CLAIM SUMMARY / DETERMINATION

Claim Number: 917030-0001
Claimant: Pheonix Control & Environmental Services, Inc.
Type of Claimant: Corporate
Type of Claim: Removal Costs
Claim Manager: [redacted]
Amount Requested: $33,548.41

FACTS:

On December 06, 2016, Siempre Energy Operating (Responsible Party or RP) discharged approximately 10 gallons of crude oil into Tabbs Bay. The discharge resulted from the overflow of a casing air vent tank that is located on a pump jack platform. Prevailing North winds and outgoing tide beached the oil on the shore line of the island across from the well site.[1]

Texas General Land Office (TGLO) was contacted and sent a Primary Response Officer to the oil spill incident where an on-site investigation was conducted.[2]

The National Response Center was contact and report number 1165717 was generated.[3]

Pheonix Control and Environmental Services, Inc. (Pheonix or Claimant) responded to the oil spill incident with personnel and equipment for immediate response and cleanup and deployed boom in the ship channel across from the well head.

Claim and Claimant:

On June 22, 2017, Pheonix presented a claim to the National Pollution Funds Center (NPFC) for its uncompensated removal costs in the amount of $33,548.41.

The claim consists of a cover letter, a signed OSLTF Claim Form, Texas General Land Office (TGLO) Form Incident Report[4], Phoenix invoice # 9363 which indicates dates of service from Tuesday, December 06, 2016 through December 27, 2016 in response to the oil spill, daily field logs for Phoenix dated, December 07, December 12, December 14, December 15, and December 16, A & B Labs Chain of Custody form,[5] two Phoenix Driver Trip Tickets,[6] a Uniform Hazardous Waste Manifest # 014557121 JJK, a Pheonix oil spill report that describes the removal actions,[7] and a signed Master Service Agreement.[8]

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[1] See Claimant's OSLTF Form and oil spill report.
[2] *See* Texas General Land Office Incident Report # 2016-3723.
[3] *See* NRC report in claim file that was submitted by TGLO.
[4] *See* TGLO report # 2016-3723
[5] The ink is extremely faded, which makes it illegible.
[6] Report Numbers 18967 and 18983.
[7] The report was created December 07, 2016 and approved on January 10, 2017.

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.

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 -

[8] The Agreement was entered into on May 29, 2015 between Phoenix and Siempre Energy Operating LLC.

(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. There is no evidence that a Federal On-Scene Coordinator (FOSC) directed the response to this incident, nor did one determine that the actions undertaken by the Claimant were consistent with the National Contingency Plan (NCP). 33 U.S.C. §§ 2702(b)(1)(B) and 33 CFR § 136.203(c);
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 U.S.C. §2701 to "navigable waters."
3. The claim was submitted to the Fund within the six year period of limitations for removal costs claims. 33 U.S.C. §2712(h)(1).
4. In accordance with 33 CFR § 136.105(e)(12), the Claimant has certified that no suit has been filed in court for the claimed costs.
5. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that no costs are allowable under OPA and 33 CFR § 136.205.

B. *Analysis:*

NPFC CA reviewed the documentation that was provided by the Claimant. The review focused on (1) whether a discharge or substantial threat of a discharge to a navigable waterway occurred; (2) 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 an incident); (3) whether the costs were incurred as a result of these actions; (4) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (5) whether the costs were adequately documented and reasonable.

In this case, the facts and evidence that were provided by the Claimant and TGLO demonstrate that oil was emitted into the environment however, the evidence does not demonstrate that the Claimant's actions were directed by an FOSC or that an FOSC determined that the clean-up was consistent with the NCP. Under 33 CFR 136.203, a claimant must establish that the actions taken were determined by the FOSC to be consistent with the NCP or were directed by the

FOSC. The Claimant provided no documentation that shows any involvement of an FOSC. The Claimant does not allege that the U.S. Coast Guard was ever contacted, or were present on scene.

Should the Claimant decide to request reconsideration of this denial, the Claimant will need to obtain a written statement from the FOSC which states the response was to an oil as defined under OPA, that the actions undertaken by the Claimant were reasonable and necessary to prevent, minimize, and mitigate the effects of the incident, pursuant to the governing claims regulations and were in accordance with the NCP. The FOSC in this case would be the United States Coast Guard.

Based on the foregoing, this claim is denied.

(b) (6) [redacted]

Claim Supervisor: (b) (6) [redacted]

Date of Supervisor's review: 7/06/2017

Supervisor Action: ***Denial Approved***