

CLAIM SUMMARY / DETERMINATION

Claim Number:	E12705-0001
Claimant:	Hydro-Klean, LLC
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$269,631.06

FACTS:

Oil Spill Incident: On September 13, 2012, a 20,000 gallon aboveground storage tank (AST)¹ at Krieger Greenhouse was found to be leaking from a faulty valve. An unknown quantity (potential of 15,000) was released from the AST which migrated across the commercial property, crossed a residential property into a small deeply incised tributary and 10 miles of the North Raccoon River. Mr. [REDACTED] (owner) accepted responsibility and retained the services of Hydro-Klean.²

On September 18, 2012, after several days of waffling by the [REDACTED]'s insurance provider, Hydro-Klean and Haz-Mat Response, Inc (third party contractor) walked off the site and pulled their equipment with the exception of the boom. Iowa Department of Natural Resources (IDNR) requested the United States Environmental Protection Agency (USEPA) to federalize the response actions and assume the lead agency role.³ USEPA federalized the incident and opened a Federal project.

On September 28, 2012, the USEPA and IDNR conducted a final site walk to ensure that there was no oiled areas and ended the presence of continuous on-site personnel. However, ongoing sock boom monitoring and maintenance for recovery of any entrained material that might surface during precipitation events continued.⁴

Responsible Party: [REDACTED] the Responsible Party (RP), are the registered owners of the Krieger Flower and Greenhouse at the time of the incident and is determined to be the responsible party⁵ under the Oil Pollution Act. The National Pollution Funds Center (NPFC) sent a RP Notification letter to the RP on May 14, 2013.

On June 11, 2013, the NPFC received a letter from the RP's attorney stating the cause of the spill was a criminal act of a third party not related to their client. No further corroborating information was contained in the letter.⁶

Description of Removal Activities for this Claimant: Hydro-Klean (HK) commenced emergency response on September 13, 2012 by deploying boom and absorbent material in the river. They continued to mobilize resources to the scene from HK and contracted [REDACTED] and Haz-Mat Response Inc. (HMRI) as subcontractors.

¹ IDNR Report of Investigation

² US EPA POLREP # 1.

³ US EPA POLREP # 2.

⁴ US EPA POLREP # 3

⁵ IDNR Notice of Violation

⁶ Letter dated June 6, 2013 from Brick Gentry P.C.

Containment and clean-up of the oil from the North Raccoon River continued from September 14-18th by HK and HMRI resources. Contaminated soil was removed between the spill source and the river by [REDACTED] from September 15-18th.

At 1200 on September 18, 2013, all clean-up operations were completed by HK. All equipment was demobilized from the work sites with the exception of HK containment boom. HK and HMRI demobilization continued at their respective facilities through September 20th. [REDACTED] had all equipment demobilized on the 18th.

The Claim: On May 2, 2013, Hydro-Klean, LLC presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$299,631.06⁷

On June 4, 2013, Hydro-Klean, LLC presented a revised sum certain for their removal cost claim for the amount of \$269,631.06.⁸

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].

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.

⁷ NPFC Standard Claim Form dated April 29, 2013.

⁸ Email dated June 4, 2013 containing new OSLTF Claim Form dated April 29, 2013.

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 was provided by U.S. EPA Region VII ([REDACTED]) in accordance with 33 CFR § 136.203.
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. §2701 to “navigable waters.”
3. In accordance with 33 U.S.C. § 2712(b)(2) and 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed 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 thoroughly reviewed all documentation submitted with the claim and determined which of the costs presented were for actions in accordance with the NCP and that the costs for these actions were 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 Claimant is seeking \$1,450.20 for the disposal costs associated with the 24,170 pounds of oily water generated on September 15, 2012. The supplied waste manifests⁹ show a total of 21,980 pounds of waste. Therefore, the NPFC determines that the OPA compensable cost is \$1,318.80 and the remaining cost of \$131.40 is denied as unsupported by manifests.

The Claimant is seeking a fixed cost of \$1,000.00 for Absorbent Material Waste Disposal on September 20, 2012. The supplied waste manifest¹⁰ has a total of 6,190 pounds of solid waste. The rate schedule for disposal cost is \$0.06 per pound or \$0.50 per gallon.¹¹ Therefore, the NPFC determines that the OPA compensable cost is \$371.40 and the remaining cost of \$628.60 is denied as not in accordance with the pricing schedule in place.

The Claimant is seeking compensation for costs they incurred when Haz-Mat Response, Inc (HMRI) was subcontracted to assist with the spill clean-up.¹² The cost determinations were made based on HMRI invoice number 22272.

- HMRI is seeking \$48.74 for a tire repair at Don's Ace Hardware on September 16, 2012. The NPFC determines that this cost is a damage expense and is not OPA compensable. Therefore the cost of \$48.74 is denied.
- HMRI is seeking personnel expenses of \$1,785.38 for Mr. [REDACTED] as a Project Manager/Site Safety Officer (8 hours regular time and 6 hours over overtime) and as a Project Technician (3 hours overtime) on September 17, 2012. HMRI Incident Report shows that all HMRI response personnel worked a total of 14 hours on this date (0700-2100). It also shows that there was only one Mr. [REDACTED] and that he was assigned to a vessel crew. The NPFC determines that Mr. [REDACTED] did not work 17 total hours this day and three hours of overtime costs was deducted from his position as the Project Manager/Site Safety Officer. Therefore, the NPFC determines that the OPA compensable cost is \$1,380.38 and the remaining cost of \$405.00 is denied as unsupported by the record.
- HMRI is seeking personnel expenses of \$1,617.39 for three Project Technicians (Mr. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED]) for eight hours of regular time and one hour over time each on September 19, 2012. HMRI Incident Report shows that all HMRI response personnel started the day at 0700 and were all off the clock prior to 1500 with the exception of three different individuals ([REDACTED]) were off the clock at 1600. The NPFC determines that Mr. [REDACTED] did not work a nine hour day and has deducted the one hour of over time. Therefore, the NPFC determines that the OPA compensable cost is \$1,362.01 and the remaining cost of \$255.38 is denied.

⁹ Non-Hazardous Waste Manifest #26930-1 has 16,500 pounds and Manifest #26930-2 has 5,420 pounds.

¹⁰ Non-Hazardous Waste Manifest #27513.

¹¹ Solid Waste disposal rate was detailed in email dated June 17, 2013 from Mr. [REDACTED]

¹² Haz-Mat Response, Inc. signed agreement with Hydro-Klean dated September 16, 2012.

- HMRI is seeking fuel surcharge of \$8,835.66. The surcharge is applied to the invoice total excluding subcontractors and/or materials purchased. Since the NPFC has adjusted the compensable invoice cost for labor, the fuel surcharge cost is recalculated to be \$8,782.83 and \$52.83 is denied.

The Claimant is seeking \$30,300.65 for a 25% mark-up on HMRI invoice number 22272. Since the NPFC has recalculated the total compensable amount for this invoice, the mark-up is also recalculated to \$30,110.16 and the remaining \$190.49 is denied.

All other costs were validated and the NPFC has determined the costs were reasonable, necessary and performed in accordance with the National Contingency Plan (NCP).

On that basis, the Claims Manager hereby determines that the Claimant did in fact incur \$267,918.63 of uncompensated removal costs and that amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #E12705-0001. The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident on September 13, 2012. The Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$267,918.63 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #E12705-0001. 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 Claimants.

AMOUNT: \$267,918.63

Claim Supervisor: 

Date of Supervisor's review: 7/16/13

Supervisor Action: *Approved*

Supervisor's Comments: