

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 912023-0001
Claimant	: State of Washington Department of Ecology
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$21,465.25

### **INCIDENT:**

On October 15, 2009 the State of Washington Department of Ecology (Ecology) responded to a trestle fire at Fidalgo Bay, Anacortes, WA. Fidalgo Bay is part of Padilla Bay both navigable waters of the United States. The fire was reported at approximately 1144 hours local time when the Anacortes Fire Department responded. Ecology was notified at 1218 via NRC Report # 920711 and arrived on-scene at 1344 to the Incident Command Post established by Anacortes Fire. Ecology observed a large area of the Tommy Thompson Parkway Trestle (trestle) on fire and material containing creosote, falling from the trestle into the water. Charred debris and rainbow sheen were noted on the water west of the trestle. The amount of creosote contained in the former railroad trestle structure was unknown and due to the fire and safety considerations direct observation of creosote impacts to water was not possible.

No Responsible Party could be identified and the cause of the fire is suspected to be arson.

### **CLAIM AND CLAIMANT:**

The Claimant, State of Washington Department of Ecology, (Ecology or Claimant) presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of its uncompensated removal costs in the amount of \$21,465.25 which was received by the NPFC on December 21, 2011.<sup>1</sup>

Ecology's claim to the NPFC includes copies of the following: NRC Report # 920711; a cover letter and claim description from the State of WA Dept of Ecology; Personnel invoices for the State of WA Dept of Ecology related to this incident; EPA Indirect Costs and Grants rates description sheet; State of WA Invoice Voucher for NRCES; invoices from NRCES related to this incident; NRCES Rate Sheets; NRCES Spill Report related to this incident; Completed ICS 201-OS Forms for this incident; photographs; USCG List of Petroleum and Non-Petroleum Oils; and the Samish Indian Nation DNR Lab Analysis # 2.09-CV-01061-JLR.

The NPFC's review of the actual cost invoice and related documents focused on: (1) whether the actions taken were compensable removal actions under OPA and the claims regulations at 33 CFR Part 136 (e.g. whether the actions were taken to prevent, minimize, and mitigate the effects of the incident; (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken are determined to be consistent with the National Contingency Plan (NCP) or directed by the FOSC; (4) whether the costs were adequately documented and

<sup>1</sup> See Cover letter from Claimant dated December 8, 2011.

reasonable, and (5) whether the Claimant's submitted costs were uncompensated.

### **DESCRIPTION of RESPONSE ACTIONS:**

Ecology, after consulting with the USCG hired NRC Environmental Services (NRCES) to respond and control any oil and oily debris by the fire from the burning creosote pilings and trestle components. Responders from both the Shell refinery and the Anacortes Fire Department assisted in deploying a hard boom. NRCES responded with a fast response vessel, a skiff, a four-person crew, and 500 feet of boom on the first day. The boom was deployed around the fire damaged portion of the trestle and sorbent sweep was placed within the boom. NRCES worked throughout the week to contain, collect and remove from both the water and beaches 4.11 tons of contaminated debris generated from the trestle fire. Ecology collected samples from the trestle as well as the shoreline and provided those samples to the Samish Indian Nation for analyses.

### **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".

"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". 33 USC § 2701(31).

Removal costs referred to in 33 USC 2702(a) include any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan. 33 USC 2702(b)(1)(B).

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.

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party of the source designated under 2714(a). 33 U.S.C. § 2713(a). If the claim is not settled by any person by payment within 90 days after the date the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 U.S.C. § 2713(c)(2).

"Claimant" means "any person or government who presents a claim for compensation under this subchapter." 33 USC § 2701(4).

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action the claimant has under any other law. 33 USC § 2715(a).

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 136.203, the claimant bears the burden to prove the removal costs 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 by Sector Puget Sound for the actions undertaken by the Claimant on a daily basis;
2. The incident involved the alleged report of a discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. No RP has been identified. 33 U.S.C. § 2701(32);
4. The claim was submitted within the six year period of limitations for removal costs claims to the Fund. 33 U.S.C. § 2712(h)(2);
5. 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;
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim as well as other information obtained during the course of the adjudication and has determined this claim is denied for the reasons set forth below.

#### ***B. NPFC Analysis:***

Ecology states in its claim that all costs claimed are for uncompensated removal costs incurred for this incident. It represents that all costs presented to the Fund are compensable removal costs, payable by the OSLTF.

The NPFC Claims Manager reviewed Ecology's actual cost invoicing and dailies to ensure that the Claimant had incurred all costs claimed and that the costs were adequately documented and reasonable. Pursuant to 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.

Based on the preponderance of the evidence, the claim is denied because (1) the response has not been coordinated with a Federal On-Scene Coordinator (FOSC) pursuant to the governing claims regulations found at 33 CFR 136.203, (2) no FOSC has determined that the actions undertaken by the Claimant were deemed consistent with the National Contingency Plan nor were the actions by the Claimant directed by the FOSC in accordance with 33 CFR

136.205, and (3) the Claimant has failed to meet its burden to demonstrate that a discharge or substantial threat of a discharge oil into or upon a navigable waterway existed.

The Claimant has not provided evidence as to the amount of oil released into the navigable waterway. More importantly, the Claimant has not proven whether or not the sheen observed in the water was mixed with any other substance.

Should the Claimant choose to request reconsideration of this claim, the Claimant would need to coordinate its response actions with the Federal On Scene Coordinator (FOSC) and provide a written statement from the FOSC that would satisfy the requirements of 33 CFR 136.203 and 205.

Additionally, the Claimant would need to provide evidence that the sheen in the waterway was strictly an OPA oil and not mixed with any other hazardous substance. Based on the claim submission, the Claimant has failed to provide substantiation that the oil was strictly oil as defined by OPA, and did not contain ANY hazardous materials such as Polychlorinated Biphenyls (PCBs). 33 USC 2701(23). Please note that "Oil" must be discharged to impose liability under the Oil Pollution Act (OPA).

The facts as presented in the documentation does not exclude that the contamination consisted of polychlorinated Biphenyls (PCBs), which are listed "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 does OPA.

**C. Determined Amount: \$0.00**

The NPFC hereby determines this claim is denied because (1) the Claimant failed to provide FOSC coordination pursuant to 33 CFR §§136.203 & 205, and (2) the Claimant failed to demonstrate that the discharge was strictly an OPA oil not mixed with any other hazardous substance.

Claim Supervisor:

Date of Supervisor's review: 1/12/12

Supervisor Action: *Denial approved*

Supervisor's Comments: