

CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/6/2011
Claim Number	: 912009-0001
Claimant	: State of Kentucky
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$36,082.27

FACTS:

- 1. Oil Spill Incident:** On May 21, 2010, the Claimant, State of Kentucky Department of Environmental Protection (KDEP) responded to an incident location of abandoned transformers on an old surface mining operation. The Claimant reports that the transformers were vandalized for the copper which resulted in transformer oil being spilled. The Claimant states the transformer oil spilled into a pond that leads into Camp Branch. The incident was reported to the National Response Center (NRC) on May 21, 2010 via report # 941188. The Claimant's submission indicates the responsible party as unknown.
- 2. Description of removal actions:** The Claimant responded to the incident site on May 21, 2010 along with Damon White of the Division of Waste Management for the State of Kentucky. The response contractor, Enviro-Pro was already onsite at the time of the Claimant's arrival. The Claimant reported that several pad mounted transformers had been vandalized for their copper contents. The mineral oil from the transformers spilled onto the ground. Enviro-Pro was excavating the site and placing the contaminated soil onto plastic for later disposal. A large area had to be excavated. The contaminated soils were eventually taken to Pike County Landfill for disposal.
- 3. The Claim:** The Claimant presented a claim for its uncompensated removal costs associated with the Calloway Branch transformer incident in the amount of \$36,082.27. The claim consisted of: cover letter, KDEP report summary, Enviro-Pro invoicing, solicitation for bid by Enviro-Pro, NRC report, KDEP compliance evaluation report, photographs, site maps, Corrective Action Spill Report from Enviro-Pro, chronological list of events by Enviro-Pro, and sample analysis.

APPLICABLE LAW:

"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 Facts:

1. The removal actions were coordinated with a Federal on Scene Coordinator (FOSC). 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4).
2. The incident did not involve the discharge nor substantial threat of discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23) to navigable waters.
3. A Responsible Party was not identified. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six-year statute of limitation for removal costs. 33 U.S.C. § 2712(h)(2).

5. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim.

B. Analysis:

Upon review of the incident specifics and the documentation provided, this claim is denied. The OSLTF claims program is only available to pay claims for strictly oil pollution incidents. This incident involves a “mixed spill substance” which is not considered OPA compensable oil. The facts as presented in this case indicate that the contamination consisted of polychlorinated biphenyls (PCBs), which are listed as hazardous substances under CERCLA and are thus excluded from the definition of oil under OPA. CERCLA requires different procedures and allows different types of recovery than OPA does.

Based on the foregoing, this claim is denied.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *12/6/11*

Supervisor Action: *Denial approved*

Supervisor's Comments: