶ See, RIDEM call log # 21-21220 dated November 18, 2021.

⁷ See, RIDEM Emergency Response Report dated November 18, 2021, Summary section, page 3 of 4.

⁸ See, December 16, 2021 Memo to File email for Oil Release at (b) (6) from USEPA Region 1 to RIDEM.

⁹ See, RIDEM Emergency Response Report dated November 18, 2021, 11/22/21 entry, page 3 of 4.

¹⁰ See, RIDEM state contract with with Newton B Washburn LLC dated 9/7/21 for the response period of 10/1/21-9/30/24 providing hazardous and petroleum related services.

materials.¹¹ On August 23, 2023, RIDEM submitted its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) seeking \$142,532.70.¹²

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$122,737.23 of the requested \$142,532.70 is compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On November 13, 2021, Reichert Oil delivered about 330 gallons of home heating oil to a home on Hartford Pike in Foster, Rhode Island.¹³ Four days later on November 17, the homeowner discovered he had no heat and called Reichert¹⁴. A Reichert technician investigated and discovered that the underground home heating oil tank (underground storage tank or UST) was almost empty.¹⁵

The National Response Center and State authorities were notified of the oil discharge.¹⁶ Through underground and aboveground migration, the oil reached the neighboring property's pond, which is fed by Hannah Brook and drains to Windsor Brook,¹⁷ a navigable water of the United States, that eventually leads through a series of waterways to Narragansett Bay.¹⁸ NBW was called in to remediate the oil release and remove the UST.¹⁹ The FOSC responded along with RIDEM personnel.²⁰ The FOSC confirmed that NBW's actions consistent with the National Contingency Plan.²¹

Responsible Party

Mr. (b) (6) owns the heating oil tank that was the source of the discharge of oil²² making Mr. (b) (6) the Responsible Party (RP) under Oil Pollution Act (OPA).²³

Recovery Operations

¹¹ NBW work order page 20 dated August 19, 2022, citing removing plates, backfilling ruts, spreading seed and closing the site.

¹² RIDEM original claim submission dated August 3, 2023 and received at NPFC on August 23, 2023.

¹³ See, RIDEM Emergency Response Report dated November 18, 2021, Summary section, page 3 of 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ DEM Enforcement Call Sheet dated 11/18/21 provided with initial claim. NRC Report #1322415 dated 11/18/21 provided with initial claim.

¹⁷ Email from EPA Region 1 to NPFC dated October 31, 2023.

¹⁸ *Id.*

¹⁹ See, RIDEM state contract with with Newton B Washburn LLC dated 9/7/21 for the response period of 10/1/21-9/30/24 providing hazardous and petroleum related services.

²⁰ See, December 16, 2021 Memo to File email for Oil Release at (b) (6) from USEPA Region 1 to RIDEM.

²¹ Email from EPA Region 1 to NPFC dated October 31, 2023.

²² See, RIDEM Notice of Responsibility issued to (b) (6) and dated November 18, 2021.

²³ See, 33 U.S.C. § 2701(32).

NBW responded on November 18, 2021 and placed boom and absorbent pads in the pond.²⁴ Over the next month, NBW monitored and replaced absorbents as needed.²⁵ The UST was removed from the ground on December 3, 2021.²⁶ Oil was frequently pumped out of the septic tank through March 2022.²⁷ The final backfilling, removal of steel plates, seed-spreading, demobilization and closing of the site work occurred on August 19, 2022.²⁸

II. NPFC AND RP:

The NPFC issued an RP Notification letter dated August 29, 2023 to (b) (6). An RP Notification letter notifies the RP that a claim was presented to the NPFC that is seeking reimbursement of uncompensated removal costs or damages incurred as a result of the incident in which the recipient is the identified or suspected RP.²⁹

III. CLAIMANT AND NPFC:

On August 23, 2023, the NPFC received RIDEM's claim in a timely manner via letter dated August 3, 2023. RIDEM seeks reimbursement of \$142,532.70 for removal costs paid to the Oil Spill Response Contractor, Newton B. Washburn, LLC. The claim was properly presented to the NPFC as the state may present a claim for removal costs directly to the OSLTF without first presenting it to the RP.³⁰

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³¹ 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.³² The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³³ If there is conflicting evidence in the record, the

²⁴ RIDEM Emergency Response Report 2021-496 provided with initial claim.

²⁵ Timeline provided with initial claim.

²⁶ *Id.*

²⁷ *Id.*

²⁸ NBW work order page 20 dated August 19, 2022, citing removing plates, backfilling ruts, spreading seed and closing the site.

²⁹ RP Notification Letter dated August 29, 2023.

³⁰ 33 U.S.C. §2713(b)(1)(c).

³¹ 33 CFR Part 136.

³² 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)).

³³ 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).

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.³⁴ An RP's liability is strict, joint, and several.³⁵ 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."³⁶ 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."³⁷ 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."³⁸

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁰ 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.⁴¹

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.⁴²

³⁴ 33 U.S.C. § 2702(a).

³⁵ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

³⁶ *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).

³⁷ 33 U.S.C. § 2701(31).

³⁸ 33 U.S.C. § 2701(30).

³⁹ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁰ 33 CFR Part 136.

⁴¹ 33 CFR 136.105.

⁴² The FOSC confirmed that NBW's actions consistent with the National Contingency Plan. See, Email from EPA Region 1 to NPFC dated October 31, 2023.

(d) That the removal costs were uncompensated and reasonable.⁴³

After adjudication of the claim and the related costs, the NPFC has determined that the amount of compensable removal costs is \$122,737.23 while \$19,795.47 is deemed non-compensable as detailed in the spreadsheet enclosed with this determination.⁴⁴ Examples of reasons for denial of costs or reduction of amounts allowed are summarized below.

1. Numerous line items on each NBW invoice provided were charged at rates above those provided in the NBW pricing sheet submitted by the claimant. The NPFC reduced all the line items to the rates in the NBW pricing sheet, resulting in denials of the differences in charged amounts over the amounts calculated using the pricing sheet rates. The total amount denied for this category is \$10,699.60⁴⁵ and broken down below by invoice number:
 - 6464 – Rate reduction denials for this invoice total \$4,549.40
 - 6492 – Rate reduction denials for this invoice total \$741.20
 - 6647 – Rate reduction denials for this invoice total \$1,991.00
 - 6723 – Rate reduction denials for this invoice total \$898.00
 - 6800 - Rate reduction denials for this invoice total \$2,520.00
2. Several line items were not itemized on the daily work orders that listed personnel, equipment and supplies utilized each day. These line items were denied. The total amount denied for this category is \$928.50⁴⁶ and broken down below by invoice number:
 - 6464 – Items not on daily total \$246.00
 - 6723 – Items not on daily total \$682.50
3. Some line items such as work hours or number of supplies used, were invoiced at a higher number or amount, than what were listed on the daily work orders. The NPFC reduced the allowed amount to the amount documented on the daily work orders. The total amount denied for this category is \$85.02⁴⁷ and broken down below by invoice number:
 - 6464 – Daily count adjustment total \$85.02
4. Certain third-party purchases (e.g., backfill) were denied because the claimant was unable to provide receipts, invoices or other documentation to support the amounts

⁴³ 33 CFR 136.203; 33 CFR 136.205.

⁴⁴ See, Enclosure (3) NPFC Summary of Costs spreadsheet.

⁴⁵ *Id.*

⁴⁶ See, Enclosure (3) NPFC Summary of Costs spreadsheet.

⁴⁷ *Id.*

invoiced for these items. The total amount denied for this category is \$8,082.35⁴⁸ and broken down below by invoice number:

- 6647 – No invoice or receipts total \$1,316.60
- 6800 – No invoice or receipts total \$6,765.75

Overall Denied Costs = \$19,795.47⁴⁹

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Rhode Island, Department of Environmental Management's request for uncompensated removal costs is approved in the amount of **\$122,737.23**.

This determination is a settlement offer,⁵⁰ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁵¹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁵² 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: 01/16/2024

Supervisor Action: *Offer Approved*

Supervisor's Comments:

⁴⁸ See, Enclosure (3) NPFC Summary of Costs spreadsheet.

⁴⁹ For a more detailed description of the costs denied, see Enclosure (3) NPFC Summary of Costs spreadsheet.

⁵⁰ 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).

⁵¹ 33 CFR § 136.115(b).

⁵² *Id.*