

CLAIM SUMMARY / DETERMINATION

Claim Number:	E13305-0001
Claimant:	Commonwealth of Pennsylvania DEP
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$185,611.96

FACTS:

Oil Spill Incident: On February 25, 2013, the Pennsylvania Department of Environmental Protection (PA DEP) responded to a discharge of oil into an unknown tributary of Surveyor Run, which is a tributary of the west branch of the Susquehanna River, a navigable waterway of the United States. The site is located in Girard Township, Clearfield County, PA. PA DEP initially identified the source of the discharge to be two sites immediately adjacent to a 300-foot culvert pipe located on property owned by CAW Energy LP and SWK Energy LP. The culvert drained water and oil from the hillside through a second culvert under Surveyor Run Road to the unknown tributary. PA DEP subsequently identified a third site located immediately adjacent to a road that runs parallel to, and approximately 100 feet up gradient from, the unnamed tributary.

BACKGROUND:

PA DEP Removal Actions: PA DEP hired Eagle Towing and Recovery to conduct removal actions on the surface of the unnamed tributary and to remove contaminated soil from sites one, two and the hillside at site three.¹ Removal actions at the hillside were stopped on March 4, 2013, when an underground storage tank (UST) was discovered along the road at site three. At the time of the discovery, the fill cap on the UST was missing and the UST was full of oil and water. PA DEP presumed that surface water run-off entered the UST via the uncapped UST and displaced the contents out of the top of the UST.² Concerned that the UST was the source of the discharge of oil and oil would continue to discharge if left unattended, Eagle Towing and Recovery removed approximately two feet of liquid from the UST. On March 11, 2013, PA DEP contacted the landowners, CAW Energy LP and SWK Energy LP, and instructed them to pump down the remaining liquid in the tank, excavate the tank, and remove any contaminated soil in the vicinity of the UST.³ Eagle Towing and Recovery removed, and disposed of, approximately 125 tons of contaminated soil at the culvert pipe and unnamed tributary, and removed the culvert pipe (it was deteriorated and contained oil) from the property.⁴

PA DEP sampled the oil in the UST and the oil recovered in the unnamed tributary and forwarded the samples to the PA DEP Bureau of Laboratories.⁵ On March 16, 2013, the PA DEP oil sample analysis revealed that the oil sampled from the UST was very similar to the oil recovered from the unnamed tributary to Surveyor Run.⁶

¹ See USEPA POLREP 1 dated February 26, 2013

² See USEPA POLREP 3 Page 3 dated March 29, 2013

³ See PA DEP Email to Landowner Exhibit 11 of Claimant submission dated March 11, 2013

⁴ See USEPA POLREP 2 dated March 7, 2013

⁵ See PA DEP Inspection Report Tab G of Claimant submission dated March 4, 2013

⁶ See PA DEP Sample Analysis Tab E of Claimant submission dated March 16, 2013

Removal actions conducted by Eagle Towing and Recovery (for PA DEP) ended on March 19, 2013. PA DEP inspectors, in an inspection on April 11, 2013, observed surface water flowing over the face of the hillside migrating toward the unnamed tributary. A light petroleum sheen was observed in the flowing water.⁷

EPA Actions:

According to the POLLUTION REPORTS authored by the EPA Federal On Scene Coordinator (FOSC), [REDACTED] he observed, monitored and documented conditions, i.e., ensuring that the PA DEP removal actions would remove, mitigate or prevent the discharge of oil to a navigable water. On March 26, 2013, he reported that the oil in the UST was consistent with the oil in the unnamed creek.⁸ On April 19, 2013 he reported a conversation with PA DEP representative [REDACTED] who stated that it was also the State's opinion that the oil in the UST matched the oil recovered in the unnamed tributary of Surveyor Run.⁹

On May 9, 2013, EPA FOSC [REDACTED] and PA DEP representative [REDACTED] met at the site and determined that if the UST had discharged oil, it would have been a separate incident and the oil in the UST was not the discharge source at spill sites one and two along the unnamed tributary of Surveyor Run.¹⁰ According to the FOSC there was no clear overland pathway from the UST to spill sites one and two and it was their general consensus (no evidentiary documentation) that the source of the discharge was not runoff from the UST.¹¹

On May 20, 2013, OSC [REDACTED] contacted the landowners to discuss the status of the oil spill and remediation activities being conducted on their property. With the cleanup activities nearing completion and the potential of PA DEP releasing the landowners, OSC Zenone was informed by the landowners that PA DEP still wanted the landowners to pay for the cleanup costs incurred by the State and then submit a claim against the OSLTF for reimbursement. However, the landowners referred to the UST closure report, citing that the UST was not the source of the discharge and it was their intention to file a claim against the OSLTF for their removal costs. They suggested that the State of Pennsylvania file their own claim against the OSLTF for their removal costs.¹²

On November 1, 2013, the Claimant presented this claim to the National Pollution Funds Center (NPFC) for compensation of its uncompensated removal costs in the amount of \$185,385.55. On January 15, 2014, the Claimant provided additional information relevant to the removal costs and requested the sum certain be changed to \$185,611.96.¹³

APPLICABLE LAW:

⁷ See USEPA POLREP 4 dated May 31, 2013

⁸ See USEPA POLREP 3 Page 3 dated March 29, 2013

⁹ See USEPA POLREP 4 Page 4 dated May 31, 2013

¹⁰ See USEPA POLREP 4 Page 4 dated May 31, 2013

¹¹ See USEPA POLREP 4 Page 4 dated May 31, 2013

¹² See USEPA POLREP 4 Page 5 dated May 31, 2013

¹³ See Optional OSLTF Claim Form dated October 28, 2013

Under OPA 90, at 33 U.S.C. § 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 U.S.C. § 2702(b)(1)(B).

"Oil" is defined in relevant part, 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". 33 U.S.C. § 2701(23).

Each 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 of the United States is liable for removal costs and damages. 33 U.S.C. §2702(a).

In the case of an onshore facility, the responsible party means any person owning or operating the facility. 33 U.S.C. § 2701(32)(B).

A facility means any structure, equipment, or other device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, storing, handling, transferring, processing, or transporting oil. 33 U.S.C. § 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 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(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:

PA DEP submits this claim for removal costs paid to its contractor, Eagle Towing and Recovery, for the February 25, 2013 discharge into an unknown tributary of Surveyor Run. The costs are associated with removal actions taken at two sites at or in the unnamed tributary, the culvert and the third site, the UST site.

During the initial removal activities PA DEP determined that the third site, the UST site, may have discharged oil to the unnamed creek; its contractor removed two feet of liquid from inside the UST. Initially, EPA and PA DEP, based on laboratory analyses that oil in the UST and in the unnamed tributary were similar, determined that the UST was the source of the discharge to the unnamed tributary.^{14 15} When the excavated UST did not exhibit holes both EPA and PA DEP determined, notwithstanding the laboratory analyses, that the oil in the unnamed tributary did not originate in the UST.^{16 17} They also determined that if oil did discharge from the UST it would have been a separate incident.¹⁸ Neither EPA nor PA DEP provided evidence to support their later determinations.

Despite the EPA and PA DEP later opinions evidence in the administrative record convinces the NPFC that the three sites, including the UST site, are all connected with the oil discharge to the unnamed tributary. Accordingly, the PA DEP costs for this incident, including qualifying removal costs associated with the UST site, are compensable subject to the spreadsheet notations.

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,

¹⁴ See USEPA POLREP 3 Page 3 dated March 29, 2013

¹⁵ See USEPA POLREP 4 Page 4 dated May 31, 2013

¹⁶ See USEPA POLREP 4 Page 4 dated May 31, 2013

¹⁷ See UST Closure Report Report Page 7 of Tab L of Claimant submission dated April 23, 2013

¹⁸ See USEPA POLREP 4 Page 4 dated May 31, 2013

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 NPFC has determined that the majority of the costs incurred by the Claimant in this determination were reasonable and necessary to mitigate the effects of the incident. Upon review of the information provided by the Claimant, the NPFC has determined that the payable costs were billed in accordance with the rate schedule and/or contractual agreements in place at the time the services were rendered, unless otherwise indicated below, and were determined by the FOSC to be consistent with the NCP.

General Categories of denied costs:

1. PA DEP personnel billed as on-scene after the cleanup of the spill was complete;
2. Lack of supporting documentation from Eagle Towing. Specifically, documentation that supported their fuel service charge markup, certain pieces of heavy equipment, proof of payment to subcontractors and associated transportation costs.

The NPFC included the spreadsheet created by the claims manager for each invoice where the identification of each item billed, claimed, paid, denied and the reason for denial by line item.

OVERALL DENIED COSTS = \$48,565.08

A. Determined Amount:

The NPFC hereby determines that the OSLTF will offer \$137,046.88 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim E13305-0001. 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: \$137,046.88

Claim Supervisor

Date of Supervisor's Review: 6/18/14

Supervisor Action: **Approved**

Supervisor's Comments: