

CLAIM SUMMARY / DETERMINATION FORM

Claim Number : E10111-0001
Claimant : Massachusetts Department of Environmental Protection
Type of Claimant : State Agency
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$682,884.84

FACTS:

1. **Oil Spill Incident:** On 11 June 2010, a citizen residing at the Cady Brook Condominium complex called in an odor complaint to the Charlton Fire Department (CFD).¹ CFD responded and found free product and heavy sheening in a stream and wetland area which flows into Cady Brook adjacent to the apartment buildings.² CFD deployed sorbent pads and boom and notified the Massachusetts Department of Environmental Protection (Claimant).³ Claimant responded and mobilized their clean-up contractor, New England Disposal Technologies, (NEDT) to perform oil recovery operations.⁴

Claimant and CFD traced the source of the oil upstream to Charlton Welding and Repair Inc. located at 11 Griffin Rd and owned by [REDACTED]. Claimant and CFD spoke with Mr. [REDACTED] who stated his 7,000 gallon tanker wagon used to fuel equipment and vehicles on site was the source of the release due to vandalism prior to 0700 on 11 June 2010.⁶ Oil released from the 7,000 gallon tanker traveled over a parking area into a drainage swale, which goes to a culvert under Route 20.⁷ From there, the No. 2 oil traveled down a small stream into a slow moving wetland area and into a tributary of Cady Brook.⁸ Cady Brook flows into the Quinebaug River which flows into the Thames River which flows into the Atlantic Ocean.⁹

On 12 June 2010, the United States Environmental Protection Agency (EPA) Federal On Scene Coordinator (FOSC) mobilized to the site coordinating and authorizing the Claimant's removal actions. The United States Environmental Protection Agency Region I directed the cleanup and removal activities for this incident. On 13 June 2010, [REDACTED] EPA, who served as the FOSC, requested a Federal Project Number (FPN) via the automated Ceiling and Number Assignment Processing System CANAPS.¹⁰ CANAPS issued FPN number E10111 for the incident.

2. **Description of removal actions performed:** On 11 June 2010, the Claimant and its contractor, NEDT, mobilized to the site. The Claimant coordinated with EPA, CFD,

¹ See Polreps #1&2 from United States Environmental Protection Agency Region I, filled out by [REDACTED] (FOSC) dated 21 June 2010 and 30 December 2010 and MassDEP Release Amendment Forms dated 11 June 2010.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ MassDEP Release Amendment Forms dated 11 June 2010.

⁶ See Polreps #1&2 from United States Environmental Protection Agency Region I, filled out by [REDACTED] (OSC) dated 21 June 2010 and 30 December 2010 and MassDEP Release Amendment Forms dated 11 June 2010.

⁷ See Polrep I from United States Environmental Protection Agency Region I, filled out by Dan Wainberg (OSC) dated 21 June 2010.

⁸ Ibid.

⁹ GIS map showing path of oil release to the Thames River and onto the Atlantic Ocean.

¹⁰ Extended Spill Summary Report for Data ID #785328 from EPA dated 15 June 2010.

Charlton Police Department, local and state public health departments, local conservation commission, State Fish and Wildlife and other response agencies. The Charlton Police Department was utilized for traffic control and site security.

NEDT began removal activities by deploying sorbent pads in many places and deploying containment boom to stop the progression of the oil. Vacuum trucks were deployed to skim/pump free phase oil from the stream and wetland areas impacted. Two underflow dams were constructed to create oil/water separator collection points where the vacuum trucks could pump out the contaminated water. Portions of the stream channel were lined with silt fence to protect vegetation and to ensure that stream banks were not oiled. The Claimant obtained water from the same water basin to raise the water level of the stream/wetland to flush oiled vegetation towards collection points. Oiled vegetation that was not cleaned by flushing was cut and bagged.

The Claimant repaired an underground water main pipe damaged during removal activities. Public drinking water was sampled; laboratory results indicated that there were no impacts from the oil. Outdoor and indoor samples were taken by three summa canisters, one was placed inside the Cady Brook Crossing Condominiums and the other two outside of the apartment buildings where they abutted the Brook to ensure no inhalation hazard existed. High visibility fence was installed between the stream and adjacent residences to keep children and pets out of impacted areas. Four frac tanks were brought on scene to store the contaminated water.

From 21 June through 19 July 2010, the Claimant conducted daily inspections of the site. Claimant and NEDT removed and disposed of saturated sorbent pads and boom and replaced them as necessary. Additionally, testing of the drinking water and well supplies continued to ensure both remained potable and safe. The laboratory results indicated that there was no contamination of the drinking water. Testing of the water and well supplies continued; all laboratory results indicated no contamination of the drinking water. The FOSC via email to the NPFC, states that the Claimant's removal actions "did mitigate a substantial threat to navigable waters and prevent oil from migrating downstream."¹¹

On 19 July 2010, the RP's consultant, CMG Environmental, took over response actions from the Claimant. From 19 July through 31 December 2010, the Claimant provided oversight of CMG Environmental and the RP who were performing activities under an Immediate Response Action Plan.

NOTICES:

The FOSC issued a Notice of Federal Interest to Charlton Welding and Repair Inc. identifying that entity as the potential responsible party (RP).¹²

Mr. [REDACTED] asked the Claimant to estimate the cost to clean up the oil. The Claimant estimated that the cost was likely to exceed \$250,000.00.¹³ Mr. [REDACTED] stated that he did not have the financial means to perform the cleanup.¹⁴ As of the date of this determination, the RP's legal representation, Stern Shapiro Weissberg & Garin LLP, has denied designation as the RP due to the alleged fact that no oil reached Cady Brook, but only a tributary of Cady Brook.¹⁵ The NPFC issued a Notice of Designation to Charlton Welding

¹¹ See email from FOSC [REDACTED] EPA to the NPFC dated 20 August 2010.

¹² See Polrep I from United States Environmental Protection Agency Region I, filled out by [REDACTED] (OSC) dated 21 June 2010.

¹³ MassDEP Release Amendment Forms dated 11 June 2010.

¹⁴ Ibid.

¹⁵ Stern Shapiro Weissberg & Garin LLP letter to the NPFC dated 01 February 2012.

and Repair on 07 July 2010.¹⁶ On 18 August 2010, the RP's legal representative from Bowditch and Dewey denied the designation via letter to the NPFC.¹⁷ Pursuant to 33 USC 2714(c), the NPFC advertised the notice of the claims process on 26 August 2010 to the impacted community of Cady Brook Crossing Condominiums.¹⁸

3. **The Claim:** On 13 October 2011, the Claimant presented a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$639,628.08 for the services provided from approximately 11 June 2010 through 31 December 2010. Claimant also claimed \$43,256.76 for public services to recuperate the Claimant's labor hours while conducting removal related activities. The NPFC has re-categorized the public services claim to its more proper categorization as removal costs. Thus, the Claimant has a removal cost claim before the NPFC in the amount of \$682,884.84. A copy of the vendor rate schedule is included with this claim.

In support of this claim, the Claimant provided the supporting documentation listed in Enclosure 1.

The review of the actual cost invoicing and dailies 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 consistent with the National Contingency Plan or directed by the FOSC, and (4) whether the costs were adequately documented.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), a responsible party for a vessel or facility from which oil is discharged or which poses a substantial threat of discharge of oil into navigable waters and adjoining shorelines is liable for removal costs and damages. Removal costs include any 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).

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".

"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".

"Facility" means "any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil." 33 USC § 2701(9).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) 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.

¹⁶ NPFC designation of RP letter dated 07 July 2010.

¹⁷ Bowditch and Dewey Attorneys letter dated 18 August 2010.

¹⁸ NPFC's Public Notice dated 26 August 2010.

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].

Claims for removal costs may be presented first to the Fund by the Governor of a State for removal costs incurred by that State. 33 USC § 2713(b)(1)(C).

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. FOSC coordination has been established via US EPA Region I.¹⁹
2. 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. 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 period of limitations for claims. 33 U.S.C. § 2712(h)(1)
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of removal costs presented were for actions in

¹⁹ See Polreps #1&2 from United States Environmental Protection Agency Region I, filled out by [REDACTED] (FOSC) dated 21 June 2010 and 30 December 2010.

accordance with the NCP, and if the costs for these actions were indeed 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 has determined that the costs presented and incurred were billed in accordance with the rate schedule and determined reasonable at the time services were rendered. The NPFC also determined that the actions taken by the Claimant and its contractor were reasonable and necessary in order to mitigate the discharge and continuing threat of discharge to the environment. The analytical results corroborate the presence of oil contamination. Proper disposal has been performed and documented. The Claimant provided an itemized spreadsheet of billable hours for its internal staff.²⁰ The rates have three components, direct rate, overhead rate, and fringe rate. Claimant provided a rate calculation sheet showing the calculations for fringe and direct rates.²¹

The NPFC has denied **\$12,924.46** for indirect/overhead costs²²; we cannot approve unsubstantiated indirect/overhead costs per line item as charged in this claim, as this is considered an improper use of the Oil Spill Liability Trust Fund (OSLTF). See 33 CFR §136.105(e)(6).

The NPFC has denied the billable hours for codes 410 and 420 in the amount of **\$1,333.86**²³ because the actions are not associated with the removal of oil but rather enforcement and compliance regarding the Potential Responsible Party.²⁴

The NPFC has denied the billable hours for duplicative preparation and finalization of the factual chronologies for the dates of 03 August through 09 October 2010 in the amount of **\$1,592.59**.²⁵²⁶

On that basis, the Claims Manager hereby determines that the Claimant did in fact incur **\$667,033.93**²⁷ of uncompensated removal costs and that that amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and presented to the NPFC under claim E10111-0001. The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident from approximately 11 June 2010 through 31 December 2010. The Claimant represents that \$667,033.93 of the costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

²⁰ Report from Claimant itemizing the hours spent by internal employees between the dates of 06 June 2010 through 06 October 2010.

²¹ Mass DEPs rates calculation document.

²² See Encl (2) NPFC spreadsheet of costs.

²³ Id.

²⁴ See codes and description on Report from Claimant itemizing the hours spent by internal employees between the dates of 06 June 2010 through 06 October 2010 and explanation attached.

²⁵ Work done by legal staff from 03 August through 09 October 2010.

²⁶ See Encl (2) NPFC spreadsheet of costs.

²⁷ Claimed amount of \$682,884.84 minus denials of \$15,850.91 equals \$667,033.93.

C. *Determined A*

Claim Supervisor:

Date of Supervisor's review: *3/27/12*

Supervisor Action: *Approved*

Supervisor's Comments: