

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPP23015-URC001
Claimant:	Philadelphia Wholesale Produce Market
Type of Claimant:	Private
Type of Claim:	Uncompensated Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$35,620.59
Action Taken:	Offer in the amount of \$30,595.07

EXECUTIVE SUMMARY:

On August 9, 2023, at 14:30 local time, United States Coast Guard (USCG) Air Station Atlantic City alerted the National Response Center (NRC) to a sheen on the Schuylkill River from an unknown source, via NRC Report #1375726.² On August 10, 2023, the NRC received report #1375827 about a sheen at the same location.³ Over two months, sheening continued to occur from the outfall on 67th Street.⁴

On September 8, 2023, the USCG issued a Notice of Federal Interest (NOFI) to PhilaPort, the owner of the 67th Street property where the outfall was located.⁵ On September 14, 2023, USCG's Federal On Scene Coordinator (FOSC) issued an Administrative Order to PhilaPort requiring them to inspect the property's manholes and drainage system and remediate the spill.⁶ On September 20, 2023, PhilaPort contacted the operator of the location, Philadelphia Wholesale Produce Market ("PWPM" or "Claimant"), and demanded they remediate the spill as is required in PWPM's lease agreement.⁷

During the response, USCG took samples of the sheen located near the outfall on 67th Street and in the drainage system in front of PWPM and sent them for testing.⁸ On September 21,

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 USCG NRC Report # 1375726 dated August 9, 2023.

³ USCG NRC Report # 1375827 dated August 10, 2023.

⁴ USCG SITREP/POLREP 3 dated September 12, 2023

⁵ USCG Notice of Federal Interest (NOFI) to PhilaPort dated September 8, 2023.

⁶ USCG Administrative Order to PhilaPort dated September 14, 2023.

⁷ See, PhilaPort letter to PWPM dated September 20, 2023, ordering Tenant and Subtenant to undertake all response actions as identified by the USCG in its NOFI, in accordance with lease provisions.

⁸ USCG SITREP/POLREP 4, section H, dated September 25, 2023.

2023, USCG determined that PWPM was not the RP. On September 25, USCG rescinded the Administrative Order to PhilaPort.⁹ An RP has not been identified.¹⁰

On February 28, 2024, PWPM presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$35,620.59.¹¹ On June 5, 2024, PWPM amended their sum certain to \$34,865.54.¹² The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that the majority of the costs requested are compensable and offers \$30,595.07 as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On August 9, 2023, at 14:30 local time, United States Coast Guard (USCG) Air Station Atlantic City alerted the National Response Center (NRC) to a sheen on the Schuylkill River from an unknown source, via NRC Report #1375726.¹³ On August 10, 2023, the NRC received report #1375827 about a sheen at the same location.¹⁴ Over two months, sheening continued to occur from the outfall on 67th Street.¹⁵

On September 8, 2023, the USCG issued a Notice of Federal Interest (NOFI) to PhilaPort, the owner of the 67th Street property where the outfall was located.¹⁶ On September 14, 2023, USCG's Federal On Scene Coordinator (FOSC) issued an Administrative Order to PhilaPort requiring them to inspect the property's manholes and drainage system and remediate the spill.¹⁷ On September 20, 2023, PhilaPort contacted the operator of the location, Philadelphia Wholesale Produce Market ("PWPM" or "Claimant"), and demanded they remediate the spill as is required in PWPM's lease agreement.¹⁸

During the response, USCG took samples of the sheen located near the outfall on 67th Street and in the drainage system in front of PWPM and sent them for testing.¹⁹ On September 21, 2023, USCG determined that PWPM was not the RP. On September 25, USCG rescinded the Administrative Order to PhilaPort.²⁰ An RP has not been identified.²¹

⁹ USCG SITREP/POLREP 4, section H, dated September 25, 2023.

¹⁰ USCG SITREP/POLREP 5 and Final dated October 5, 2023, section 4A indicates search for source continues.

¹¹ PWPM claim submission received February 28, 2024.

¹² See, amended OSLTF Claim Form dated June 5, 2024.

¹³ USCG NRC Report # 1375726 dated August 9, 2023.

¹⁴ USCG NRC Report # 1375827 dated August 10, 2023.

¹⁵ USCG SITREP/POLREP 3 dated September 12, 2023

¹⁶ USCG Notice of Federal Interest (NOFI) to PhilaPort dated September 8, 2023.

¹⁷ USCG Administrative Order to PhilaPort dated September 14, 2023.

¹⁸ See, PhilaPort letter to PWPM dated September 20, 2023, ordering Tenant and Subtenant to undertake all response actions as identified by the USCG in its NOFI, in accordance with lease provisions.

¹⁹ USCG SITREP/POLREP 4, section H, dated September 25, 2023.

²⁰ USCG SITREP/POLREP 4, section H, dated September 25, 2023.

²¹ USCG SITREP/POLREP 5 and Final dated October 5, 2023, section 4A indicates search for source continues.

Responsible Party

USCG took samples of the sheen located near the outfall on 67th Street and in the drainage system in front of PWPM and sent them for testing.²² On September 21, 2023, USCG determined that PWPM was not the RP.²³ On September 25, 2023, USCG rescinded the Administrative Order to PhilaPort.²⁴ An RP has not been identified.²⁵

Recovery Operations

PWPM contracted with Wind River Environmental to address the spill on September 8, 2023.²⁶ The next day, Wind River Environmental cleaned out the manholes adjacent to the storm drain and pumped out the retention pond nearby.²⁷ On September 15, 2023, Wind River pumped 2,000 gallons of oily water from the storm drain manhole.²⁸

On September 18, 2023, PWPM hired ACV Environmental Services to remediate the spill.²⁹ The following day, ACV travelled to the scene and deployed hard boom and replaced sorbents. On September 20, 2023, ACV responded to the scene along with representatives from EPA, USCG, and the Water Department to begin remediation procedures.³⁰ ACV performed air sampling and determined that the levels of VOC concentration in the target manhole exceeded safety standards.³¹ ACV moved onto other manholes and flushed 3,000 gallons of water and clean sorbent boom was installed.³²

On September 21, 2023, the sampling analysis showed that PWPM was not the RP.³³ On September 25, 2023, USCG terminated the September 14, 2023 Administrative Order to PhilaPort.³⁴

II. CLAIMANT AND NPFC:

On February 28, 2024, PWPM presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$35,620.59.³⁵ On June 5, 2024, PWPM amended their sum certain to \$34,865.54.³⁶ When the claim was received, it included PWPM's unsigned OSLTF form, The USCG Administrative Order to PhilaPort dated September 14, 2023, USCG letter to PhilaPort dated September 25, 2023, terminating the September 14, 2023 Administrative Order, Republic

²² USCG SITREP/POLREP 4, section H, dated September 25, 2023.

²³ USCG SITREP/POLREP 5 and Final dated October 5, 2023, section 4A indicates search for source continues.

²⁴ SITREP/POLREP 4 dated September 25, 2023

²⁵ USCG SITREP/POLREP 5 and Final dated October 5, 2023, section 4A indicates search for source continues.

²⁶ Wind River Environmental quote to Philadelphia Wholesale Produce Market dated September 8, 2023

²⁷ SITREP/POLREP 3 dated September 12, 2023.

²⁸ See, Wind River Environmental invoice # 6027477 dated September 15, 2023.

²⁹ USCG SITREP/POLREP 4 dated September 25, 2023. See also, Republic Services Quote # SJ106159 dated September 18, 2023.

³⁰ USCG SITREP/POLREP 4 dated September 25, 2023.

³¹ USCG SITREP/POLREP 4 dated September 25, 2023.

³² USCG SITREP/POLREP 4 dated September 25, 2023.

³³ USCG SITREP/POLREP 4, section H, dated September 25, 2023.

³⁴ September 25, 2023 letter from the USCG to PhilaPort terminating the September 14, 2023 Administrative Order..

³⁵ PWPM claim submission received February 28, 2024.

³⁶ See, amended OSLTF Claim Form dated June 5, 2024.

Services Invoice # 1356174 dated October 24, 2023, Republic Services Invoice # 1356177 dated October 24, 2023, PWPM Labor Expenses listing, letter from PhilaPort to PWPM dated September 25, 2023, ordering a response in accordance with USCG Administrative Order, a copy of the USCG NOFC dated September 8, 2023, and Wind River Payment Confirmation and Invoices.³⁷

The NPFC requested additional information from PWPM on the following dates: March 15, 2024, April 22, 2024, and June 20, 2024.³⁸ PWPM responded to the NPFC's requests for additional information on the following dates: April 4, 2023, April 25, 2024, May 30, 2024, June 5, 2024, and June 20, 2024.³⁹

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁴⁰ 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.⁴¹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁴² 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.⁴³ An RP's liability is strict, joint, and several.⁴⁴ 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

³⁷ PWPM claim submission received February 28, 2024, with Attachments.

³⁸ Emails from NPFC to PWPM dated March 15, 2023, April 22, 2023, and June 20, 2024, respectively.

³⁹ See, PWPM responses to NPFC with additional information dated April 4, 2023, April 25, 2024, May 30, 2024, June 5, 2024, and June 20, 2024, respectively.

⁴⁰ 33 CFR Part 136.

⁴¹ 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)).

⁴² 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).

⁴³ 33 U.S.C. § 2702(a).

⁴⁴ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

favoring those responsible for the spills.”⁴⁵ 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.”⁴⁶ 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.”⁴⁷

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁸ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁹ 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.⁵⁰

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.
- (d) That the removal costs were uncompensated and reasonable.⁵¹

The NPFC analyzed each of these factors and determined that the majority of the costs incurred and submitted by PWPM herein are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced in accordance with the quotes provided, payroll records provided, daily PWPM personnel breakdown and description of services provided, Wind River photos, proof of payment, third party receipts from Home Depot and Best Buy for equipment purchased, and USCG documentation.⁵²

⁴⁵ *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).

⁴⁶ 33 U.S.C. § 2701(31).

⁴⁷ 33 U.S.C. § 2701(30).

⁴⁸ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁹ 33 CFR Part 136.

⁵⁰ 33 CFR 136.105.

⁵¹ 33 CFR 136.203; 33 CFR 136.205.

⁵² See, PWPM claim submission received February 28, 2024, and all supporting documentation provided and obtained as part of the administrative record.

In a response to NPFC's request for additional records, PWPM provided a quote with rates from Wind River Environmental dated September 8, 2023; a price quote with rates from Republic Services; and a staff rate sheet and breakdown of hours PWPM staff spent working on the response.

In reviewing these documents, NPFC found most of the costs supported by the documentation, but also found several unsupported costs. Wind River Invoice # 6027503 included \$2,800 for disposal of 2,000 gallons of waste. In the quoted rates from Wind River Environmental, the cost of disposal per gallon of liquid waste was listed as \$0.18, which should have totaled \$360.00. The NPFC notified PWPM about the invoice discrepancy and on June 5, 2024, PWPM provided a revised Wind River invoice they received from Wind River and reduced their sum certain from \$35,620.59 to \$34,865.54 which a difference of \$755.05.⁵³

On September 14, 2023, PWPM bought a GoPro Hero camera and accessory items from Best Buy that are not compensable and are denied on the basis that the items were not at the direction of the USCG or EPA FOSCs, and as such, the total amount of \$520.51 is denied.

On September 14, 2023, PWPM bought a 20V LED Tripod Light from Home Depot in the amount of \$247.32.⁵⁴ The NPFC denies the purchase of this asset as there is no evidence that this piece of equipment was at the direction of the USCG, nor was this asset turned over to the USCG or sold and proceeds applied to the claim.

The NPFC has denied a total of \$233.54 in PWPM costs associated with Photographs and/or videos taken since the claimant has not provided evidentiary documentation that the FOSCs ordered the purchase of the camera and accessories.⁵⁵

On October 16, 2023, PWPM charged \$112.50 in labor hours for (b) (6) however no description of what the primary purpose of time claimed was and as such, the time is denied as not supported by the record.⁵⁶

On February 29, 2024, PWPM staff charged \$57.53 in labor costs for (b) (6) that was associated with filling out the OSLTF form and gathering the required documents for submission of their claim. These actions are not OPA compensable removal costs as outlined in the governing claims regulations found at 33 CFR 136.105(e)(8).⁵⁷

⁵³ See, revised PWPM OSLTF Claim Form dated June 5, 2024; See also, revised Wind River Invoice # 6027503 in the amount of \$360.00 from \$2,800.00.

⁵⁴ See, Home Depot receipt dated September 15, 2023, page 2 of 2 of file entitled Labor Expenses as part of PWPM claim submission with attachments.

⁵⁵ See, Enclosure (3), PWPM Tab, lines 4, 5, 24, and 30.

⁵⁶ See, Enclosure (3), PWPM Tab, line 26.

⁵⁷ 33 CFR 136. 105(e)(8) states..." The reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with preparation of the claim".

The applicable tax and fringe benefits for (b) (6) has been adjusted to apply to the approved costs only and as such, the NPFC has denied \$15.20 based on the labor hours denied by the NPFC.⁵⁸

The applicable tax and fringe benefits for (b) (6) has been adjusted to apply to the approved costs only and as such, the NPFC has denied \$67.52 based on the labor hours denied by the NPFC.⁵⁹

The applicable tax and fringe benefits for (b) (6) has been adjusted to apply to the approved costs only and as such, the NPFC has denied \$3.89 based on the labor hours denied by the NPFC.⁶⁰

ACV Invoice # 1356174 invoiced an energy and insurance charge in the total amount of \$949.15 however the charge is not outlined in the Republic Services quote provided nor is it listed in the published rates therefore this charge is denied.

ACV Invoice # 1356177 invoiced an energy and insurance charge in the total amount of \$1,863.20 however the charge is not outlined in the Republic Services quote provided nor is it listed in the published rates therefore this charge is denied.

ACV Invoice # 1356177 invoiced hand tools on 9/20/23 in the total amount of \$200.00 however the daily field log does not have this listed and as such, the NPFC denies \$200.00 as unsubstantiated by contemporaneous daily documentation.

Based on the claimant's amended sum certain, the NPFC denies \$.12 as an undocumented difference.⁶¹

Overall Denied Costs: \$4,270.47⁶²

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Philadelphia Wholesale Produce Market's request for uncompensated removal costs is approved in the amount of \$ 30,595.07.

⁵⁸ See, Enclosure 3, PWPM tab, lines 4,5, and 10.

⁵⁹ See, Enclosure 3, PWPM tab, lines 24, 26, 30, and 31.

⁶⁰ See, Enclosure 3, PWPM tab, lines 37 and 38.

⁶¹ See, Enclosure 3, Invoice Summary tab, line 14.

⁶² Enclosure 3 provides a detailed analysis of the amounts approved and denied by the NPFC.

This determination is a settlement offer,⁶³ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁶⁴ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁶⁵ 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: 7/2/24

Supervisor Action: *Offer Approved*

⁶³ 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).

⁶⁴ 33 CFR § 136.115(b).

⁶⁵ 33 CFR § 136.115(b).