

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 914022-0001
Claimant	: State of Washington Department of Ecology
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$347,657.28

FACTS:

Oil Spill Incident:

On Monday, February 4, 2008, Craig Gallinton of the Wishkah Valley School District, called the National Response Center (NRC) and reported that someone attempted to steal gasoline from the school's storage tank and left the hose in the storage tank, which resulted in a discharge of oil. The caller reported that the Gray's Harbor Sheriff's Office has the name of the suspected party.

The State of Washington Department of Ecology (Ecology) responded to the report of a gasoline spill at the Wishkah Valley School near Aberdeen, Washington. Once on scene, Ecology met with school officials, law enforcement, and a cleanup contractor hired by the School's Administration. The officials explained that during the early Sunday morning hours, a thief attempted to steal gasoline from the school's 500-gallon fuel tank and ended up spilling approximately 350 gallons of it on the school property. The spill site drains into an unnamed tributary, which leads to the Wishkah and Chehalis Rivers, ultimately draining into Grays Harbor, all navigable waterways of the US.¹

Claimant reports that there was a strong odor of gasoline in the air and the School Administration's cleanup contractor (hired prior to Ecology arriving on-scene) was utilizing a vacuum truck to recover spilled fuel from a sump near the school's septic tank. The pump for the sump had been shut off to stop the flow of gasoline to the stream. However, run-off from the school's football field had started to flood the school. Approximately 100 gallons of gasoline had already been pumped to the stream and was visible as free product and sheen on the surface of the creek.

Responsible Party:

Wishkah School District owns the storage tank, located at 4640 Wishkah Road, Aberdeen, WA 98520,² and is the Responsible Party (RP) under the Oil Pollution Act (OPA).³ The Claimant provided evidence to the NPFC that Mr. [REDACTED] a nearby resident to the Wishkah School, was apprehended and questioned by Grays Harbor County Sheriff's Department where he subsequently provided a written confession statement of his attempted theft in the second degree dated February 3, 2008.⁴ He was subsequently convicted; thus, there is convincing evidence that he caused the discharge and is the RP for this incident.

Description of removal actions performed:

Prior to Ecology's arrival to the spill site, the School's Administration hired a local contractor to begin cleanup of the oil spill. As noted above, initially, vacuum trucks were utilized to remove the gasoline and runoff from the spill area, although this proved inefficient and unsustainable. Numerous absorbents, including pads, sweep, and sausage boom, were deployed in the creek.

Mr. [REDACTED] Washington State Department of Ecology Spill Responder, contacted United States Environmental Protection Agency (EPA) Region X, Federal On Scene Coordinator (FOSC), Mr. [REDACTED]

¹ See, Tab A of Claim Package; OSLTF Modified Claim Form dated February 7, 2014.

² See, NRC Report # 861473 dated February 4, 2008.

³ See, Tab W of Claim Package; Grays Harbor County Sheriff's Department Initial Report dated February 4, 2008.

⁴ See, Tab W of Claim Package; Witness statement of Mr. [REDACTED] and Grays Harbor County Sheriff's Department Initial Report.

at 1243 hours on February 4, 2008, advising him of his on-scene observations, impacts to the creek, and suspected impacts downstream.⁵ When the incident was reported to the National Response Center (NRC), USCG Sector Portland also responded by requesting a call back with "downstream information."⁶ After consultation with Coast Guard Sector Portland and EPA Region X, excavation of the entire spill area was considered, but ruled out, because of the high volume of water draining to the area, as well as the extreme height of the watertable due to heavy rains throughout the entire event. Also, the recovery of gasoline was no longer feasible except possibly in a few pockets near the school. It was agreed that, since gasoline was not to be contained for safety reasons and the initial source was "controlled," the spill to surface water would be left to dissipate on its own. Eventually, a plan was developed to pump the contaminated rainwater and surface runoff through industrial-sized carbon-filtration units, aerate it in large mobile tanks to remove all of the gasoline constituents and finally, discharge it to its original destination, the nearby creek, thereby avoiding flooding the entire area.

USCG Sector Portland and EPA's FOSC agreed that they would not respond unless impacts downstream to the Chehalis River or Grays Harbor were observed and reported. Both federal entities were satisfied with Ecology's response to the incident and the cleanup/mitigation efforts.

