

## CLAIM SUMMARY / DETERMINATION

**Claim Number:** 917016-0001  
**Claimant:** Tahoe Keys Property Owners Association  
**Type of Claimant:** CLAIMANT TYPE  
**Type of Claim:** Removal Costs  
**Claim Manager:** [REDACTED]  
**Amount Requested:** \$5,035.75

### **FACTS:**

- A. Oil Spill Incident:** On August 18, 2016, at approximately 1:20pm local time, Mr. [REDACTED] the Security Officer for Tahoe Keys Property Owners Association (TKPOA) and Mr. [REDACTED], Aquatic Invasive Species Weed Coordinator responded to a call from a property owner located at [REDACTED], South Lake Tahoe, CA. A spill that resulted in a sheen approximately 200 ft long by 50 ft wide was located in the Tahoe Keys Starboard Cove Lagoon,<sup>1</sup> a navigable water of the U.S. Mr. [REDACTED] notified the California Office of Emergency Services (OES). OES notified the Environmental Protection Agency (EPA) regarding the incident.
- B. Description of removal actions performed:** The Claimant, Tahoe Keys Property Owners Association (TKPOA) deployed absorbent booms around the affected area, located near 2158 Inverness, to contain oil sheen. The California Department of Fish and Wildlife Game Warden instructed TKPOA staff to isolate the spill for 24 hours to see if it would dissipate over the course of the night and next day. TKPOA hired H2O Environmental, Inc. (H2O) to dispose of absorbent boom material<sup>2</sup>.
- C. Presentment to the Responsible Party:** A Responsible Party was not identified.
- D, The Claim:** On May 12, 2017, the National Pollution Funds Center (NPFC) received TKPOA's claim for reimbursement of its uncompensated removal costs in the total amount of \$5,035.75 for the costs of its personnel time and materials expended, plus the costs of H2O's services on August 18, 2016.

### **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).

<sup>1</sup> See, Tahoe Keys Property Owners Association Optional Claim form dated April 27, 2017

<sup>2</sup> See, H2O Environmental, Inc. Invoice #008404087 Dated 10/21/2016

"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.

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. Mr. [REDACTED] of the EPA served as the Federal On-Scene Coordinator (FOSC) and was aware of incident; however, the response was primarily handled by the State of California Fish and Wildlife Game Warden. The Warden coordinated with the FOSC.<sup>3</sup> The NPFC hereby determines that the actions undertaken by TKPOA and its subcontractors were consistent with the National Contingency Plan (NCP). 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4).
2. The incident involved a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. The claim was submitted to NPFC 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. In accordance with 33 CFR § 136.105(e)(12), the Claimant has certified that no suit has been filed by or on behalf of the Claimant in court for the claimed uncompensated removal costs.

The NPFC Claims Manager has thoroughly reviewed all documentation submitted by the Claimant, and has determined which claimed costs were incurred for removal actions taken in accordance with the NCP, and whether the costs for these actions were reasonable and allowable under OPA 90 and 33 CFR § 136.205.

#### **B. Analysis:**

NPFC CA reviewed the documentation provided by the Claimant and independently obtained by the NPFC. 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 claimed 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 claim submission were reasonable and necessary to mitigate the effects of the incident. The actions undertaken were overseen by either the State On Scene Coordinator, or the State of California Fish and Wildlife OSPR warden, and were coordinated with the EPA FOSC.

Under OPA, TKPOA is entitled to its reasonable costs of oil spill response. TKPOA submitted this claim seeking costs paid to H2O to dispose of the oiled absorbent materials, and it also seeks its own costs for responding to the incident.

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<sup>3</sup> See, May 16, 2017 email from EPA FOSC [REDACTED] to Claims Manager [REDACTED].

The NPFC reviewed the documentation of claimed costs provided by TKPOA and H2O. The documentation supporting H2O's costs included H2O's invoice for \$1,566.00, H2O's rate schedule and service agreement, and disposal documentation. NPFC finds that all of the H2O costs were necessary and reasonable for the response and, thus, are reimbursable to TKPOA.

Regarding TKPOA's claim for its own costs, it seeks reimbursement for absorbent boom it expended at \$257 per bag<sup>4</sup> for 12 bags of boom totaling \$3,084.00. TKPOA is not an Oil Spill Response Organization. It is a property owners' association that has been providing first response duties in its local waterway. Since TKPOA is not an OSRO, it is not entitled to charge OSRO prices when seeking reimbursement from the OSLTF. It is only entitled to be reimbursed for its uncompensated costs of responding to the oil spill. That means it can only be paid for costs expended, with no allowance for markup. Since TKPOA is not an OSRO, NPFC requested documentation of TKPOA's purchase costs of the boom. In return, TKPOA provided invoices from New Pig Corporation for boom purchased by TKPOA. The invoices from New Pig provided prices of \$115.00 per bag for 3 bags of boom, and \$106.00 per bag for 16 bags.<sup>5</sup>

TKPOA expended and had to replace 12 bags in this response. Therefore, the NPFC will reimburse TKPOA for its costs to replace the 12 bags. NPFC will allow 3 bags at \$115.00 and 9 bags at \$106.00 based on the prices paid to New Pig as listed on their invoices. For the purpose of compensating the claimant, we employed Last-In-First-Out accounting for inventory replacement costs since we do not know how many bags from the prior inventory remained in stock beyond the 12 used for this spill. The total allowed at these rates is \$1,299.00. The difference results in \$1,785.00 of the claimed amount for disposable absorbent boom being denied.

Claimant also seeks labor totaling \$385.75 based on a work order dated August 26, 2016. However, attached to TKPOA's June 5, 2017 letter, Claimant provided a spreadsheet with a list of employees with their work times and rates for the response. The total labor hours were reduced from 23.5 as listed on the work order to 19 on the spreadsheet, and the number of workers was reduced from 7 to 6. NPFC has applied the data from the spreadsheet versus the work order because the data on the spreadsheet is more detailed and lists actual start and stop times, whereas, the work order only lists number of hours. Two of the employees listed on the work order did not appear on the spreadsheet, but a different employee was added. The resulting labor expense as stated by TKPOA is \$313.80 as opposed to the initial claimed amount of \$385.75. Therefore, the \$71.95 difference is denied due to the reduction in labor costs as stated by the claimant in the supplemental documentation provided .

The NPFC finds that \$3,178.80 is compensable to TKPOA, and the remaining \$1,856.95 is denied for the reasons stated above. Should TKPOA continue to respond to oil spills and seek to be paid OSRO-level fees from the OSLTF in the future, it must ensure that its employees are HAZWOPER-certified so that they follow proper response procedures and

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<sup>4</sup> The \$257 per bag rate appears on the TKPOA published rate for spill cleanup assistance dated 1/1/2016.

<sup>5</sup> New Pig Vendor invoice #4686107-03 dated 05/06/16 lists absorbent boom at \$106.00 per bag for 16 bags and New Pig invoice#4686107-04 dated 08/15/16 lists absorbent boom at \$115.00 per bag for 3 bags.

follow key provisions of the National Contingency Plan, and related federal regulations regarding oil removal.

**C. *Determined Amount:***

The NPFC hereby determines that the OSLTF will pay \$3,178.80 as full compensation for the claimed removal costs incurred by the Claimant and submitted to the NPFC under claim 917016-0001.

**AMOUNT: \$3,178.80**

Claim Supervisor: Mr. [REDACTED]

Date of Supervisor's review: 06/22/2017

Supervisor Action: *Approved.*

Supervisor's Comments: