

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

<b>Claim Number:</b>	UCGP924028-URC001
<b>Claimant:</b>	Massachusetts Department of Environmental Protection (MassDEP)
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$29,441.13
<b>Action Taken:</b>	Denial

### **EXECUTIVE SUMMARY:**

On November 2, 2022, at approximately 11:00 am local time, Massachusetts Department of Environmental Protection (“MassDep” or “Claimant”) made notification to the United States Coast Guard’s (USCG) National Response Center (NRC) regarding the release of home heating #2 fuel oil from an unknown source in Dingle Brook.<sup>2</sup>

The oil release was observed on a surface water associated with storm water from the area around White Street<sup>3</sup>, which leads to Entry Dingle Brook. Leaves and other vegetated debris were containing the majority of the oil, and no additional oil was observed to be emanating from the pipe.<sup>4</sup> No responsible party could be identified.<sup>5</sup> The United States Environmental Protection Agency (USEPA) Region 1 is identified as the Federal On Scene Coordinator (FOSC) for the incident based on the location.

MassDEP mobilized its emergency response contractor, New England Disposal Technologies Inc. (“NEDT”), to perform clean-up operations.<sup>6</sup> MassDEP presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$29,441.13 on March 5, 2024.<sup>7</sup> 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.

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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 with 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> National Response Center Report # 1351558 dated November 2, 2022.

<sup>3</sup> MassDEP Release Amendment Form BWSC 102, Release Tracking # 1-21680 dated December 15, 2022, under section entitled “Description of Activities Recorded by this Form”, pg. 3 of 3.

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

<sup>5</sup> See, MassDep OSLTF Claim Form, question 6, pg. 3 of 4, dated February 5, 2024; and National Response Center Report # 1351558 dated November 2, 2022.

<sup>6</sup> See, MassDep OSLTF Claim Form, question 11, pg. 4 of 4, dated February 5, 2024; and NEDT Invoice 45969 dated November 30, 2022 and supporting documentation, pgs. 1 - 18.

<sup>7</sup> MassDep original claim submission dated February 5, 2024, and received March 5, 2024.

## **I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

### ***Incident***

On November 2, 2022, at approximately 11:00 am local time, Massachusetts Department of Environmental Protection (“MassDep” or “Claimant”) made notification to the United States Coast Guard’s (USCG) National Response Center (NRC) regarding the release of home heating #2 fuel oil from an unknown source in Dingle Brook.<sup>8</sup> The oil release was observed on a surface water associated with storm water from the area around White Street.

Leaves and other vegetated debris were containing the majority of the oil, and no additional oil was observed to be emanating from the pipe.<sup>9</sup> No responsible party could be identified.<sup>10</sup> The United States Environmental Protection Agency (USEPA) Region 1 is identified as the Federal On Scene Coordinator (FOSC) for the incident based on the location.

### ***Recovery Operations***

On November 2, 2022, MassDEP received notification from the City of Springfield, MA regarding a release of home heating oil into Dingle Brook by an unknown source.<sup>11</sup> MassDep met with representatives of NEDT, MassDep’s response contractor who contained the spill with oil absorbent boom. NEDT also deployed absorbent boom in the water of a retention pond to collect free product.<sup>12</sup> On November 3, 2022, NEDT deployed additional booms and pads and bagged oily and spent absorbents debris.<sup>13</sup> On November 18, 2022, NEDT performed an on-site inspection and found no remaining oil and removed all remaining booms and transported for disposal.<sup>14</sup>

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

On March 5, 2024, the NPFC received a claim from Massachusetts Department of Environmental Protection for its uncompensated removal costs dated February 5, 2024, in the amount of \$29,441.13.<sup>15</sup> The claim included the Optional OSLTF Claim form, NEDT Rate Schedule, Invoice 45969, disposal manifests, daily work reports, ER/ IRASS Master Service Agreement, Standard Contract Form, MassDEP personnel time slip, and voucher & schedule.<sup>16</sup>

The NPFC requested additional information and asked additional questions to better understand the claim and circumstances involved.<sup>17</sup>

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<sup>8</sup> National Response Center Report # 1351558 dated November 2, 2022.

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

<sup>10</sup> See, MassDep OSLTF Claim Form, question 6, pg. 3 of 4, dated February 5, 2024; and National Response Center Report # 1351558 dated November 2, 2022.

<sup>11</sup> MassDEP Release Amendment Form BWSC 101, Release Tracking # 1-21680 dated November 2, 2022, pgs. 1-5 of 5.

<sup>12</sup> NEDT Invoice 45969 dated November 30, 2022, and supporting documentation, pg. 7 of 18.

<sup>13</sup> *Id.*, pg. 8 of 18.

<sup>14</sup> NEDT Invoice 45969 dated November 30, 2022, and supporting documentation, pg. 17 of 18.

<sup>15</sup> MassDEP original claim submission with Attachments dated February 5, 2024, received March 5, 2024.

<sup>16</sup> *Id.*

<sup>17</sup> See, email from the NPFC to the MassDep dated March 28, 2024.

### **III. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>18</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>19</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>20</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:**

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.<sup>21</sup> An RP's liability is strict, joint, and several.<sup>22</sup> 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."<sup>23</sup> 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."<sup>24</sup> 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."<sup>25</sup>

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<sup>18</sup> 33 CFR Part 136.

<sup>19</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)).

<sup>20</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>21</sup> 33 U.S.C. § 2702(a).

<sup>22</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>23</sup> *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).

<sup>24</sup> 33 U.S.C. § 2701(31).

<sup>25</sup> 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).<sup>26</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>27</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>28</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>29</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>30</sup>

The NPFC analyzed each of these factors and has determined the following:

1. OPA defines a “claim” to mean “a request made in writing for a sum certain, for compensation for damages or removal costs **resulting from an incident.**”<sup>31</sup>

An “incident” under OPA is defined as any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, **resulting in the discharge or substantial threat of discharge of oil.**<sup>32</sup>

OPA defines “oil” as “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601) and which is subject to the provisions of that Act [42 USCA Section 9601 et seq.]”<sup>33</sup>

The NPFC requested a copy of sample analysis in order to confirm that the response actions performed by MassDep and its response contractor were in fact to an oil spill and that the spilled product was an OPA oil.<sup>34</sup> Mass Dep responded stating that

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

<sup>27</sup> 33 CFR Part 136.

<sup>28</sup> 33 CFR 136.105.

<sup>29</sup> Email from EPA Region 1 to NPFC Re After the Fact Coordination Response dated April 3, 2024.

<sup>30</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>31</sup> 33 U.S.C. § 2701(14).

<sup>32</sup> 33 U.S.C. § 2701(14) (emphasis added).

<sup>33</sup> 33 U.S.C. § 2701(14).

<sup>34</sup> Email from NPFC to MassDep dated March 28, 2024, requesting additional information which included sample analysis.

samples were not taken during this incident therefore the NPFC is unable to determine that the response was associated with an OPA oil.<sup>35</sup>

2. 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;”<sup>36</sup> and
3. The Claimant has not provided sufficient evidence to establish that the uncompensable removal costs of actions claimed were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.<sup>37</sup>

#### **V. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above MassDEP’s request for uncompensated removal costs is denied.

Claim Supervisor:

(b) (6)

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Date of Supervisor’s review: *4/18/2024*

Supervisor Action: *Denial approved*

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<sup>35</sup> Email response from MassDep to NPFC dated April 2, 2024, stating no samples were taken for this incident.

<sup>36</sup> 33 U.S.C. § 2701(30).

<sup>37</sup> 33 CFR §§136.203(c) & 205. The NPFC contacted EPA Region 1 and the OSC could not confirm that this spill posed a threat of discharge or was a substantial threat to a navigable waterway. *See*, Email from EPA FOSC to NPFC dated April 3, 2024, whereby the FOSC stated that it could not confirm that the spill posed a threat of discharge or was a substantial threat to a navigable waterway.