

CLAIM SUMMARY / DETERMINATION FORM

Claim Number : 913001-0001
Claimant : Carolina Environmental Specialists
Type of Claimant : OSRO
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$33,925.47

FACTS:

Oil Spill Incident: On April 19, 2011, a personal vehicle operated by Mr. [REDACTED] struck a Farm Service vehicle carrying 650 gallons of nitrogen fertilizer/herbicide.¹ The impact occurred at 515 West Knapp Street, Dobson, NC which is the location of the Dunmore Plantation Assisted Living, LLC. As a result of the impact, the Farm Service vehicle spilled the entire volume of nitrogen fertilizer/herbicide at the site.² The material migrated from the Dunmore Plantation Assisted Living parking lot to an adjacent grass-lined ditch and flowed into a creek that feeds into the Fisher River which joins the Yadkin River, a navigable waterway of the United States.³

Description of Removal Actions: On April 20, 2011, the Claimant responded to the spill at the request of [REDACTED], Surry County Emergency Management Coordinator. The migration of the spilled material affected approximately 60 feet of lawn on the Dunmore Plantation Assisted Living property, which necessitated its partial removal.⁴ The affected grassed areas and underlying soils were excavated and approximately 4 truckloads of material were taken to the Carolina Environmental Specialists (CES) facility for storage and laboratory sample testing. The Claimant secured the services of Zebra Environmental Services for the removal of the non-hazardous liquid at the site, which resulted in 665 gallons of liquid waste pumped off the site and out of the overturned farm vehicle. The site was remediated to NC Department of Environment and Natural Resources (NC-DENR) standards and evidenced through multiple site soil samples subsequent to the cleanup. The site was granted “no further action” status on January 18, 2012.

The Claim: Carolina Environmental Specialists presented a removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$33,925.47.

The claim consists of OSLTF Claim Form, Claimant letter to the NPFC, Claimant letter to Mr. [REDACTED], motor vehicle insurance company, NC-DENR letter to Mr. [REDACTED], motor vehicle insurance company, Zebra Environmental Services facility profile form, NC-DENR application for contaminated soil land application, GeoScience & Technology sample reports and chain of custody records, Claimant Invoice #1377, Zebra Environmental Services invoice #11808, GeoScience & Technology invoices #4468, 5059, and 4576, and disposal manifests.

¹ See, OSLTF Claim Form, dated October 9, 2012.

² See, Claimant letter to Mr. [REDACTED], Insurance Company, dated April 4, 2012.

³ See, OSLTF Claim Form, dated October 9, 2012.

⁴ See, GeoScience & Technology Analysis Report to NC Department of Environment & Natural Resources, dated 20 Jan 2012.

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].

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:

Overview:

1. There is no evidence of FOSC coordination.
2. The incident involved the discharge of a mixed spill as evidenced by sample analysis testing provided.
3. 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.
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(2)

Analysis:

The claim is denied. The claimant has failed to provide substantiation that the spilled material was oil as defined by OPA, and did not contain ANY hazardous materials such as Polychlorinated Biphenyls (PCBs). See 33 USC 2701(23) and 40 CFR 116.4.

“Oil” must be discharged to impose liability under the Oil Pollution Act (OPA). The facts as presented in the lab analysis documentation from Zebra Environmental Services indicate the contamination consisted of 0.0025% liquid nitrogen (N₂), 0.0025% Bicep II Magnum (acetamide), 0.0025% Scanner (non-ionic surfactant), and 0.0025% Gramoxone (paraquat dichloride) as constituents in the water solution spilled from its farm service carrier as a result of the motor vehicle crash. Acetamide is listed as a “hazardous substance” under CERCLA and is thus excluded from the definition of oil under OPA.

The claimant has failed to provide substantiation that the spilled material did not contain hazardous substances as defined under 40 CFR 116.4 and as such, this claim is denied. Oil spill incidents involving “mixed spills” are not compensable under OPA.

Claim Supervisor: [REDACTED]
Date of Supervisor’s review: <i>10/29/12</i>
Supervisor Action: <i>Denial approved</i>
Supervisor’s Comments: