

CLAIM SUMMARY / DETERMINATION FORM

Date	: 27 July 2011
Claim Number	: 909005-001
Claimant	: State of New York - Environmental Protection and Spill Compensation Fund
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$707,518.19

On or about March 9, 2002, a tire fire at the Mohawk Tire Facility Storage, located between Halfmoon and Waterford in Saratoga County, New York, resulted in the discharge of hazardous substances that threatened Mudderkill Creek and the Hudson River. According to a local news outlet¹ report on March 29, 2002, the tire fire consumed 700,000 to one million tires and Saratoga County firefighters extinguished the fire on March 12, 2002. The 24.5-acre tire facility site, which consists of three parcels of land, is owned by Mohawk Tire Recycling, Inc., [REDACTED] and [REDACTED] (the responsible parties).²

Claimant and the Claim: New York Environmental Protection and Spill Compensation Fund, Office of the State Comptroller, presented a claim to the Oil Spill Liability Trust Fund (OSLTF) on October 8, 2008, for removal costs totaling \$707,518.19. Claimant presented the claim to the responsible parties on May 10, 2004³. The responsible parties' debts were discharged in bankruptcy.

On October 16, 2008, the National Pollution Funds Center (NPFC), which administers the OSLTF, sent a letter to the Claimant requesting further information, including whether there had been Federal On Scene Coordinator (FOSC) coordination, the start and end dates for the incident and information from the removal crew vendors with their rate schedules. On December 10, 2008, Claimant submitted significant amounts of raw data in 3 boxes that consisted of Department of Environmental Conservation (DEC) files, including memoranda, photographs, numerous Phoenix Environmental Laboratories Analysis Reports and contractual documents.

The information sent to the NPFC included a document reflecting that the incident was reported to the NRC on March 11, 2002. See report # 586165. It also included an EPA Region II Mini Pollution Report (ERNS No. 64872), stating a release date of March 9, 2002 and a response on March 11, 2002. It also states that all sampling pumps put in place by 2100 hours on that day and all fire department equipment demobilized by 0700 hours the next day, when the fire was declared out: March 12, 2002. On October 2, 2009 a second letter was sent to the Claimant requesting more information, specifically information on where in the administrative record evidence of the discharge of Pyrolitic oil was located. Claimant's response⁴ pointed to the claim submission witness list and internal DEC reports detailing spill cleanup efforts. No information was sent to the NPFC evidencing coordination with the FOSC.

¹ TimesUnion.com

² State of New York letter to the NPFC dated March 22, 2010

³ State of New York Environmental Protection and Spill Compensation Fund Claim Form - Block #5

⁴ Dated March 22, 2010 and received by the NPFC on March 31, 2010.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), each responsible party for a vessel or facility from which oil is discharged, or poses the substantial threat of a discharge of oil, into or upon the navigable waters is liable for removal costs and damages that result from such incident. "Removal costs" means "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 such an incident." 33 U.S.C. § 2701(31).

"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, but does not include petroleum, including crude oil or any fraction thereof, 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".

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

The President shall publish regulations detailing the manner in which the authority to obligate the Fund. 33 U.S.C. § 2712(e). The claims regulations are found at 33 CFR Part 136.

No claim may be presented to the OSLTF for recovery of removal costs for an incident unless the claim is presented within six years after the date of completion of all removal actions for that incident. 33 U.S.C. § 2712(h)(1).

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].

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. This is a *de novo* review. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

DETERMINATION OF LOSS:

A. Overview:

1. There was no FOSC coordination for this incident. 33 U.S.C. § 1321(d)(2)(K).
2. A Responsible Party was determined and subsequently notified by the NPFC. However, no response has been received from the RP to date. 33 U.S.C. § 2701(32).
3. The claim was not submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(2)
4. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm whether or not the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

After review of the administrative record the claim is denied on the following grounds:

Failure to present the claim to the OSLTF within the limitation period.

First, the NPFC requested specific information related to the date that removal actions were completed. Claimant did not provide this information. Therefore, the NPFC determined, based on evidence in the administrative record that removal actions were completed no later than June 10, 2002.

The tire fire occurred on March 11, 2002. According to other documentation in the record active firefighting activities ended on March 12, 2002. From March 12, 2002, through May 15, 2002, Claimant’s contractors constructed drainage ditches and trenches to direct remaining contaminated water from the firefighting activities and water from potential rain events to retention basins where the water could be treated and recycled. Overdams and underdams were replaced with sturdier barriers to ensure that contaminated water would not

reach Mudderkill Creek or the Hudson River. Also, documentation in the record states that all oil was cleaned from the streams by May 15, 2002.

Finally, documents reflect that disposal of the contaminated water and ashes were disposed at the Albany Solid Waste Management Facility on April 30, 2002⁵. A memo in the record states that on June 10, 2002, there was no measurable impact to the Hudson River, no contract personnel were on site and there was minimal sampling. Thus, without more credible evidence, the NPFC determined that cleanup was complete on June 10, 2002. The limitation period for presenting claims to the OSLTF is six years after completion of cleanup activities. The claim was presented to the OSLTF on October 8, 2008, more than six years after cleanup was complete.

Failure to present information evidencing that the removal activities were coordinated with the FOSC or were consistent with the National Contingency Plan.

The only document in the record is an email stating that EPA would certify that the removal actions were consistent with the NCP but no official record was found in the file. The only EPA document submitted by the claimant is the Mini Pollution Report stating the release date of March 9, 2002, a response on March 11, 2001, and a declaration that the fire was out on March 12, 2002.

Failure to evidence that the contaminated waters posing a substantial threat to Mudderkill Creek and the Hudson River was oil as defined in OPA.

The New York State DEC Spill Report Form, Spill No. 0111651 stated that the "material spilled" was a "hazardous material" and the "resource affected" was "air." Various narratives in the record discuss "contaminated water," "water samples taken along the Mudderkill Creek," and "significant petroleum contamination" and sheening was observed across the Mudderkill Creek. However, there is no evidence stating that the contamination was Pyrolitic oil. While tires may produce Pyrolitic oil as they burn, there is no evidence in the record that the contaminated water reaching and/or posing a substantial threat to the Mudderkill Creek or the Hudson River was Pyrolitic oil. Claimant submitted numerous Phoenix Environmental Laboratory Analysis Reports; however, these reflect petroleum constituents in the samples along with detectable levels of heavy metals and other contaminants. The reports do not establish that the contaminated water contained Pyrolitic oil.

⁵ Claimant's March 22, 2010 Letter - Enclosure (5) - numbered by NPFC - Page 4 of 5

Based on the grounds discussed above this claim is denied. The administrative record reflects that the NPFC claims staff requested specific information needed to support the claim on at least three occasions and the specific information requested was not provided. The Claimant has not provided the necessary documentation to support the claim.

DETERMINED AMOUNT: \$0.00

Claim Supervisor:

Date of Supervisor's Review:

Supervisor Action:

Supervisor's Comments:



7/2/11
DENIAL APPROVED