

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

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| <b>Claim Number:</b>     | UCGP922015-URC001                          |
| <b>Claimant:</b>         | Oregon Department of Environmental Quality |
| <b>Type of Claimant:</b> | State                                      |
| <b>Type of Claim:</b>    | Removal Costs                              |
| <b>Claim Manager:</b>    | (b) (6)                                    |
| <b>Amount Requested:</b> | \$31,420.79                                |
| <b>Action Taken:</b>     | Offer in the amount of \$31,418.49         |

### **EXECUTIVE SUMMARY:**

On October 12, 2021 at approximately 10:00 p.m., a fire broke out at the D & C Motor Company European Motor Cars [d/b/a D & C Motorz Inc.'s (D & C Motorz)] automotive service building in Clackamas County, Oregon. The fire consumed a plastic liner of a 275-gallon aluminum framed tote of used oil that was located next to the building, resulting in the discharge of its contents.<sup>2</sup> On October 13, 2021, the Oregon Department of Environmental Quality (ORDEQ) notified the National Response Center (NRC) of an unknown sheen from an unknown source that discharged into Kellogg Creek and Kellogg Lake, navigable waterways of the United States.<sup>3</sup>

Based on the location of this incident, the Federal On Scene Coordinator (FOSC) was the United States Environmental Protection Agency (USEPA).<sup>4</sup> ORDEQ, as the State On Scene Coordinator (SOSC) for the incident, determined that the “unknown” sheen stemmed from the incident at D&C Motorz the day before. ORDEQ determined the spill to have been caused by arson<sup>5</sup> at the D & C Motorz property which consumed the plastic liner of the 275-gallon tote and caused the tote to fail and discharge its contents.<sup>6</sup> The exact volume of oil present in the tote was

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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> Oregon DEQ Pollution Report (POLREP) #1 Initial and Final dated June 9, 2022.

<sup>3</sup> National Response Center (NRC) Report # 1319398 dated October 13, 2021.

<sup>4</sup> See, 40 CFR 300.120(a)(2).

<sup>5</sup> The Clackamas County Sheriff's Department identified (b) (6) as the individual potentially responsible for the arson. The Sheriff's Department stated that this individual is also potentially responsible for other related acts of arson as well. Mr. (b) (6) is classified as homeless and could not be located by law enforcement during the investigation. See, ORDEQ POLREP #1 Initial and Final, under the Enforcement Activities, Identity of Potentially Responsible Parties (PRPs) section dated June 9, 2022. See also, Causal Investigation email to ORDEQ from Clackamas County Sheriff's Department dated February 23, 2022.

<sup>6</sup> See, ORDEQ POLREP #1 Initial and Final, under the Location, Site and Source Description section, dated June 9, 2022.

unknown, but it was estimated to be nearly full based on observations and conversations with D & C Motorz representatives.<sup>7</sup>

ORDEQ reported the incident to the National Response Center (NRC) and as the State On Scene Coordinator (SOSC), responded to the incident beginning on October 14, 2021, and on successive dates as needed to evaluate site conditions, effectiveness of containment measures and other aspects of the response.<sup>8</sup>

ORDEQ presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$31,420.79 on June 29, 2022.<sup>9</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 \$31,418.49 of the requested \$31,420.79 is compensable and offers this amount as full and final compensation of this claim.

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

### ***Incident***

On October 12, 2021, a fire occurred at the D & C Motorz's automotive service building and consumed the plastic liner of a 275-gallon aluminum framed tote located next to the building. The tote discharged its contents of used oil, and the firefighting water moved the oil into a nearby storm drain that is managed by the Oregon Department of Transportation (ORDOT).<sup>10</sup> On October 13, 2021 ORDEQ notified the NRC of an unknown sheen from an unknown source that was discovered on Kellogg Creek and Kellogg Lake, navigable waterways of the United States.<sup>11</sup> ORDEQ determined the incident at D & C Motorz caused the sheen that was reported on October 13, 2021.

### ***Responsible Party***

D & C Motorz is the owner of the tote tank that discharged the oil<sup>12</sup> and, thus, the RP under Oil Pollution Act (OPA).<sup>13</sup>

### ***Recovery Operations***

On October 13, 2021, ORDEQ personnel responded to the incident and began response actions. The SOSC attended the scene on October 14, 2021, and on successive dates as needed to evaluate site conditions, effectiveness of containment measures and other aspects of the response.<sup>14</sup> The SOSC oversaw the response in coordination with the FOSC.

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<sup>7</sup> ORDEQ POLREP #1 Initial and Final, under the Location, Site and Source Description section, dated June 9, 2022.

<sup>8</sup> ORDEQ POLREP #1 Initial and Final, under the Response Actions section, dated June 9, 2022.

<sup>9</sup> Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form dated June 13, 2022.

<sup>10</sup> ORDEQ POLREP #1 Initial and Final, under the Response Actions section, dated June 9, 2022.

<sup>11</sup> NRC Report Number 1319298 dated October 13, 2021.

<sup>12</sup> See, email from D&C Motorz to NPFC dated September 27, 2022 acknowledging ownership of the tank.

<sup>13</sup> See, 33 U.S.C. § 2701(32).

<sup>14</sup> ORDEQ POLREP #1 Initial and Final dated June 9, 2022.

Local city government personnel assisted in the site and source investigation while Oregon Department of Fish & Wildlife staff performed monitoring for oiled wildlife and ultimately identified a mallard that had been impacted by the oil. The bird was captured and delivered to the Audubon Society for rehabilitation.<sup>15</sup> Due to the impact to the stormwater conveyance system, ORDOT assisted with the coordination of cleanup activities and promptly hired US Ecology to contain and remove oil from the storm water conveyance system along with the impacted waterways.<sup>16</sup>

US Ecology personnel deployed containment and absorbent boom within the creeks and lake to prevent the movement of oil into the Willamette River. Cleaning of the source area and within the stormwater systems was completed to prevent further movement of oil into the waterway. After the cleaning, absorbents were left in the catch basins of the stormwater system to absorb any residual oil that might remain. Passive oil collection methods continued over several months by leaving the booms in place and relying on anticipated rain events to flush out any residual oil to the collection points.<sup>17</sup>

On January 4, 2022, given that no additional oil was recoverable from the waterways and only very minor sheening was observed entering the lake, the response was deemed complete. All booms and absorbents were pulled from the water. In total, 4.98 tons of oily absorbents and debris along with approximately 150 gallons of oily water were collected and disposed of during the response.<sup>18</sup>

## **II. NPFC AND RP:**

The NPFC issued a RP Notification letter dated August 17, 2022 to D&C Motorz Inc. 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 a result of the incident in which the recipient is the identified or suspected RP.<sup>19</sup>

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

On June 29, 2022, the claimant submitted its claim to the NPFC for \$31,420.79.<sup>20</sup> On July 25, 2022, the NPFC requested additional information from the claimant, and they promptly provided the requisite information to the NPFC on August 10, 2022.<sup>21</sup>

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<sup>15</sup> ORDEQ POLREP #1 Initial and Final dated June 9, 2022.

<sup>16</sup> ORDEQ POLREP #1 Initial and Final dated June 9, 2022.

<sup>17</sup> ORDEQ POLREP #1 Initial and Final dated June 9, 2022.

<sup>18</sup> ORDEQ POLREP #1 Initial and Final dated June 9, 2022.

<sup>19</sup> RP Notification Letter dated August 17, 2022.

<sup>20</sup> The claim included the Oil Spill Liability Trust Fund Optional Claim Form dated June 13, 2022; ORDEQ POLREP #1 – Initial and Final dated June 9, 2022; Site Location Map; Photo Log of incident photos; Casual Investigation Information from Clackamas Sheriff's Department; NRC Report # 1319398 dated October 13, 2021; Oregon Emergency Response System Incident Report screenprint; and USEPA coordination emails and communication; ORDEQ Invoice and ORDEQ personnel listing by date and activity performed.

<sup>21</sup> This information included: D & C Motorz Inc. corporate information from the Oregon Secretary of State; ORDEQ Costs and Time Log for incident by name and date; FOSC coordination statement dated July 26, 2022, which determined their actions were consistent with the NCP; Fiscal Year 2020 indirect rate calculation paperwork; ORDEQ Personnel Costs and position descriptions; and Clackamas Fire Department statement dated August 3, 2022 indicating no firefighting foam was used in the fire suppression for the incident.

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

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>22</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>23</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>24</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>25</sup> An RP's liability is strict, joint, and several.<sup>26</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>27</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>28</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>29</sup>

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<sup>22</sup> 33 CFR Part 136.

<sup>23</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>24</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>25</sup> 33 U.S.C. § 2702(a).

<sup>26</sup> See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

<sup>27</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>28</sup> 33 U.S.C. § 2701(31).

<sup>29</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>30</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>31</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>32</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>33</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>34</sup>

The NPFC analyzed each of these factors and determined that the majority of the costs incurred and submitted by ORDEQ are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced at the appropriate ORDEQ published rates personnel labor, ORDEQ agency indirect costs, and ORDEQ Land Quality Division (LQD) Indirect costs.

Based on the location of this incident, the FOSC is the United States Environmental Protection Agency (USEPA).<sup>35</sup> All approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).<sup>36</sup>

Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$31,418.49 while \$2.30 are deemed non-compensable for the following reasons:<sup>37</sup>

1. The claimant requested \$9,619.94 for ORDEQ personnel labor costs.<sup>38</sup> However, upon adjudication of the individual line items for each person using their respective hourly rates and hours claimed, the personnel costs actually total \$9,619.87, which is a difference of (\$0.07). As such, the NPFC denies the difference.

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<sup>30</sup> See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>31</sup> 33 CFR Part 136.

<sup>32</sup> 33 CFR 136.105.

<sup>33</sup> Email from FOSC to ORDEQ dated July 26, 2022 acknowledging the actions taken were consistent with the National Contingency Plan.

<sup>34</sup> 33 CFR 136.203; 33 CFR 136.205.

<sup>35</sup> 40 CFR 300.120(a)(2).

<sup>36</sup> See, ORDEQ claim submission dated June 13, 2022, additional information provided by the claimant, and email from FOSC to ORDEQ dated July 26, 2022 acknowledging the actions taken were consistent with the National Contingency Plan.

<sup>37</sup> Enclosure 3 to this determination which provides a detailed analysis of the amounts approved and denied by the NPFC.

<sup>38</sup> ORDEQ claim submission dated June 13, 2022, page 30 of 33.

2. The claimant requested \$1,983.77 for the ORDEQ Agency Indirect Costs.<sup>39</sup> As discussed above, the total personnel cost of \$9,619.94 was incorrect; the appropriate amount should have been \$9,619.87. Applying the agency indirect cost rate of 20.6%<sup>40</sup> to the corrected amount equals \$1,981.69. The \$2.08 difference between the claimed amount and the amended amount is denied.
3. The claimant requested \$19,817.08 for the ORDEQ LQD Indirect Costs.<sup>41</sup> The claimant calculated the total personnel costs of \$9,619.94 and multiplied them by the determined LQD rate of 206%,<sup>42</sup> arriving at a total of \$19,817.08. However, the NPFC's calculation of personnel costs of \$9,619.87 multiplied by the determined LQD indirect percentage of 206% results in a total of \$19,816.93. The \$0.15 difference is denied.

**Overall Denied Costs** = \$2.30<sup>43</sup>

## **VI. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, ORDEQ's request for uncompensated removal costs is approved in the amount of \$31,418.49.

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

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| <b>(b) (6)</b>                                 |
| Claim Supervisor: <b>(b) (6)</b>               |
| Date of Supervisor's review: <i>12/14/2022</i> |
| Supervisor Action: <i>Offer Approved</i>       |

<sup>39</sup> *Id.*

<sup>40</sup> *See*, **(b) (6)** CPA Indirect Cost Recovery Methodology for ORDEQ, page 28 of 42, under spill prevention it shows 25% for Indirect Cost rate and they are asking for only 20.6%

<sup>41</sup> ORDEQ claim submission dated June 13, 2022, page 30 of 33.

<sup>42</sup> *See*, Personnel Costs\_Position Descriptions\_LQD Indirect Cost Calc, page 2 of 2. *See also*, FY20 indirect rate work papers-month 12 final, under the FY18 forecast, line 15 shows 206%. *See also*, FY 2011 Indirect Calc for ORDEQ.

<sup>43</sup> Enclosure 3 to this determination which provides a detailed analysis of the amounts approved and denied by the NPFC.