

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 909089-001
Claimant	: Bridgestone Retail Operations LLC
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Amount Requested	: \$195,106.02

INCIDENT:

Upon arrival at the Firestone Complete Auto Care (Firestone store) on August 24, 2008, the manager, [REDACTED] discovered that oil had discharged from the store's above ground storage tank that contained new, unused automotive motor oil. A reported 200-300 gallons of oil run out of the building, migrated onto the parking area and into a storm drain. Some of the oil reached drainage canals that lead to the Caloosahatchee River, a navigable water of the U.S.

CLAIMANT AND CLAIM:

Claimant is Bridgestone Retail Operations LLC (BSRO or Claimant), which owns the Firestone store. An above-ground storage tank at its Firestone store on Cleveland Avenue in Ft. Myers, Florida, was identified as the source of the discharge. BSRO is the responsible party (RP). It conducted removal actions and paid the removal costs.

BSRO presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) on April 30, 2009 asserting that it was entitled to a complete defense and that an unknown, unrelated third party solely caused the discharge at its Firestone site. Based on this defense, Claimant seeks reimbursement of \$195,106.02 in uncompensated removal costs it alleges it incurred responding to the oil spill from the Firestone store. The Claimant submitted the costs to its insurer, but the insurer denied coverage.¹

Claimant provided documents to support its assertion that it is entitled to a complete defense to liability and cost documentation and invoices to support its removal costs claim.

FACTS:

The Firestone store.

The Firestone site is an out parcel associated with the Edison Mall, located at 4325 Cleveland Avenue in Fort Myers, Florida. It consists of a showroom, stock rooms including a tire storage area, and a garage with eight service bays where tires are repaired and replaced, and oil-changing services are provided for vehicles (the service area). BSRO leases the property from the Simon Property Group, L.P.

¹ Crawford letter to [REDACTED] Senior Vice President, Risk Management, SIMON Property Group, Inc., dated 2/20/09

There is a 500-gallon above ground storage tank (AST) located in the service area that holds new, unused oil; the AST is typically not filled to capacity.² There is also a 55-gallon drum to store new oil. A 320-gallon double-walled AST stores used oil.³ Both ASTs are located on an interior wall of the shop area. The oil dispensers are located between the two eastern and two western sets of bays.

In order to activate the dispensers that move oil from the ASTs both the electricity and the air compressor must be on.⁴ The air compressor is turned on/off at a disconnect box located outside the compressor room. The compressor room did not have a door. The electrical box is located on the back wall inside the tire storage room. The tire storage room is locked at night.

BSRO security measures.

According to a Closing Policy Checklist provided by the Claimant certain policies "must be adhered to when closing the facility at the end of the day."⁵ They include: (1) verifying that all windows and doors are closed and locked in the showroom and the service bays; (2) shutting off and bleeding all air compressors; (4) locking all keys in the safe; (5) turning on the alarm when present, (6) turning off the power to the air compressors, and (7) exiting the building, locking the door and verifying that the lock is in place.

As part of BSRO's Policy and Procedures the store manager, as part of closing procedures, must ensure that the store's air compressors are shut off and the oil delivery system is depressurized at the end of each day.⁶ Only store managers and sales associates are issued keys. If there are any changes in employment with a key-carrying employee all locks, safe combinations and security access codes are immediately changed.⁷

The Firestone store is an automotive maintenance/repair facility and, according to the Claimant, there are no industry site security standards for these types of businesses. The decision to install security systems in new Firestone stores is made at the corporate level after new store members assess the building location and determine whether certain security functions are deemed necessary. For existing or leased Firestone stores the decision to install security measures is made at the district level. BSRO leased the property on which the Firestone store was located but BSRO owned the ASTs. According to the Claimant it was not required to have a Spill Prevention, Control, and Countermeasure Plan (SPCC) Plan because the storage capacity of its ASTs at the store was 870 gallons, which is below the threshold requirement of 1,320 gallons.

The incident.

The evidence indicates that an unidentified person⁸ broke into the store sometime overnight on August 23 after 1830 or early morning August 24, 2008 before 0745. The person gained access to the building by knocking out a metal panel in a garage bay door. The person activated the

² At the time of the incident Claimant estimates that the AST held approximately 360-380 gallons of oil.

³ Florida Department of Environmental Protection regulations require that used oil tanks must be double-walled but there is no requirement for double walling new and unused oil tanks.

⁴ Ft. Myers Police Report Narrative

⁵ Firestone Retail and Commercial Operations, Part 12, Checklist.

⁶ Bridgestone Retail Operations, LLC letter received by the NPFC on July 13, 2009.

⁷ Id.

⁸ The police investigated the incident but the party was never identified.

motor oil dispensing system inside the service area. According to the documentation in the record the person used zip-ties to depress the oil dispenser handles, which caused the oil to continuously pump out onto the garage floor until the AST was empty. The discharged oil migrated onto the parking lot outside the building. Some of the oil entered the local storm drain near the parking lot and through several drainage canals that lead to the Caloosahatchee River.

The police and fire departments were notified by Mr. [REDACTED] at 0758 on Aug. 24th.⁹ The Claimant promptly responded by mobilizing an emergency response team and funded removal actions conducted by Safety Kleen and Earth Science.

APPLICABLE LAW:

Under the Oil Pollution Act of 1990 (OPA 90), each responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines, is liable for the removal costs and damages that result from such incident. 33 U.S.C. § 2702(a).

“Facility” means “any structure, group of structures, equipment, or device which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, and transferring, processing or transporting oil. 33 U.S.C. § 2701(9).

A responsible party for an onshore facility is the owner or operator of that facility. 33 U.S.C. § 2701(32)(B).

“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).

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.

33 U.S.C. §2713(b)(1)(B) provides for presentation of claims under OPA by responsible parties. The responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2708(a)(1) of this title only if the responsible party demonstrates that (1) the responsible party is entitled to a defense to liability under section 2703 of this title.

⁹ Ft. Myers Police Report

A responsible party is not liable for removal costs or damages under section 2702(a) if he 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 an act or omission of a third party, other than an employee or agent of the responsible party or 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 exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances and took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions. 33 U.S.C. § 2703(a)(3)(A) and (B). Section (a) does not apply with respect to the responsible party who fails or refuses to report the incident as required by law if the responsible party knows or has reason to know of the incident. 33 U.S.C. § 2703(c)(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."

COMPLETE DEFENSE DETERMINATION:

NPFC Analysis for Establishment of a Third Party Defense

Claimant is the RP and presented this claim to the OSLTF asserting entitlement to a complete defense and seeking reimbursement of its removal costs. As noted above the complete defense in OPA provides that a responsible party must demonstrate by a preponderance of the evidence that the discharge of oil was solely caused by a third party, other than an employee or agent of the third party, and that it exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances, and

took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.

Claimant asserts that it is entitled to a complete defense because the discharge was caused solely by the acts of a third party who gained access by criminally entering the Firestone store after hours. BRO argues that the RP exercised due care by maintaining the oil product in a locked facility and the store closing procedures, including completely turning off the compressors and locking all doors and windows, were followed when the store was closed on August 23, 2008.

The administrative record demonstrates that an unknown third party entered the Firestone store after hours by kicking in a panel on one of the garage bay doors. The Firestone store had implemented and followed the BRO's Firestone store closing procedures and asserts that its employees followed those procedures when the store closed on August 23, 2008. The procedures included closing and locking all doors and windows, shutting off and depressurizing the air compressor system, and ensuring that the outside door was locked before the closing employee left for the day.

While the Claimant was not required to have an SPCC Plan because its oil storage capacity was 870 gallons of oil, it states that it did consider spill control measures because it required its stores to shut off the air compressor system each night and de-pressurize it. The air compressor was located outside the compressor room, presumably so that it could be turned off quickly by an employee in the event of an oil discharge during working hours. The procedure also required that the electrical circuit for the compressor system be deactivated. The electric box was in a different room and that room was locked at night.

In this case the ASTs storing both the unused, new oil and the used oil were located within the Firestone store, which was locked each night. The maximum storage capacity of oil in the store was 870 gallons. To ensure against former employees gaining illegal access their keys and combinations to the safe would be retrieved and new locks and combinations installed and used. The air compressor was turned off and depressurized each night to ensure that no oil could be dispensed and ultimately discharged.

The vandal in this case gained entry into the store by kicking in a panel on one of the garage bay doors, not by entry through a door or window. He (or she) activated the compressor system in order that the oil could be pumped out of the AST. He used zip ties to hold dispensers together so that the oil would continually flow out of the AST until it was empty. This allowed the discharged oil to flow onto the floor of the service area and migrate onto the parking lot and into a storm sewer. The oil in the storm sewer migrated into the canal system and posed a substantial threat of a discharge to the Caloosahatchee River, a navigable water.

In order to successfully establish entitlement to a sole fault third party defense an RP must take reasonable precautions against foreseeable acts or omissions of a third party. In this case the vandal gained entry by kicking in a panel on a service bay door - not by accessing the store through a door or window, which were closed and locked. He used zip ties to ensure that the dispenser would dispense all the oil from the AST, allowing it to migrate out of the service area and into the parking lot and into a storm drain.

Taking into consideration the remote pathway to the River, the small amount of oil stored within the locked building store, and the compliance with the closing procedures taken on August 23, 2008, the RP exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances. The security arrangements were adequate precautions against foreseeable acts or omissions of any third party and the foreseeable consequences.

The NPFC determines that the Claimant established by a preponderance of the evidence that it is entitled to a complete defense in this case.

REMOVAL COSTS DETERMINATION:

A. Findings of Fact:

1. The NPFC has determined that Claimant/RP is entitled to a defense to liability under 33 U.S.C. § 2703(a)(3).
2. The NPFC has determined that certain actions undertaken by the Claimant's hired-OSRO are consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C. § 2702(b)(1)(B) and 2712(a)(4);
3. The incident involved the report of a discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), that posed a substantial threat of discharge of oil to navigable waters;
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;
5. The claim was submitted to the Fund within the six-year limitation period for removal costs under the Oil Pollution Act of 1990;
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined which removal costs presented were for actions performed 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. Removal Cost Analysis:

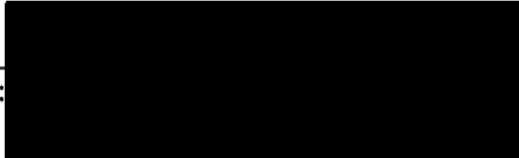
The Claims Manager reviewed the invoices and associated other documentation provided in support of the uncompensated costs as claimed. The Claims Manager focused on: (1) whether the actions taken were compensable "removal actions" under OPA and its regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken would have been determined by the FOSC to be consistent with the NCP or were directed by the FOSC, and (4) whether the costs were adequately documented and reasonable. The attached spreadsheets detail the adjudication of costs.

Most of the costs related to cleaning up the oil on the ground, in the drainage system, and in and along the canals are compensable removal costs. However, certain costs are denied. All fuel surcharges under the Safety-Kleen invoices are reduced to 12.5% of mileage charges based on documented mileage paired with documented vehicles to coincide with the rate sheet allowance. The reduction of fuel surcharges to coincide with the rate sheet allowance is \$2,579.22. An

additional Safety-Kleen fuel surcharge of \$703.66 is deducted for lack of documentation of mileage. The remaining \$5,477.09 of denied Safety-Kleen costs are deducted due to lack of documentation. Other claimed costs totaling \$55,514.70 from the Earth Science contractor invoices are denied. The majority of these costs are denied because they are for excavation and replacement of the paved area around the store and cleaning of stains in paved areas.¹⁰ These costs are not OPA-compensable oil removal costs. Further, there is no evidence of FOSC direction or coordination to support these charges.

The Claims Manager hereby determines that the OSLTF should pay \$130,831.35 as full compensation for the uncompensated removal costs incurred by the Claimant and submitted to the NPFC under claim #909089-001. These costs were incurred by the Claimant for removal actions taken, as defined under OPA and payable by the OSLTF as compensable removal costs.

DETERMINED AMOUNT: \$130,831.35

Claim Supervisor: 

Date of Supervisor's review: 7/30/12

Supervisor Action: *Approved*

Supervisor's Comments:

¹⁰ See Earth Science, Inc. Interim Source Removal Report, dated March 23, 2009.