Pockets of gasoline and sheen remained visible in the creek until February 7, 2008, with strong odors even after the installation of the filtration system. Daily samples analyzed by a mobile laboratory, confirmed the presence of gasoline. By February 10, 2008, the water level had subsided enough to allow the immediate area to be excavated. Although this effectively removed a majority of the contaminants, filtration was still needed to remove residual gasoline for several weeks following. Once the filtration system was installed and activity had decreased at the site, one of the Claimant's pre-bid response contractors (NRCES) was brought in to take over the ongoing cleanup activities at the site and dispose of the contaminated soil. This was done as a cost-control measure, as the cleanup was expected to be somewhat long-term. Response actions ended on March 8, 2008 when a water filtration system to remove residual gasoline was installed and final demobilization was complete. Final disposal activities took place the end of March 2008.

The Claim

On February 20, 2014, Ecology presented a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of its uncompensated removal costs in the amount of \$347,657.28 for the services provided from February 4 through April 2, 2008. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim file.

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 NCP 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 a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for removal costs and damages resulting from such incident. 33 USC § 2702(a). In any case in which a responsible party establishes that a discharge or threat of a discharge of oil and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) the third party shall be treated as the responsible party for purposes of determining liability under this subchapter. 33 USC § 2702(d)(1)(A).

⁵ Mr. [REDACTED] was the EPA duty officer when the call came in.

⁶ The USCG was subsequently advised by Ecology and Fish & Wildlife that the creek was devoid of life all the way to the Whsikah River downstream. Several dead fish and other organisms had been recovered.

"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".

"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". 33 USC § 2701(31).

Removal costs referred to in 33 USC 2702(a) include any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan. 33 USC § 2702(b)(1)(B).

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.

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party of the source designated under section 2714(a) of this title. The Governor of a State seeking reimbursement of removal costs is not required to first present its claim to the responsible party. 33 USC § 2713(a).

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action the claimant has under any other law. 33 USC § 2715(a).

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 136.203, the claimant bears the burden to prove the removal costs 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:

Findings of Fact:

1. The NPFC determines that the removal actions undertaken by the Claimant are deemed consistent with the NCP. This determination is made in accordance with the NPFC Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);⁷
2. In accordance with 33 USC § 2713(b)(2) and 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
3. The claim was submitted within the six year period of limitations for claims to the Fund. 33 U.S.C. § 2712(h)(1).

⁷ See, Email between EPA Region X, Mr. [REDACTED], and [REDACTED] NPFC dated April 25, 2014.

4. A Responsible Party has been identified for this incident. 33 U.S.C. §§ 2701(32).
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that all 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.

Analysis:

Presentment

Claimant, a State agency seeking reimbursement of its removal costs, is not required to first present its claim to the responsible party.

Removal Cost 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 Claims Manager validated the costs incurred and determined they were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

The USCG Sector Portland (now Sector Columbia River) and EPA Region X were aware of the incident and the removal actions performed by the Claimant. The Claimant provided contractor dailies, invoicing and lab analysis of the work performed, including its own personnel and equipment costs. These were deemed reasonable to accomplish the response objective. The contractor rate schedules (for all of the different vendors) in place at the time services were rendered was reviewed. Verbal oversight was performed by the EPA Region X Federal On-Scene Coordinator, Mr. [REDACTED] as well as USCG Sector Portland Case # 642027. As such, the work performed has been deemed reasonable, necessary and in accordance with the NCP in order to mitigate the effects of the spill.

Based on the evidence in this claim submission for the actions undertaken by Ecology, the Claims Manager hereby determines that the Claimant incurred \$344,647.86 of uncompensated removal costs and that the Fund will offer this amount as full compensation for the reimbursable removal costs incurred by Ecology and submitted to the NPFC under claim #914022-0001.

Upon adjudication of the costs, \$9.42 in claimed NRCES subcontractor costs are denied due to math errors on the part of the Claimant. These denied costs are reflected in the attached summary of costs spreadsheet for this claim. The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident from February 4 through April 2, 2008. Ecology represents that all costs paid by it are compensable removal costs, payable by the OSLTF as presented by the claimant.

Determined Amount: \$344,647.86

The NPFC hereby determines that the OSLTF will offer \$344,647.86 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim 914022-0001. 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. \$9.42 in claimed costs are denied.

Please note that if Mr. [REDACTED] provides restitution to Washington Department of Ecology for removal costs associated with this incident all or any amount of the restitution received by the County or the Department of Ecology shall be returned to the Fund.

Claim Supervisor



Date of Supervisor's review: *6/30/14*

Supervisor Action: *Approved*

Supervisor's Comments: