

CLAIM SUMMARY / DETERMINATION

Claim Number:	S18010-0004
Claimant:	Oregon Department Of Environmental Quality
Type of Claimant:	STATE
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$13,652.36

FACTS:

- A. ***Oil Spill Incident:*** At 1400 on January 18, 2018, the Oregon Department of Environmental Quality (DEQ) “received a report of a sheen originating under a pier next to the Cannery Pier Hotel.”¹ The Cannery Pier Hotel is located along the Columbia River, a navigable waterway of the United States, in Astoria, Oregon. US Coast Guard Sector Columbia responded to the oil spill site, reporting a “sheen on the Columbia River was a half mile long and lighter bands were observed for 2 to 3 miles downstream.”² Oregon DEQ responded as the environmental unit lead and coordinated with NOAA (SSC), Washington Department of Ecology, the City of Astoria, and Port of Astoria.
- B. ***Description of removal actions performed:*** On January 20, 2018, Oregon DEQ responded to the oil spill site and found that a tank beneath the pier located at the Cannery Hotel was the most likely source of the discharge and determined that no drinking water intakes were impacted. DEQ personnel then monitored the deployment of surface washing agents as well as other cleanup techniques, reviewed and approved a draft salvage plan for the removal of the damaged tank including the deconstruction of the pier, provided review for permitting for pier deconstruction, and provided shoreline and wildlife assessments/observations for further cleanup operations.³

CLAIM AND CLAIMANTS:

This Claim for uncompensated removal costs was presented to the National Pollution Funds Center (NPFC) on August 2, 2018, by Mr. ██████████ of Oregon DEQ (Claimant). The Claimant is specifically seeking uncompensated removal costs in the amount of \$13,652.36, asserting that Cannery Pier Hotel failed to pay them for their removal costs.

Specifically, Oregon DEQ billed the responsible party (RP), Cannery Pier Hotel LLC (Cannery Pier Hotel), for the costs associated with its removal actions, totaling \$13,652.36. The costs include \$8,621.69 in Land Quality Indirect Costs, \$4,185.29 in Personal Services, and \$845.38 in Agency Indirect Costs. Cannery Pier Hotel responded to Oregon DEQ through its attorney, (b) (6) ██████████, Esq. (Mr. ██████████) of Schwabe Williamson & Wyatt via a letter dated March 6, 2018. On behalf of Cannery Pier Hotel, Mr. ██████████ stated, “Cannery Pier Hotel does not have the resources to pay for all the

¹ See, Oregon DEQ Incident Status Summary dated January 18, 2018.

² See, Oregon DEQ Pollution / Situation Report January 18, 2018.

³ *Id.*

claims and costs incurred related to the oil spill. It has sought assistance from the Oil Spill Liability Trust Fund regarding immediate payment on claims and costs related to the oil spill.”⁴

The NPFC sent an RP Notification Letter, dated August 3, 2018, to Cannery Pier Hotel.⁵ To date, no communication has been received by the NPFC as of the writing of this Determination Package.

As evidence for its claim, the Claimant submitted numerous documents associated with its response to the oil spill incident. The documents include: DEQ Invoice # HSRAF18-3662 dated July 19, 2018; Optional OSLTF Claim Form dated July 23, 2018; DEQ Pollution / Situation Report dated January 18, 2018; State of Oregon Resources At Risk Summary dated January 19, 2018; DEQ Detailed Incident Reports dated January 18, 2018, through January 24, 2018; USCG National Response Center (NRC) Report # 1202688 dated January 18, 2018; ICS Incident Briefing dated January 19, 2018; Oregon Emergency Response System (OERS) report dated January 18, 2018; DEQ Time Reporting Daily Logs for January 18, 2018, through February 1, 2018; DEQ Cost Recovery Accounting Schedule Invoice for Project # S23400-00, totaling \$13,652.36; Letter from Schwalbe Williamson & Hyatt to DEQ dated March 6, 2018; and DEQ OSC Unit Log dated January 18, 2018, through January 31, 2018.

Additional Information: The NPFC identified deficiencies with the claim and requested the following information by email dated August 8, 2018: salary information for all personnel, including hourly rates and associated job descriptions; pre-enforcement documentation and a description of all enforcement efforts; a description of costs associated with public information and how they relate to the removal of oil; a detailed breakdown of all indirect costs and the indirect rate calculation.

By email dated August 23, 2018, the claimant submitted numerous documents in response to the NPFC’s request for additional information. The documents include: undated Microsoft Word document including typed responses to additional information request; DEQ Waste Management and Cleanup Program Indirect Cost Rate Methodology dated March 16, 2001; several documents including FY10 & 11 Land Quality Indirect Cost Rates; undated document titled Invoicing for Cleanup Costs; DEQ Pre-Enforcement Notice to Cannery Pier Hotel dated May 21, 2018.

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).

⁴ See, letter from (b) (6) Esq. to Department of Environmental Quality dated March 6, 2018.

⁵ See, RP notification letter dated August 3, 2018.

"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".

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].

DETERMINATION OF LOSS:

A. Findings of Fact:

1. MST3 [REDACTED], as the USCG Sector Columbia Federal On-Scene Coordinator (FOSC) for this incident, oversaw the removal actions and determined that the actions undertaken by Oregon DEQ were consistent with the National Contingency Plan (NCP). 33 U.S.C. § 2702(b)(1)(B) and 2712 (a)(4);
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. 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;
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined which of the removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

B. NPFC Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that 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.

With respect to the \$8,621.69 in LQD Indirect Costs and \$845.38 in Agency Indirect Costs, the NPFC notes that typically, the “indirect costs” are based on a percentage calculation, as determined by the Department of Commerce or an independent agency in some cases, to cover general administrative and overhead expenses for agencies. It is important to note that indirect rate calculations based on a percentage are typically affiliated with the old OMB Circular A-87 that has since become 2 CFR 225. That program is for agencies that are under contract with the government or affiliated with a grant program. With that being said, claimants to the Fund are not under contract with the NPFC nor is our program a grant program; therefore, calculating indirect expenses based on percentage calculations is not, in and of itself, OPA compensable.

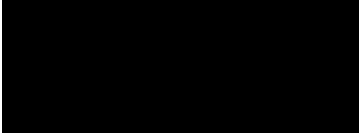

In this claim, the claimant failed to break down its actual agency expenses in order to establish the actual indirect amount; therefore, substantiation of indirect cost has not been provided nor is it supported by the record using actual expenses, rent, utility bills, payroll,

etc. and is, therefore, denied as unsubstantiated. The NPFC denies the \$8,621.69 in LQD Indirect Costs and \$845.38 in Agency Indirect Costs, for a total of \$9,467.07.

With regard to the \$4,185.29 in Personal Services, the NPFC has confirmed that the rates charged by the Claimant are in accordance with the published rates at the time services were rendered and the work performed was for the response to the oil spill incident. Based on the Federal On-Scene Coordinator's (FOSC's) direction and oversight, the response has been determined to be reasonable, necessary and performed in accordance with the NCP and as such, the state's personnel costs are likewise approved.

The NPFC hereby determines that the OSLTF will pay \$4,185.29 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N15019-0001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

AMOUNT: \$4,185.29


Claim Supervisor: 
Date of Supervisor's review: <i>9/19/18</i>
Supervisor Action: <i>Approved</i>
Supervisor's Comments: