CLAIM SUMMARY / DETERMINATION FORM

Date	: 9/15/2009
Claim Number	: E06601-001
Claimant	: Sunoco Pipeline L.P.
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Claim Manager	: Eric Bunin
Amount Requested	: $511,358.32

I. INCIDENT

Facts:

During the evening of October 21, 2005 between 1700 and 1820 hours, Sunoco's pipeline was running at 31 pounds per squre inch (psi). At 1824 the pipeline pressure began decreasing. Concurrently, the Sheriff's Deputy of Osage County, Oklahoma was investigating reports of gunfire in the area where Sunoco's pipeline crosses aerially over Birch Creek. Witnesses saw people and heard gunshots in the vicinity of the pipeline crossing. Sunoco's data show that the pipeline continued to lose pressure until 2016 when Sunoco pressurized the pipeline for a transfer. After two transfers, the pressure continuously decreased until reaching 0 psi at 0638 on October 22, 2005. Early in the morning on October 22, 2005, Sunoco's pipeline control center indicated a possible shortage on the Barnsdall to Tulsa pipeline system. The pipeline is an eight-inch crude oil pipeline that transports oil from Barnsdall, Oklahoma to Sunoco's Tulsa, Oklahoma refinery. Upon notice of the shortage, the system was shut in, pressure was monitored and field personnel were notified. At daybreak, an air patrol was dispatched and, at 9:25am, located oil spraying from the pipeline where it was suspended over Birch Creek. The oil discharged into Birch Creek and traveled about 0.25 miles downstream where it entered Bird Creek. Bird Creek leads to the Verdigris River, a navigable water of the United States.

Company personnel and Oil Spill Response Organizations were sent to the area. The claimant alleges that the release was caused by an approximate 0.5-inch puncture made by a vandal's high-powered rifle shot. About 518 barrels (bbl) of oil were released and 405 bbl were recovered. (See Birch Creek Incident Description attached to claimant's Oct. 5, 2007 claim letter). The identity of the vandal is not known.

Claimant:

The claimant is Sunoco Pipeline L.P., which owns and operates the eight inch crude oil pipeline that runs from Barnsdall, Oklahoma to Sunoco's refinery in Tulsa, Oklahoma. The claimant's records show that the pipeline is over 33 miles long and crosses Birch Creek aerially and also crosses at least one other creek, but we are unable to tell how that creek crossing occurs.

Claim:

The claimant, as the responsible party (RP) seeks entitlement under 33 U.S.C. §2708(a)(1) to a defense to liability under 33 U.S.C. §2703(a)(3) based on the allegation that the incident was solely caused by a third party. The claimant alleges that its pipeline was damaged by an

unknown vandal when the pipeline was punctured by a bullet fired from a high powered rifle some distance away. The claimant seeks reimbursement of $511,358.32 in removal costs paid to cleanup contractors.

II. APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. 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".

"Claims for removal costs or damages may be presented first to the Fund…by a responsible party who may assert a claim under section 2708." 33 USC §2713(b)(1)(B).

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

(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 determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 "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." [Emphasis added].

THIRD PARTY DEFENSE UNDER OPA 90

The Oil Pollution Act of 1990 (OPA) provides that, "*A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by –*

> *(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party…, if the responsible party establishes, by a preponderance of the evidence, that the responsible party-*
> *(A) exercised due care with respect to the oil concerned, … in light of all relevant facts and circumstances; and*
> *(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.*" 33 USC 2703(a)

To succeed in asserting this defense to liability, the RP must show that the discharge was caused **solely** by an independent third party and that the RP satisfied (3)(A) and (B) above.

OPA provides for a limitation on the complete defense if certain conditions are not met. Specifically, at 33 USC 2703(c) OPA states,

> "*Subsection (a) does not apply with respect to a responsible party who fails or refuses—*
> *(1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;*
> *(2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or*
> *(3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by the Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).*"

If proven, the third party defense is a complete defense to liability for the responsible party.

"*The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that –*

(1) the responsible party is entitled to a defense to liability under section 1003." 33 U.S.C. 2708

III. ANALYSIS:

The record indicates that the hole in the pipeline was caused by the act of a vandal using a high-powered rifle. (See EPA OSC report). A rifle scope cover and a shell casing were found within view of the pipeline. (See photographs). A hole measuring approximately one-half inch was left in the pipeline. (See photographs) There was only one hole and no evidence indicating that anyone but the vandal was involved in puncturing the pipeline. Therefore, the evidence shows that the bullet hole was likely caused solely by the act of the third party vandal.

OPA Incident and Consequences Not Solely Caused by Third Party

Contrary to the claimant's argument, the evidence does not show that oil spill incident itself was solely caused by an unknown third party. Based on the claimant's own statement, the claimant believes that it started the transfer of oil in the line (i.e. operated under pressure) at 8:15pm after the pipeline was punctured. (See claimant's letter dated December 17, 2008.) Accepting the claimant's assertion that the time of the shooting was prior to 8:15pm on October 21st, it is clear that the claimant pressured up the pipeline twice after the puncture in the pipeline. Therefore, the evidence leads to the conclusion that the actual transfer itself contributed to the leak, or at least an increase in volume of the discharge.

According to the Barnsdall Discharge PSI data printout provided by the claimant for October 21, 2005 from 1700 hours to 0700 hours, the data showed a discernible drop in pressure coinciding with the estimated time gunshots were heard by the witnesses interviewed by the Sheriff's Deputy and reported in the Osage County Sheriff's report narrative. The data revealed a pressure drop from 31 psi to 30 psi on October 21, 2005 at 18:24:35 and another continuous decrease from 30 psi beginning at 18:40:35 on October 21, 2005, which is approximately the same time as the gunshots were reportedly heard. It would seem that the evident pressure drop prior to commencing transfer operations should have put the claimant on notice of a potential issue with its pipeline. The claimant then pressured up the line to around 230 psi on October 21, 2005 at 20:16:35 and again at 23:06:35. It appears based upon Sunoco's pressure records that if the pipeline were not pressurized for transfers, the pressure would drop from 31 psi to 0 psi after a certain number of hours passed. Due to the transfers, the line had high pressure for about three hours total over two transfers after which it would slowly lose pressure. The NPFC can only conclude that the added pressure forced more oil out the puncture in the pipeline than would have discharged under the significantly lower pressure observed prior to the transfer.

Since the claimant's act of pressuring up the line and transferring the oil after the line was punctured contributed to the spill either by starting it or by making it much larger than it would have been, the claimant contributed to causing the incident. Therefore, the claimant has failed to meet its burden to prove that the discharge of oil was solely caused by the act of a third party.

Exercise of Due Care with Respect to Oil and No Precautions Taken Against Consequences of Acts of Third Parties

Based on the previous discussion regarding pressurizing the pipeline while it was punctured, the NPFC must determine whether the claimant was exercising due care with respect to the oil and taking precautions against the consequences of the act of the third party who shot the pipeline. It is clear that the claimant contributed to the severity of the incident, but it is not clear how the claimant exercised due care with respect to the oil or took precautions that mitigated this spill. The claimant pressurized its line and transferred oil, causing significantly more oil to spill into the creek than would have leaked had the claimant not pressured the line. The NPFC finds that the claimant's inability to detect the puncture, and then its act of performing transfer operations which increased the spill's magnitude is not the requisite exercise of due care with respect to the oil and the taking of precautions against the consequences of the acts of third parties, as required under the Oil Pollution Act. The NPFC makes no finding with regard to whether the claimant took proper precautions to protect its exposed pipeline against a third party act of shooting a hole in it.

The NPFC requested investigation reports from the claimant. But, the claimant only provided part of the Osage County Sheriff's report. The NPFC, therefore, independently obtained the complete Osage County Sheriff's report, which presented an account of the circumstances preceding the incident. This report provided statements from witnesses who said they saw two people in the vicinity of the pipeline at about 6:00 pm the night before the discharge was discovered. The report also documented that the witnesses heard gunshots around 6:30 pm on October 21st, the evening before the claimant realized that the incident was occurring. (See Osage County Sheriff's report, which was confirmed by a telephone conversation with Deputy Gary Blake). Deputy Blake further stated that the nearby abandoned bridge is a common area for shooting turtles and that deer hunters frequent the area as well.[1]

The RP is required to take precautions against the acts of third parties and the ***foreseeable consequences*** of those acts or omissions. 33 U.SC. §2703(a)(3)(B) It is foreseeable that someone might purposely or accidentally damage an exposed, suspended pipeline, while engaging in mischief, malice or simple carelessness. The expected result of such vandalism is the discharge of oil, especially if the pipeline operator begins pumping oil through it after it has been breached. Given the information provided by Deputy Blake and high profile pipeline shootings such as the Trans-Alaska Pipeline System shooting in 2001, the possibility that the claimant's pipeline would be shot and subsequently discharge oil into the creek over which it transited was foreseeable.

The claimant has not shown that it had reasonable precautions in place to prevent the foreseeable consequences of the acts of vandals or other third parties. Once a foreseeable act of vandalism creates an oil spill, as was the case in this incident, Sunoco should be able to immediately detect the pressure drop and deploy emergency measures, not increase pressure and oil in the line. This means that Sunoco should be able to minimize the spill rather than aggravate it. The record indicates that 518 barrels of oil escaped from a 0.5-inch puncture. Sunoco states that the oil transfer began at 8:15pm and was shut down at 11:40pm when the inventory reconciliation process showed a potential issue with the line. (See letter dated December 17, 2008) The release was not found until 9:30am the next morning, at which time the oil was still spewing

[1] Telephone discussion with Eric Bunin, Claims Manager at NPFC on September 17, 2008.

under pressure from the pipeline into the creek. Sunoco provided no information as to how long after detection the pipeline spill was stopped, clamped and sealed, or whether block valves on either side of the breach were closed after the issue was identified.

The length of time of the discharge can be estimated using evidence in the record. As the police report recounts, witness accounts state that gunshots were heard around 6:00-6:30pm the night before the incident. The claimant's own discharge PSI data also show pressure drops that correlate to this time frame. If these gunshots were in fact the shots that pierced the suspended pipeline, then about 15 hours passed before the discharge of oil was found. But, if the discharge did not begin until the oil transfer then it started around 8:15pm. By 9:30am over 13 hours had passed before the discharge was found. Certainly, this would explain how 518 bbl were released, but it raises the question of the effectiveness of Sunoco's detection and/or emergency response systems. It is this evident delay and the fact that 518 bbl were allowed to escape from the pipeline that calls into question whether Sunoco has taken the necessary precautions to detect, minimize and respond to the oil spill as the foreseeable consequences of an act of vandalism, or other acts or omission which caused a pipeline rupture in its pipeline system. The claimant has not shown that its response systems kept the spill to a minimum. It is hard to believe that 518 bbl would have leaked had emergency measures been deployed in response to detection of the pressure drop while the system was shutdown. However, the claimant has not addressed these factors. The evidence leads to the conclusion that had the claimant's precautions been sufficient; the spill could have been limited to a much smaller amount.

Conclusion

The NPFC concludes that the claimant failed to meet its burden of proving that it satisfied the requirements for a defense under OPA. Sunoco has failed to satisfy its burden of showing that the spill was solely caused by a third party, or that it took necessary precautions to minimize the consequences of an act of vandalism or other acts or omission causing a pipeline rupture. The claimant alleged that its system of leak detection worked because it identified the loss of oil and the claimant was able to shut down the system and limit the discharge to 518 barrels. The NPFC disagrees and finds that given the information provided, Sunoco has not met its burden to demonstrate that it took precautions to sufficiently prevent or minimize the discharge of oil, for which Sunoco is liable. In addition, the record is incomplete because certain details of the incident and circumstances surrounding the events of the discharge are unknown. The claimant has not provided evidence of the time the leak began or was detected, which could have been over twelve hours before the leak was found. The claimant has not shown that the pipeline was immediately shut in or explained why the oil continued to discharge under pressure for an extended period if the pipeline was shut in.

Since the claimant is presumed to have been aware of the risks and did not take sufficient precautions to protect against the consequences of third party damage to its pipeline, the claimant has not shown that it took sufficient precautions to minimize the oil damage that will result when such damage occurs. To the contrary, the claimant has provided evidence that its actions actually contributed to aggravating the discharge, causing more oil to discharge than without their actions.

The evidence shows that the claimant did not exercise due care with respect to the oil and did not take adequate precautions against the foreseeable consequences of the acts of third parties. The pipeline crosses over a creek where it is exposed for all to see and/or vandalize. This issue is not

the vandalism, but is the claimant's contribution to the magnitude of the spill. The NPFC makes no finding regarding whether the claimant took proper precautions against the acts of third parties. Rather, the NPFC finds that the claimant was required to take precautions against the foreseeable consequences of the acts of third parties

DEFENSE TO LIABILITY DENIED

The claimant is denied its claimed entitlement to a third party defense to liability and the underlying costs claimed.

Claim Supervisor: Thomas S. Morrison Date of Supervisor's review: Supervisor Action: Supervisor's Comments:

U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
National Pollution Funds Center
United States Coast Guard

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5890
October 28, 2009

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7003 3110 0000 0018 9333

Sunoco Pipeline L.P.
ATTN: Mr Gus Borkland
1735 Market Street
Suite LL
Philadelphia, PA 19103

RE: Claim Number: E06601-001

Dear Mr. Borkland:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number E06601-001 involving the Sunoco Pipeline discharge of oil into Birch Creek. Compensation is denied for the reasons stated in the attached Claim Summary/Determination.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter or within 30 days of your receipt of this letter, whichever date is earlier, and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number E06601-001.

Mail reconsideration requests to:

NPFC CA MS 7100
US Coast Guard
4200 Wilson Blvd. Suite 1000
Arlington VA 20598-7100

Sincerely,

Eric Bunin
Claims Manager
U.S. Coast Guard

Encl.: Claim Summary / Determination Form