

## CLAIM SUMMARY / DETERMINATION FORM

|                  |                                                           |
|------------------|-----------------------------------------------------------|
| Claim Number     | : 911084-0001                                             |
| Claimant         | : Phoenix Pollution Control & Environmental Services, Inc |
| Type of Claimant | : OSRO                                                    |
| Type of Claim    | : Removal Costs                                           |
| Claim Manager    | : [REDACTED]                                              |
| Amount Requested | : \$17,034.05                                             |

### **FACTS:**

On or about October 21, 2008, it appears the Claimant was called out to Green Hunter Bio Fuels Inc. in order to respond to a spill of sulfuric acid. The Claimant was asked to neutralize and disposal of the sulfuric acid.

### **CLAIM and CLAIMANT:**

On June 2, 2011, the Claimant, Phoenix Pollution Control & Environmental Services, Inc. presented a claim to the National Pollution Funds Center (NPFC) for its alleged uncompensated removal costs in the amount of \$17,034.05. The Claimant provided a cover letter and OSLTF Optional Claim Form that contained minimal information associated with the incident for which these costs originated.

The claim consists of: a cover letter dated April 25, 2011, an OSLTF Claim Form dated May 27, 2011, contractor invoices, daily field logs, disposal manifests, and subcontractor invoices.

The Claimant has presented the subject invoices to Galveston Bay Biodiesel LP, the responsible party (RP) for the incident. The RP filed a Chapter 11 bankruptcy which included the Claimant as an unsecured creditor.<sup>1</sup> The bankruptcy case was officially closed on or about February 1, 2012 with no payments issued to the Claimant.<sup>2</sup>

### **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

<sup>1</sup> See, Bankruptcy Case # 10-80278-G3 in the Southern District of Texas, Galveston Division.

<sup>2</sup> See, Final Decree closing bankruptcy case # 10-80278\_G3-11 dated February 1, 2012.

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. Overview:**

1. No FOSC coordination has been provided for the Claimant responding to an OPA event.

2. The Claimant has not demonstrated that the incident involved the report of a discharge and substantial threat of discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1)
4. A Responsible Party was determined for this incident. 33 U.S.C. § 2701(32).
5. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified that a proof of claim in the RP's bankruptcy case has been filed in court for the claimed uncompensated removal costs although the case has since been closed.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the removal costs presented were not for actions in accordance with the NCP, or whether the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

**B. *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.

Upon review of the claim submission, the NPFC performed independent research associated with the neutralization and disposal of a sulfuric acid spill. The Claimant has not demonstrated that the claim is for response to OPA oil. An OPA 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 product that the Claimant responded to was sulfuric acid which is not an oil as defined under OPA. As such, this claim is denied.

Furthermore, the Claimant has not demonstrated that the actions undertaken were determined by Federal On Scene Coordinator (FOSC) to be consistent with the National Contingency Plan (NCP) or were directed by the FOSC. The FOSC would be a designated representative from either the United States Coast Guard (USCG) or the United States Environmental Protection Agency (USEPA).

Should the Claimant decide to request reconsideration of this denial, the Claimant will need to obtain a written statement from the FOSC which states the response was to an oil as defined under OPA, that the actions undertaken by the Claimant were reasonable and necessary to prevent, minimize, and mitigate the effects of the incident. The Claimant will also need to demonstrate that the oil product in which it responded either discharged or substantially threatened to discharge into a navigable waterway.

Additionally, should the Claimant request reconsideration, it will need to provide a copy of the entire agreement/ contract along with the rate schedule that was in place at the time services were rendered. The Claimant will also need to provide a copy of all payments made to each subcontractor hired along with the

subcontractor daily field logs and any agreement/contract the Claimant had in place with any and all subcontractors.

Based on the information provided by the Claimant, the NPFC has determined this claim is denied because (1) the Claimant failed to obtain FOSC coordination pursuant to 136.203 and 205 which state as follows:

136.205 (Compensation allowable)...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 (NCP) or were directed by the FOSC; and

136.203 which states "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 [Federal On-Scene Coordinator] FOSC to be consistent with the National Contingency Plan or were directed by the FOSC," and

(3) the Claimant has failed to demonstrate that the product subject of this response was an oil as defined under the OPA.

Should the Claimant desire to request reconsideration of this claim, the Claimant will need to provide documentary evidence from the FOSC that the actions undertaken by the Claimant were in response to oil pollution incident and as such, the FOSC will need to provide a written statement documenting such coordination.

Based on the foregoing, this claim is denied.

Claim Supervisor: 

Date of Supervisor's review: 3/12/12

Supervisor Action: ***Denial approved***

Supervisor's Comments: