

CLAIM SUMMARY / DETERMINATION

Claim Number:	912014-0001
Claimant:	Hepaco, Inc.
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$214,153.47

FACTS:

On December 20, 2010, a homeowner reported a strong odor of fuel and a deep red fuel pooling in the creek behind his home in Greer, South Carolina. South Carolina Department of Health and Environmental Control (DHEC) responded and found the source. The source was a faulty valve on a 25,000 gallon underground storage tank at a nearby former hospital. The sight glass on the fuel system in the basement of the building broke, leaking diesel into a nearby storm drain.¹ The spill was determined to be diesel fuel and about 10,000 gallons had been released. SC DHEC hired Claimant to respond to the spill. The suspected responsible party is Cardinal Real Estate Group Inc. (Cardinal or RP), which was doing work on the former Allen Bennett Hospital.

CLAIMANT:

Claimant (Claimant or Hepaco) is the response contractor hired to contain and clean up the spill. Hepaco and Cardinal executed a contract for the rapid response services dated 21 December 2010.

CLAIM:

Claimant seeks the costs it claims it earned for emergency response and remediation of the diesel spill. The claim is for the oil spill removal costs associated with the response and cleanup services provided by Hepaco.

REQUEST FOR RECONSIDERATION:

On October 18, 2012, NPFC received Claimant's request for reconsideration. The NPFC originally denied the claim on August 30, 2012, because the Claimant did not demonstrate that it retained all its subrogable rights to recover from the RP under 33 U.S.C. §2712(f), since it had entered into a contract² with the RP that requires the parties to enter into arbitration to resolve all disputes and claims. As of that time, Claimant had not obtained a mutual waiver of the arbitration requirement as prescribed by the arbitration provision if they chose not to arbitrate.

Claimant seeks reconsideration based upon the argument that it attempted to contact the RP without receiving any response. Claimant asserts that this constitutes the RP's waiver of the

¹ Claimant's email to NPFC on November 1, 2011.

² The contract is HEPACO's form contract for services.

arbitration provision in the contract and allows the NPFC to reverse its previous decision and adjudicate the claim.

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 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].

Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party. 33 USC § 2712 (f).

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.

The Director, NPFC, upon written request of the claimant reconsiders any claim denied. 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 Director, 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. 33 CFR 136.115(d).

DETERMINATION OF LOSS:

In support of its request for reconsideration, Claimant provided copies of two letters it sent to the RP. The first letter is dated July 17, 2012, and demands payment for costs plus interest

accrued. It states that if payment is not made immediately then HEPACO intends to proceed to arbitration in accordance with their contract. Delivery of this letter was confirmed by a signed USPS return receipt date stamped July 23, 2012. The second letter is dated August 14, 2012, and notifies the RP that if it does not respond, HEPACO will seek reimbursement from the Oil Spill Liability Trust Fund via the NPFC. It also states, "FAILURE TO RESPOND TO THIS LETTER BY FRIDAY, AUGUST 24, 2012, WILL BE CONSIDERED A WAIVER ON THE PART OF CARDINAL REAL ESTATE GROUP OF THE RIGHT TO ARBITRATION as allowed by Blanket Rapid Response Services Agreement dated December 21, 2010." This letter was returned by the USPS on September 7, 2012 marked "Attempted, Not Known." The return receipt provided by Claimant shows a signature similar to the one on the return receipt for the first letter and a date stamp of September 4, 2012. Claimant states that it also made numerous attempts, including e-mails and phone calls to the RP without success.

HEPACO argues that Cardinal's failure to respond to their communications constitutes Cardinal's waiver of the right or obligation to arbitrate this claim. Aside from the letters to the RP and Claimant's letter to the NPFC stating that it believes arbitration has been waived, HEPACO has provided no other arguments, factual or legal, and no new evidence.

NPFC's initial decision found that HEPACO was bound by its contract to arbitrate with Cardinal or to provide evidence of the mutual agreement of both parties to waive arbitration. Under the terms of the contract, which clearly states that it is subject to arbitration, "all claims, disputes and other matters or questions arising out of or relating to this Agreement shall be decided by arbitration ... unless the parties mutually agree otherwise. Judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof."

The administrative record does not reflect that HEPACO provided evidence of the mutual waiver of arbitration as required by its contract. Claimant has only demonstrated a unilateral proposition that it believes the RP waived arbitration. Cardinal's unresponsiveness to Claimant's letters does not constitute mutual agreement to waive arbitration. As recently as July 2012 and possibly August 2012, Cardinal was still reachable, but unresponsive.

When presenting a claim to the Fund for reimbursement of removal costs and/or damages, a Claimant's rights must include all rights, including the right to file an action in court. 33 U.S.C. §2712(f) If a Claimant does not retain all its rights, the Fund is not available to compensate the Claimant. Because HEPACO has not demonstrated that it retained all subrogable rights to recover from the RP in this incident, it cannot offer those rights to the OSLTF in exchange for payment. Therefore

Claim Supervisor:

Date of Supervisor's review: 11/5/12

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments: