

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

<b>Claim Number:</b>	UCGP923040-URC001
<b>Claimant:</b>	Northampton County Emergency Management Services
<b>Type of Claimant:</b>	Municipality
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$431.75
<b>Action Taken:</b>	Denial

### EXECUTIVE SUMMARY:

On February 3, 2022, a tractor trailer owned by ISR Transportation, Inc. (“ISR” or “RP”) traveling Northbound on SR512, entered a railroad crossing located at the borders of Bath Borough and East Allen Township, Pennsylvania, without the appropriate clearance.<sup>2</sup> The vehicle was struck by a Norfolk Southern Railway train traveling westbound on the intersecting railroad tracks, causing the cab and trailer to rip apart and positioning the cab upright over a drain.<sup>3</sup> Incident command reported approximately 400 gallons of diesel fuel, engine oils and coolants spilling from the vehicle along with 7 pallets of milk and yogurt spilling from the trailer. The spillage entered the Monocacy Creek; a navigable waterway of the United States.<sup>4,5</sup>

The United States Environmental Protection Agency Region 3 (“USEPA” or “FOSC”) is the Federal On-Scene Coordinator (FOSC) based on the location of this incident. The FOSC determined that the incident posed a substantial threat of discharge of oil into a navigable waterway of the United States, and determined all actions taken by the Claimant were consistent with the National Contingency Plan (NCP).<sup>6</sup>

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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> Northampton EMS claim submission received September 27, 2023. *See*, State Police Incident Report pg. 2 of 2.  
<sup>3</sup>*Id.*

<sup>4</sup> Following the 2023 court ruling in the case titled, *Sackett vs. EPA*, the United States Environmental Protection Agency and United States Army Corps. of Engineers have implemented rules defining navigable waterways under rules amended by Sackett or the pre-2015 regulatory regime, consistent with Sackett: dependent upon state. For both provisions, the agencies will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret “adjacent” to mean “having a continuous surface connection,” and will limit the scope of the (s)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories. Under these provisions, relatively permanent waters include tributaries that typically flow year-round or have continuous flow at least seasonally (typically three months); Pre-2015 Regulatory Regime: (a)(5) - Tributaries. *See*, *Sackett v EPA* 21-454.

<sup>5</sup> Email from EPA Region 3 to the NPFC dated October 13, 2023.

<sup>6</sup> Northampton EMS claim submission received September 27, 2023. *See*, Letter from EPA Region 3 to the NPFC dated August 9, 2023.

ISR Transportation, Inc., is the owner of the tractor trailer responsible for the collision and spillage, was identified as the responsible party (RP), as defined by the Oil Pollution Act of 1990.<sup>7</sup>

On September 27, 2022, Northampton EMS presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$431.75<sup>8</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 all costs must be denied.

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

### ***Incident***

On February 3, 2022, a tractor trailer owned by ISR Transportation, Inc. (“ISR” or “RP”), traveling Northbound on SR512, entered a railroad crossing located at the borders of Bath Borough and East Allen Township, Pennsylvania, without the appropriate clearance.<sup>9</sup> The vehicle was struck by a Norfolk Southern Railway train traveling westbound on the intersecting railroad tracks, causing the cab and trailer to rip apart and positioning the cab upright.<sup>10</sup> Upon their arrival on scene, Northampton EMS personnel found the train engine broad side into the passenger side of the cab of the tractor trailer.<sup>11</sup> The cab was separated from the trailer and pushed approximately 500 yards down the railway.<sup>12</sup> The cab began leaking oil and coolants into the Monocacy Creek; a navigable waterway of the United States.<sup>13</sup>

Incident command reported approximately 400 gallons of diesel fuel, engine oils and coolants had spilled from the vehicle, and 7 pallets of milk and yogurt had spilled from the trailer.<sup>14</sup> Due to the food and fuel spillage into the navigable waterway, Pennsylvania’s Department of Environmental Protection (PA DEP), Pennsylvania’s Department of Agriculture (PA AGR) and Pennsylvania’s Fish & Boat Commission (PA FBC) were all notified of the incident.<sup>15</sup>

### ***Responsible Party***

In accordance with the Oil Pollution Act of 1990, the owner of the source which caused the oil spill is the Responsible Party (RP) for the incident.<sup>16</sup> ISR Transportation, Inc. is the confirmed owner of the vehicle at the time when the spill incident occurred.<sup>17</sup> As such, ISR is identified as the responsible party (RP), as defined by the Oil Pollution Act of 1990.<sup>18</sup>

### ***Recovery Operations***

The East Allen Township and Hanover Township fire companies arrived on scene and aided in mitigation and response. They placed a spill pool under the tractor trailer’s passenger side saddle tank,

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<sup>7</sup> 33 U.S.C. § 2701 (32).

<sup>8</sup> Northampton EMS claim submission received September 27, 2023.

<sup>9</sup> Northampton EMS claim submission received September 27, 2023. *See*, State Police Incident Report pg. 2 of 2.

<sup>10</sup> Northampton EMS claim submission received September 27, 2023. *See*, State Police Incident Report pg. 2 of 2.

<sup>11</sup> Email from Northampton EMS to NPFC dated October 2, 2023. *See*, 2022-05 Incident Report pg. 2 of 4.

<sup>12</sup> Email from Northampton EMS to NPFC dated October 2, 2023. *See*, 2022-05 Incident Report pg. 2 of 4.

<sup>13</sup> Northampton EMS claim submission received September 27, 2023, pg. 1 of 3.

<sup>14</sup> *Id.*

<sup>15</sup> Northampton EMS claim submission received September 27, 2023. *See*, State Police Incident Report pg. 2 of 2.

<sup>16</sup> 33 U.S.C. § 2701(32).

<sup>17</sup> Northampton EMS claim submission received September 27, 2023, with attachments.

<sup>18</sup> 33 U.S.C. § 2701(32).

placed absorbents atop the drainage point and deployed absorbents into the creek to mitigate the spill and to prevent further runoff.<sup>19</sup>

Northampton EMS personnel arrived on scene at approximately 1012 hours.<sup>20</sup> Hazmat and utility vehicles were brought on-scene to provide adequate mitigation supplies to aide in mitigation of the spill and cease any additional spillage.<sup>21</sup> Northampton EMS supplied 4 pieces of 4' rebar stakes and 1 package of ½" x 25' All-Purpose Nylon Rope while deploying booms into and across the Monocacy Creek.<sup>22</sup>

On February 3, 2022, the vehicle was removed from the railway and Norfolk Southern Railway hired HEPACO, LLC ("HEPACO" or "OSRO") to clean up all remaining spillage affiliated with the incident.<sup>23</sup> Northampton EMS personnel left the scene on February 3, 2023. The roadway and railroad crossing where the incident took place were reopened, all cleanup operations complete and the case officially closed by Northampton EMS on February 4, 2022.<sup>24</sup>

## **II. CLAIMANT AND RP:**

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>25</sup> require all claims for removal costs must be presented to the responsible party before seeking compensation from the NPFC.<sup>26</sup> Northampton submitted all costs incurred as result of the February 3, 2022 incident to the responsible party via 3 separate invoice billing dates sent on March 7, 2022,<sup>27</sup> June 13, 2022,<sup>28</sup> and July 14, 2022.<sup>29</sup>

## **III. CLAIMANT AND NPFC:**

On September 27, 2023, Northampton EMS presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$431.75.<sup>30</sup> When the claim was received, it included Northampton EMS's signed claim, the WebEOC Event Report Log, a second event log titled CAD event log, the Northampton County EMS cost fee schedule, EPA Region III's signed letter to the NPFC, incident photographs, all Invoices for costs claimed and mailed to the Responsible Party with dates of submission, State Police Incident Report #PA 2022-139506, a Waterway Map specific to the incident location, and a copy of Northampton County Council's Ordinance 308.<sup>31</sup>

On October 2, 2023, the NPFC requested additional information from Northampton EMS.<sup>32</sup> On October 2, 2023, Northampton EMS submitted their reply to the NPFC's request, including the Incident Report #2022-05, the 2022 Northampton County Fee Schedule, and the 2022-05 event log.<sup>33</sup> On October 10, 2023, the NPFC requested additional information again from Northampton EMS.<sup>34</sup> On October 11,

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<sup>19</sup> Northampton EMS claim submission received September 27, 2023, pg. 1 of 3.

<sup>20</sup> Email from Northampton EMS to NPFC dated October 2, 2023. *See*, 2022-05 Incident Report pg. 2 of 4.

<sup>21</sup> Northampton EMS claim submission received September 27, 2023, pg. 2 of 3.

<sup>22</sup> *Id.*

<sup>23</sup> Northampton EMS claim submission received September 27, 2023, pg. 1 of 3.

<sup>24</sup> Northampton EMS claim submission received September 27, 2023. *See*, WebEOC Event Report Log pg. 2 of 7.

<sup>25</sup> 33 U.S.C. § 2701 *et seq.*

<sup>26</sup> 33 CFR 136.103.

<sup>27</sup> Northampton EMS claim submission received September 27, 2023. *See*, Invoices 1.2.3. pg. 1 of 3.

<sup>28</sup> Northampton EMS claim submission received September 27, 2023. *See*, Invoices 1.2.3. pg. 2 of 3.

<sup>29</sup> Northampton EMS claim submission received September 27, 2023. *See*, Invoices 1.2.3. pg. 3 of 3.

<sup>30</sup> Northampton EMS claim submission received September 27, 2023.

<sup>31</sup> Northampton EMS claim submission received September 27, 2023, with Attachments.

<sup>32</sup> Email from NPFC to Northampton EMS, dated October 2, 2023.

<sup>33</sup> Email from Northampton EMS to NPFC, dated October 2, 2023, with Attachments.

<sup>34</sup> Email from NPFC to Northampton EMS, dated October 10, 2023.

2023, Northampton EMS submitted their reply to the NPFC's request, and included a map of the Monocacy Creek.<sup>35</sup> On October 11, 2023, the NPFC contacted Northampton EMS by telephone to discuss issues concerning a "drain" noted on page 1 of the original claim submission.<sup>36</sup> Northampton EMS explained that the mention of the "drain" was an administrative error, and verified the spill released directly from the cab into the Monocacy Creek.<sup>37</sup>

The NPFC issued a RP Notification letter to ISR Transportation, Inc. dated September 28, 2023.<sup>38</sup> A 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 result of the incident in which the recipient is the identified or suspected RP.<sup>39</sup> As of the date of this letter, ISR has not responded to the RP Notification Letter.

#### **IV. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>40</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>41</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>42</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.

#### **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.<sup>43</sup> An RP's liability is strict, joint, and several.<sup>44</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>45</sup> OPA was intended to cure these deficiencies in the law.

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<sup>35</sup> Email from Northampton EMS to NPFC, dated October 11, 2023, with Attachment.

<sup>36</sup> Northampton EMS claim submission received September 27, 2023, pg. 1 of 3.

<sup>37</sup> Summary of Phone Conversation between NPFC and Northampton EMS, dated October 11, 2023.

<sup>38</sup> NPFC letter to ISR Transportation, Inc. mailed on October 4, 2023.

<sup>39</sup> See, RP Notification Letter dated September 28, 2023.

<sup>40</sup> 33 CFR Part 136.

<sup>41</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>42</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>43</sup> 33 U.S.C. § 2702(a).

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

<sup>45</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).

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>46</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>47</sup>

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

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>51</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>52</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>53</sup>

CERCLA defines “hazardous substance” broadly.<sup>54</sup> However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”<sup>55</sup> Further, the definition goes on to exclude “natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”<sup>56</sup>

Upon review of the evidence submitted by the Claimant, the NPFC opines there is not enough evidence to substantiate the product released was exclusively an OPA oil. Furthermore, evidence suggests

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<sup>46</sup> 33 U.S.C. § 2701(31).

<sup>47</sup> 33 U.S.C. § 2701(30).

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

<sup>49</sup> 33 CFR Part 136.

<sup>50</sup> 33 CFR 136.105.

<sup>51</sup> 33 U.S.C. § 2701(14).

<sup>52</sup> 33 U.S.C. § 2701(14)(emphasis added).

<sup>53</sup> 33 U.S.C. § 2701(14).

<sup>54</sup> “Hazardous substance means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606].”

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

the oil spill may have been commingled with non-oil hazardous substances. Page 1, of Northampton's claim notes:

"Incident command on scene also then reported that there were hazardous liquids leaking from the tractor such as diesel fuel (approx. 400 gallons), engine oils, coolants, etc."<sup>57</sup>

In response to the presence of non-oil hazmat substances such as "coolants" and the Claimant's mention of "hazardous liquids", the NPFC requested Northampton EMS provide proof of any disposal documentation, and any sampling data or chemical analyses whose samples were recovered from the spill incident, to determine whether hazmat substances mixed with oil prior to the discharge into the Monocacy Creek.<sup>58</sup>

Northampton EMS specified tests were taken of the spilled material using pH paper and spillfyer strips, but later stated that all testing and sample analyses were discarded at the scene.<sup>59</sup> Northampton EMS also stated that no response agency took samples for further testing.<sup>60</sup> Given the Claimants' mention of coolants and hazardous materials leaking from the source of the spill, and their inability to support that the substance was indeed *strictly* an OPA compensable oil, the NPFC cannot verify whether or not the spillage into Monocacy Creek was strictly oil, or a commingled spill.

In accordance with the Oil Pollution Act of 1990, the claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the NPFC, to support and properly process the claim, as required by 33 CFR 136.105.<sup>61</sup> After careful analysis of all the supporting documentation submitted by Northampton EMS, the NPFC must deny the costs claimed since there is not enough evidence, including but not limited to, chemical analysis, to substantiate the product released was exclusively an OPA oil.

#### **VI. CONCLUSION:**

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

**(b) (6)**

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

Date of Supervisor's review: **12/18/23**

Supervisor Action: ***Denial approved***

<sup>57</sup> Northampton EMS claim submission received September 27, 2023, pg. 1 of 3.

<sup>58</sup> Email from NPFC to Northampton EMS dated October 2, 2023.

<sup>59</sup> Email from Northampton EMS to NPFC dated October 2, 2023.

<sup>60</sup> *Id.*

<sup>61</sup> 33 CFR 136.105.