

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	S09006-0001
<b>Claimant:</b>	State of Washington -Department of Ecology
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$9,044.33

### FACTS:

1. ***Oil Spill Incident:*** On November 20, 2008, the Washington State Department of Ecology (Ecology) received a report of a mystery sheen on the Hylebos Waterway in Tacoma, Washington. The Hylebos Waterway is a navigable waterway of the United States. The incident was reported to the National Response Center (NRC).<sup>1</sup> Ecology's State On-Scene State Coordinator (SOSC) [REDACTED] arrived on-scene and found a barge in the tidal zone discharging diesel fuel.

Ecology called in their contractor, Marine Safety Response Corporation (MSRC) to provide on-water access to the barge. SOSC [REDACTED] collected an on-water sample near the barge. The SOSC coordinated with the Coast Guard's Federal On-Scene Coordinator Representative (FOSCR), Chief [REDACTED], of the United States Coast Guard Sector Seattle (USCG Sector Seattle), regarding the discharge of fuel from the barge. At the time of the incident, it was believed that 25 gallons of diesel fuel was released from the barge. The SOSC had MSRC deploy oil absorbent sweep. Then, on November 21, 2008, the FOSCR opened the Oil Spill Liability Trust Fund (OSLTF) for clean-up and response. Subsequently, on November 22, 2008, a second sample was taken by the SOSC from inside the barge. The samples were sent off to the lab for analysis. [REDACTED] was determined to be the owner of the barge, but was not involved in the response activities.

2. ***Description of Removal Activities for this Claim:*** Along with the work of MSRC, the Claimant also deployed their personnel for the initial response. They took samples for testing and sent them to the Manchester Environmental Laboratory. Global Diving and Salvage, Incorporated (Global) was hired for clean-up and response under Federal Project Number (FPN) S09006. Under FPN S09006, Global pumped and recovered 350 gallons of diesel fuel and water from several tanks on the barge.
3. ***The Claim:*** On March 11, 2013, Ecology submitted a removal cost claim to the NPFC, for reimbursement of their uncompensated removal costs in the amount of \$9,044.33. They are seeking reimbursement for the costs of personnel for November 20, 2008 and November 21, 2008, as well as lab costs and the clean-up services provided by MSRC on November 20, 2008.

Mr. [REDACTED] the owner of the barge, and therefore the responsible party (RP) for the incident, has denied ownership and responsibility for the incident. However, in their

<sup>1</sup> See NRC Report 890590.

claim submission, the Claimant provided the background and history that evolved over several years with the barge owned by Mr. [REDACTED]. The Claimant noted that the barge had been an issue for them, as well as for the Washington Department of Natural Resources (WDNR) from June 2004 to July 2012, and provided historical documentation.<sup>2</sup>

Background: According to the Claimant, in 2004, Mr. [REDACTED] had illegally moored his vessel on State-owned aquatic lands at the head of the Hylebos waterway, Commencement Bay, in Tacoma, Washington. WDNR began administrative legal actions to have him remove the barge from their property. On June 7, 2004, WDNR sent him a letter informing that the 90 foot barge was declared a derelict vessel and that they were authorized, as a public entity, to take custody of the vessel, under the State's Derelict Vessel Removal Program.<sup>3</sup> Mr. [REDACTED] was informed that WDNR planned to take custody of his barge on or after July 5, 2004. WDNR documented in the letter that members of WDNR and Ecology met with him on June 1, 2004 to discuss a timeline for the removal of his vessel and reminded him that they wanted to support him during the removal process, but would move forward with posting their Notification of Intent to Obtain Custody (Notification of Intent) on the barge thirty days before taking custody.

In that same letter, WDNR also explained that they would be willing to suspend the thirty-day clock if he met two interim deadlines toward removing the barge. The first interim deadline requirement, to be executed by June 18, 2004, was to remove the fuel from the barge in compliance with all State and Federal rules and regulations, and to the satisfaction of Ecology. The second interim deadline was to be completed by July 9, 2004 in which the requirement was that the vessel had to be moved to a legal moorage or removed from the water. WDNR indicated in the letter that if the first interim deadline was not met, they would take custody of the vessel on July 5, 2004; and, as for the second interim deadline, if the barge was not completely removed by July 9, 2004, the "clock" would re-start, and WDNR would take custody of the barge on July 26, 2004. The WDNR letter spelled out to Mr. [REDACTED] that he would have to file a lawsuit to contest their decision, if they took custody of his barge. And, informed Mr. [REDACTED] that they also intended to seek damages for trespassing and unauthorized use of state-owned aquatic lands because for about the past five years, the barge had remained on the aquatic lands without a WDNR Use Authorization, even after several requests from them to remove the barge.

In her July 20, 2004 electronic mail to [REDACTED], [REDACTED], WDNR Derelict Vessel Removal Program Manager, informed Mr. [REDACTED] that Mr. [REDACTED] claimed he would move the barge on July 27, 2004 to a legal moorage and will remove the fuel with a vac truck.<sup>4</sup> Ms. [REDACTED] also explained that Mr. [REDACTED] could not remove the barge before July 27, 2004 because he was waiting for the court to release funds tied up in divorce proceedings. And, that Mr. [REDACTED] had originally agreed to remove the fuel before attempting to move the vessel but informed that he had inadequate funds to carry out the costly operation, but can only afford to remove the fuel once he is alongside. She added

<sup>2</sup> State of Washington Department of Ecology Oil Spill Liability Trust Fund Modified Claim Form, dated February 27, 2013, page 2.

<sup>3</sup> Letter from [REDACTED] WDNR Program Manager for Derelict Vessel Removal Program, to [REDACTED] dated June 7, 2004.

<sup>4</sup> Electronic mail from [REDACTED] to [REDACTED] re [REDACTED] listing barge, dated July 20, 2004.

that Ecology's ██████ told Mr. ██████ that he would be on-site to witness the move of the barge, monitor for spills and vessel integrity; and Mr. ██████ would fully cooperate with Ecology during the move.

In that same correspondence, Ms. ██████ explained her concerns, regarding the custody of the barge, to Mr. ██████. She noted that she was not sure of WDNR's standing regarding liability if Mr. ██████ moved the barge on July 27, 2004; as July 25, 2004 would be the end of the twenty-day period for him to take legal action to get the barge out of WDNR's custody. Ms. ██████ went on to explain that she would "be happy" if Mr. ██████ "dealt with" the vessel because it would save WDNR money. She added that Mr. ██████ had been working to keep WDNR and Ecology informed of his plans to move the barge by contacting her three times and by calling Mr. ██████ twice. Ms. ██████ also suggested releasing the barge to Mr. ██████ via documentation and wanted him to sign the documentation conveying that he received WDNR's release of interest and took full responsibility for his barge.

In Ms. ██████'s July 28, 2004 letter to Mr. ██████ on behalf of WDNR, she informed him that they had "obtained legal custody"<sup>5</sup> of the vessel on July 5, 2004, thirty days after the Notification of Intent was posted on the barge, as well as posted on their website, and they had published a legal Notification to take custody in the *Tacoma News Tribune*.<sup>6</sup> The letter also informed him that, as of July 25, 2004, his twenty-day statutory period for filing a lawsuit regarding WDNR's custody of the barge had expired. The Mr. ██████ was also made aware that, because the first interim deadline was not met, the "thirty-day custody clock" was not suspended, leaving the original custody date of July 5, 2004 in effect. And, WDNR's letter advised Mr. ██████ that they were in the process of finalizing a date for removal of the barge, and the barge removal was likely to start the week of August 16, 2004. WDNR also pointed out to Mr. ██████ that they had custody of the vessel for disposal purposes, but added that their preference was that he "take the necessary actions to bring the barge in compliance" with all applicable laws. The letter went on to explain that WDNR would allow Mr. ██████ to move the barge to a legal moorage or remove it from the water, prior to their removal operations. WDNR added that the move would have to be performed with Ecology's Spills Program approval, if the barge is moved before pumping the fuel from its compartments. A copy of the letter, provided by the Claimant to the NPFC, was not signed by Mr. ██████.

Per ██████'s September 15, 2004 electronic mail regarding the barge, she informed ██████, ██████, ██████, ██████, and ██████ that ██████ had moved his barge on September 11, 2004 from the outer edge of the Tyee Marina breakwater to private tidelands on the Hylebos Waterway.<sup>7</sup> Her electronic mail informed them that Mr. ██████ was making final preparations for Schnitzer Steel to accept the barge as scrap.

<sup>5</sup> Washington State law provides that DNR takes legal custody for the purpose of disposal of vessels pursuant to its authority in RCW Chapter 79.100, but Mr. ██████ is the legal owner of the vessel.

<sup>6</sup> Letter from ██████ to ██████ re declaration of derelict vessel, dated July 28, 2004.

<sup>7</sup> Electronic Mail from ██████ to ██████ re ██████ Flotilla close-out, dated September 15, 2004.

However, from November 5, 2008 to November 20, 2008, Ecology and the USCG Sector Seattle received and investigated several reports of silver and rainbow sheens on the Hylebos Waterway.<sup>8</sup> Mr. ██████████ barge was identified as the source of the reported sheens. The Claimant's submission to the NPFC is for reimbursement of removal costs incurred solely for the November 20, 2008 incident.

**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.

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<sup>8</sup> United States Coast Guard FPN S09006 POLREP 1, dated November 22, 2008.

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. Findings:***

1. Federal On-Scene Coordination was provided by FOSCR MSTC [REDACTED] of the United States Coast Guard Sector Seattle.
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 within the six year period of limitations for removal claims to the Fund. 33 U.S.C. § 2712(h)(1);
5. A Responsible Party was determined, but to date, has not paid this claim. 33 U.S.C. § 2701(32).
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that some 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 as set forth below.
7. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined which removal costs presented were for actions in 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:**

The NPFC Claims Manager has 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 FOOSC, and (4) whether the costs were adequately documented and reasonable.

The Claimant seeks reimbursement of their uncompensated costs associated with their personnel and the clean-up services provided by MSRC. The uncompensated costs consist of \$4,059.71 for the salary and benefits for employees [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]; travel costs in the amount of \$85.00 have also been requested for [REDACTED] and [REDACTED]; lab costs for \$455.00; and \$4,444.62 for services provided by MSRC.

The NPFC will reimburse the Claimant for each employee's direct salary hourly rates as derived from the provided State of Washington Costs for 11/08 for Hylebos Derelict Vessel Sheen.<sup>9</sup> In a previous claim from Ecology, submitted by [REDACTED] regarding a sunken skiff (NPFC Claim Number S07025-0001), Mr. [REDACTED] explained in his July 12, 2012 electronic mail that they account for staff time expenses based on actual costs with "AA" indicating Direct Salary on the timesheet; whereas Disability (BA), Retire/Pension (BB), Medical Aid/Industrial Insurance (BC), Health/Life Insurance (BD), and Medicare (BH) are the "employer's share" of the employee's benefits.<sup>10</sup> The NPFC will not reimburse the Claimant for the benefits of their employees, but will pay the direct salary of each employee for a total of \$3,268.39; denying \$791.32 in costs for employee benefits.

The Claimant's billing for Mr. [REDACTED]'s travel expenses totaling \$59.00 for November 20, 2008 and November 21, 2008 will also be reimbursed by the NPFC. However, Ms. [REDACTED]'s travel costs from Lacey to Tacoma, Washington were incurred before the incident for which this claim is associated.<sup>11</sup> The documentation provided for her travel costs was for a November 6, 2008 incident regarding the Hylebos Waterway. The NPFC denies a total of \$26.00 of the claimed travel costs.

The Claimant incurred \$455.00 in lab costs for water samples taken near the barge. The Manchester Environmental Laboratory provided the service to the Claimant. The Claimant provided cost documentation for the charges and provided documentation of sample collections on November 20, 2008 and November 22, 2008. The NPFC will reimburse the Claimant \$455.00 for those costs.

<sup>9</sup> State of Washington Costs for 11/08 By Project Hylebos Derelict Vessel Sheen, dated January 8, 2009.

<sup>10</sup> See 07/12/12 e-mail from [REDACTED] Washington State Department of Ecology to [REDACTED]

<sup>11</sup> See State of Washington Travel Expense Voucher for [REDACTED], signed November 13, 2008.

The Claimant also requested reimbursement of \$4,444.62 for services provided by MSRC on November 20, 2008. Claimant submitted the MSRC Rate Schedule, daily work sheet and related cost documentation regarding the services provided.

MSRC deployed two non-exempt responders (overtime eligible) [REDACTED] and [REDACTED] at the rate of \$750.00 per day, for a total of \$1,500.00; and MSRC Tacoma Area Supervisor [REDACTED] (overtime ineligible), at the rate of \$1,000.00 per day. Mr. [REDACTED] did not respond in person, but Mr. [REDACTED] operated the utility vessel and Mr. [REDACTED] was on board to work with [REDACTED] to deploy a sweep at the incident site. The utility vessel MSRC used, a 36 foot Class II Coot was billed at \$1,800.00 per day. MSRC purchased the oil absorbent sweep that was deployed from Global for \$70.86, and was billed to the Claimant with a 10 percent mark-up for a total of \$77.95. They also billed the Claimant for state tax in the amount of \$66.67. The NPFC will reimburse the Claimant \$4,444.62 for the services of MSRC.

Based on the foregoing, the NPFC has determined that \$8,227.01 of the costs claimed are payable as presented. The Claimant produced cost documentation and demonstrated those costs claimed are uncompensated and as such, the Claims Manager hereby determines that the Claimant did in fact incur \$8,227.01 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 submitted to the NPFC under claim #S09006-0001.

The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident on November 20, 2008. 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 determines that the OSLTF will pay \$8,227.01 as full compensation for reimbursable removal costs incurred by the Claimant and submitted to the NPFC under Claim Number S09006-0001 for removal costs. 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 Claimant.

**AMOUNT: \$8,227.01**

Claim Supervisor [REDACTED]

Date of Supervisor's review: 6/5/13

Supervisor Action: *Approved*

Supervisor's Comments: