

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP923034-URC001
Claimant:	Massachusetts Department of Environmental Protection (MassDEP)
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$31,109.81
Action Taken:	Offer in the amount of \$31,109.81

EXECUTIVE SUMMARY:

On September 30, 2022, at approximately 5:17 pm local time, Massachusetts Department of Environmental Protection (“MassDEP” or “Claimant”) notified the National Response Center (NRC) via report # 1348759 of an unknown sheen sighting in the Housatonic River, a navigable waterway of the United States.² MassDEP, in its capacity as the State On Scene Coordinator (SOSC), responded to the incident, assisted and jointly monitored the activities of the response contractor.³

United States Environmental Protection Agency Region 1 (“USEPA” or “FOSC”) is the Federal On-Scene Coordinator (FOSC) based on the location of this incident. MassDEP reached out to USEPA Region 1, however no On Scene Coordinator (OSC) was mobilized to the incident.⁴ The NPFC contacted the FOSC and made a request for ‘after-the-fact’ coordination for the response actions performed. The FOSC did determine ‘after-the-fact’ that the actions taken and performed were consistent with the National Contingency Plan (NCP).⁵

MassDEP presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$31,109.81 on August 30, 2023.⁶ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$31,109.81 is compensable and offers this amount as full and final compensation of this claim.⁷

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 National Response Center Report # 1348759 dated September 30, 2022.

³ MassDEP Release Amendment Form dated 10.1.22 obtained by NPFC through comptroller site.

⁴ Email from USEPA to NPFC Re EPA and OSC Coordination Response dated September 25, 2023.

⁵ Email from USEPA OSC to NPFC Re Coordination Statement Response dated November 9, 2023, acknowledging the actions taken by the MassDEP and its contractor were necessary to prevent, minimize, or mitigate the effects of the incident and were consistent with the National Contingency Plan.

⁶ MassDEP OSLTF Claim Form dated August 16, 2023, received August 30, 2023.

⁷ 33 CFR 136.115.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On September 30, 2022, at approximately 5:17 pm local time, MassDEP notified the National Response Center (NRC) via report # 1348759 of an unknown sheen sighting in the Housatonic River, a navigable waterway of the United States.⁸ The sheen was found behind Johnson Ford dealership on 694 East Street in Pittsfield, Massachusetts.⁹ MassDEP met with Pittsfield Fire Department Deputy Chief who had placed absorbent sausage booms along the dealership side of the river.¹⁰ MassDEP in its capacity as the State On Scene Coordinator (SOSC) monitored clean up and removal operations.¹¹

MassDEP and the Department of Public Services attempted to find the source of the release by inspecting a series of manholes surrounding the area¹² but after further investigation it was found that the oil was emanating from a stormwater drainage pipe and swale on the opposite side of the Housatonic River from the auto dealership and the drainage system receives stormwater from a large area in Pittsfield, MA.¹³ The stormwater drainage system was inspected by MassDEP, the Pittsfield Fire Department, and the Pittsfield Department of Public Works but no source was found and no responsible parties were identified.¹⁴

Recovery Operations

After notifying the NRC, a MassDEP Representative (SOSC) responded to the sheen and met Pittsfield Fire Department Deputy Chief (b) (6) who had placed absorbent sausage booms along the dealership side of the river and was holding the sheen back.¹⁵ On October 1, 2022, a citizen notified MassDEP of an oil release on the Housatonic River in front of George's Liquors at 19 Deming Street, the Fire Department set up booms in the area.¹⁶

SOSC (b) (6) responded to the incident along with personnel from Environmental Services Inc. ("ESI") and observed a persistent sheen on the Housatonic River from the East Street Bridge. Absorbent boom was replaced that was previously deployed behind the dealership. A significant amount of oil was found in a stormwater drainage swale and hard boom and additional absorbent boom was deployed within the swale.¹⁷ On October 4, 2022, a supervac was utilized to remove large pockets of oil that were trapped behind the deployed boom and absorbent boom was changed in all locations and secured due to large rain event that was forecasted for the next day. Due to the heavy rain, ESI could not access any of the boom in the river or spill area and only removed the hose out of view on site.¹⁸ Upon arrival on October 7,

⁸ National Response Center Report # 1348759 dated September 30, 2022.

⁹ MassDEP Release Amendment Form dated 9.30.22 obtained by NPFC through comptroller site.

¹⁰ *Id.*

¹¹ MassDEP Release Amendment Form dated 9.30.22 obtained by NPFC through comptroller site.

¹² MassDEP Release Amendment Form dated 10.1.22 10162400 obtained by NPFC through comptroller site.

¹³ Email from Claimant Re Additional Information Response dated September 14, 2023.

¹⁴ Email from Claimant Re Additional Information Response dated September 14, 2023.

¹⁵ MassDEP Release Amendment Form dated 9.30.22 obtained by NPFC through comptroller site.

¹⁶ MassDEP Release Amendment Form dated 10.2.22 obtained by NPFC through comptroller site.

¹⁷ MassDEP Release Amendment Form dated 10.3.22 obtained by NPFC through comptroller site.

¹⁸ MassDEP Release Amendment Form dated 10.7.22 obtained by NPFC through comptroller site.

2022, no sheen or product was observed within the Day Street drainage swale or on the Housatonic River water surfaces and all hard and absorbent boom was removed from the site and containerized for disposal.¹⁹

II. CLAIMANT AND NPFC:

On August 29, 2023, the NPFC received a claim from Massachusetts Department of Environmental Protection for its uncompensated removal costs dated August 16, 2023, in the amount of \$31,109.81.²⁰

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²¹ 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.²² The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²³ 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:

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.”²⁴ 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.”²⁵

¹⁹ *Id.*

²⁰ Claimant Original Submission dated August 16, 2023.

²¹ 33 CFR Part 136.

²² 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)).

²³ 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).

²⁴ 33 U.S.C. § 2701(31).

²⁵ 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).²⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁷ 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.²⁸

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.²⁹
- (d) That the removal costs were uncompensated and reasonable.³⁰

The NPFC analyzed each of these factors and determined all of the costs incurred and submitted by MassDEP 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.³¹ The FOSC reviewed all documentation and costs associated with this incident and opined ‘after-the-fact’ that the actions undertaken by MassDep and its response contractor were consistent with the NCP.³²

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Massachusetts Department of Environmental Protection request for uncompensated removal costs is approved in the amount of \$31,109.81.

²⁶ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁷ 33 CFR Part 136.

²⁸ 33 CFR 136.105.

²⁹ Email from USEPA OSC to NPFC Re Coordination Statement Response dated November 9, 2023, acknowledging the actions taken by the MassDEP and its contractor were necessary to prevent, minimize, or mitigate the effects of the incident and were consistent with the National Contingency Plan.

³⁰ 33 CFR 136.203; 33 CFR 136.205.

³¹ Claimant Original Submission dated August 16, 2023.

³² Email from USEPA OSC to NPFC Re Coordination Statement Response dated November 9, 2023, acknowledging the actions taken by the MassDEP and its contractor were necessary to prevent, minimize, or mitigate the effects of the incident and were consistent with the National Contingency Plan.

This determination is a settlement offer,³³ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁴ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.³⁵ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor:	(b) (6)	(b) (6)
Date of Supervisor's review:	1/2/2024	
Supervisor Action:	Offer Approved	

³³ 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).

³⁴ 33 CFR § 136.115(b).

³⁵ 33 CFR § 136.115(b).