

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: G02AAG-0001
Claimant	: State of Ohio Environmental Protection Agency
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$141,059.56

FACTS:

A. Oil Spill Incident:

The United States Environmental Protection Agency (USEPA) Region V reports that on June 19, 1992, United States Coast Guard (USCG) Marine Safety Office (MSO) Toledo responded to an oil spill in Oregon, Ohio that had originated from a storm sewer outfall that emptied into Driftmeyer Ditch and ran alongside DuPont Road. This ditch drained into Maumee Bay, a nexus to Lake Erie, both of which are navigable waterways of the US. Further investigation identified a catch basin on the sewer line that was heavily contaminated with oil. Repairs to the storm sewer and catch basin were made by the City of Oregon in order to prevent oil in the saturated soil from entering the sewer system. Repairs were also made to a toe-drain system in the adjacent Toledo Edison fly ash impoundment berm that also heavily contaminated with oil. A three month investigation into the discharge couldn't identify the source of the spill. MSO Toledo indicated that further source area investigation would be referred to the USEPA upon completion of the sewer repairs although it appears no formal referral occurred until 11 years later when another large oil pollution release to the same storm sewer system happened.

On April 13, 2002, MSO Toledo was notified of an oil spill in Oregon, Ohio that had impacted a large section of the same Driftmeyer Ditch. As a responsible party was not immediately identified, the city of Oregon was ordered to conduct removal activities. The subsequent investigation revealed that the Driftmeyer Ditch, which ran parallel to DuPont Road, was fed by a sewer system and toe-drain system from a fly ash impoundment berm of Toledo Edison, a subsidiary company of First Energy. However, oil sample analysis revealed that oil sampled from the toe-drain system didn't match the oil recovered from the sewer system. Further investigation revealed oil contaminated soil on both sides of DuPont Road and the spill site consisted of public lands on both sides of the road and a section of Driftmeyer Ditch. Citgo Petroleum, Wolverine Pipeline and First Energy of Ohio are located on the east side of the road while BP Petroleum is located on the west side of the road.

Unable to conduct the comprehensive investigation needed to determine the party responsible for the discharge of oil, MSO Toledo made a formal request to USEPA Region V to assume the role as Federal On-Scene Coordinator (FOSC). Sample analysis conducted using the spill samples collected from the June 19, 1992 spill and the April 13, 2002 spill, revealed that the samples were from a common source.

On May 16, 2003, USEPA Region V FOSC, Mr. [REDACTED] assumed control of the investigation and issued a Pollution Removal Funding Authorization (PRFA) to the Ohio EPA in order for them to oversee the investigation and subsequent removal activities. This

PRFA remained in effect until 2008 although Ohio EPA never billed due to the ongoing nature and expansion of the original investigation. It was later determined that the scope of work had expanded beyond the parameters of the PRFA, so the PRFA was closed with the understanding that the Ohio EPA would submit a claim to the NPFC at the conclusion of the response activities.

This spill was reported to the National Response Center (NRC) via report # 599563.

B. Description of removal actions performed:

The Claimant, OEPA, arrived on scene and provided oversight throughout the ongoing cleanup and removal activities. Additionally, OEPA's supervisory oversight included potential Responsible Party (RP) negotiations (though, to date, no RP has been identified), as well as the planning and implementation of the source investigations and removal actions.

It should be noted here that the actions performed by the Claimant are strictly from when the Federal Project Number (FPN) GA2AAG was opened in 2002, as the original incident was considered paid and complete, and had not been linked to the later incidents until after response had commenced.

- C. The Claim:*** On February 20, 2014, OEPA submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of its uncompensated removal costs in the amount of \$141,059.56 for the services provided from June 2003 through November 2013.

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 FOOSC, and (4) whether the costs were adequately documented.

APPLICABLE LAW:

"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 2714(a). 33 U.S.C. § 2713(a). If the claim is not settled by any person by payment within 90 days after the date the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 U.S.C. §2713(c)(2).

“Claimant” means “any person or government who presents a claim for compensation under this subchapter.” 33 USC § 2701(4).

33 USC § 2712(f), which is entitled “Rights of Subrogation,” provides that payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

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:

A. Overview:

1. FOSC Coordination has been established via US EPA Region V.¹
2. 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.

¹ See US EPA Region V POLREPS 1-16 for this incident, opened 10/15/2002.

3. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1).
4. A Responsible Party has not been identified. 33 U.S.C. § 2701(32).
5. 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 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 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 MSO Toledo and USEPA Region V were made aware of the incident and the actions OEPA performed. As is exemplified in EPA POLREPS #1-16, the OEPA worked with federal and local agencies alike, as well as with the contractors and potential RPs for this incident to mitigate the effects of the spill, as well as to guide and assist in cleanup and removal activities. Oversight was performed by the USEPA Region V Federal On-Scene Coordinators, as well as USCG MSO Toledo. Therefore, 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, the actions undertaken by OEPA, the Claims Manager hereby determines that the Claimant incurred \$62,704.84 of uncompensated removal costs and that that amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by OEPA and submitted to the NPFC under claim #G02AAG-0001. \$78,354.71 in claimed indirect costs are denied as the Claimant has not substantiated how they were derived. Additionally, Indirect Costs generally apply to grants (including contracts, cooperative agreements, etc.) that come to the state from federal and other outside funding sources. While it is true that OMB A-87 guidelines show these types of charges apply to grant programs (where a contract may be in place to include these costs), the OSLTF is not a grant program and is therefore not bound by the terms of OMB Circular A-87. Therefore, this does not apply and all Indirect Costs are subsequently denied as unsubstantiated. These denied costs are reflected in the attached audit of costs for this claim.

The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident from June 2003 through November 2013. OEPA represents that all costs paid by it are compensable removal costs, payable by the OSLTF as presented by the Claimant.

C. Determined Amount: \$62,704.84

The NPFC hereby determines that the OSLTF will pay \$62,704.84 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim G02AAG-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. 78,354.71 in claimed indirect expenses are denied.

Claim Supervisor:

Date of Supervisor's review: **5/5/14**

Supervisor Action: ***Approved***

Supervisor's Comments: