

CLAIM SUMMARY / DETERMINATION FORM

Date : 12/23/2011
Claim Number : E11522-0001
Claimant : Muskingum County LEPC
Type of Claimant : Local Government
Type of Claim : Removal Costs
Claim Manager : XXXXXXXXXX
Amount Requested : \$8,214.55

FACTS:

Oil Spill Incident: On June 4, 2011, the Muskingum County Local Emergency Planning Committee (LEPC) responded to approximately 4200 gallons of crude oil spilled from an above ground storage tank valve that was allegedly kicked open by livestock. The oil migrated into White Eyes Creek, located approximately 100 feet away from the tank. White Eyes Creek eventually flows into the Muskingum River, a navigable waterway of the United States.

Description of Removal Activities for this claimant: Muskingum County LEPC responded along with the Adamsville, New Concord, Perry and Zanesville Fire Departments in accordance with Muskingum's HAZMAT Disaster Response plan. They deployed boom in strategic areas of the creek and adjacent tributaries as initial response to ensure the spill did not spread further. Work continued on June 5th, alongside the EPA and its contracted clean up company ERRS. Once the situation was stabilized on June 5, 2011, Muskingum County Fire Units were released and the cleanup was left to the EPA contractor.

The Claim: On November 8, 2011 Muskingum County LEPC submitted a "Public Services" claim, which the National Pollution Fund Center (NPFC) found to be more appropriately placed under the Oil Pollution Act (OPA) category as a removal costs claim, for reimbursement of their uncompensated costs in the amount of \$8,214.55.

Muskingum County is claiming personnel expenses of \$3,112.50, supplies totaling \$701.20, vehicle expenses of \$3,462.15, other charges (food, drink, fuel) totaling \$191.93 and an EMA administrative fee of \$746.77.

The Responsible Party (RP) for this spill is Big Sky Energy. Muskingum County provided them with the costs incurred from the spill response on June 29, 2011. The RP took no action. The NPFC notified the RP we had received this claim via certified letter dated 11/23/2011. The certified mail receipt was signed by someone working for Big Sky Energy on December 7, 2011, but no response from the RP has been provided.

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(e)(8), the reasonable costs incurred by the claimant do not include administrative costs associated with preparation of 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. EPA OSC [REDACTED] provided FOSC coordination.
2. The incident involved the 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 on time.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the removal costs presented were for actions in accordance with the NCP and that 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.

The Environmental Protection Agency (EPA) issued two POLREP's for this spill incident. Both POLREP's identify Muskingum County, Adamsville and New Concord as being on-scene providing initial response. Additionally, Perry and Zanesville Fire Departments provided support, including the Hazmat gear as shown on the call out list required by Muskingum County's LEPC Division.

The NPFC approved all the claimant's vehicle costs, which matched its rate schedule. Most of the personnel costs were approved, with the exception of \$44.71, which were denied because they exceeded the amount of time documented on the daily logs submitted (see enclosed spreadsheet for details).

Supplies claimed totaling \$701.20 is denied because it does not constitute uncompensated costs as required under OPA for payment. The claimant did not provide proof of payment for these supplies and admits in its response to the NPFC's request for additional information dated November 23, 2011 that it has "not replaced the supplies used due to not getting reimbursement from the spiller as of this date".¹

Regarding the "other charges", which consisted of food, drinks and fuel, the NPFC found it reasonable to compensate the claimant for the fuel used during the response and drinks

¹ See, Muskingum County LEPC letter dated November 28, 2011.

purchased for hydration purposes. However, the claimant's rate schedule did not address per diem in its rate schedule, which also did not provide for food purchases. Additionally, most per diem charges are paid for travel in excess of 50 miles one way, and this was not documented as such in the rate schedule or with the documentation provided. Therefore, the NPFC denied the claimed food purchase costs totaling \$38.20.

The claimant states the EMA administrative fee is equal to 10% of the cost of the response and supplies. The purpose of this fee is to cover incidental costs that are associated with responding to and completing all the forms and paperwork associated with the incident. The NPFC denied this cost, totaling \$746.77, because there is no mention of this 10% fee allowed in the claimant's rate schedule. Additionally, the NPFC denies this cost because this is an indirect cost not incurred by the claimant during the spill response.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$6,683.67** (personnel costs of \$3,067.79 + vehicle costs of \$3,462.15 + water and fuel costs of \$153.73) as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # E11522-0001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

AMOUNT: \$6,683.67

Claim Supervisor:

Date of Supervisor's review: *12/27/11*

Supervisor Action: *Approved*

Supervisor's Comments: