

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	918030-0001
<b>Claimant:</b>	Southwest Renewal Foundation of High Point INC
<b>Type of Claimant:</b>	Corporate
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$7,711.00

### **FACTS:**

On July 03, 2017, Guilford County Department of Health and Human Services Environmental Health/HERA was notified by the High Point Fire Department of an overturned 55-gallon steel drum found leaking oil on Southwest Renewal Foundation of High Point, Inc.'s property located at 1401 S. Elm Street, High Point, NC.<sup>1</sup> Guilford County's incident report stated, a 55-gallon drum had been dumped on the property and the contents of the container leaked out and was absorbed into the ground spanning a 10'x20' area killing the grass. The report further states that approximately 20-30 feet downslope from the spill is Richland Creek.<sup>2</sup>

On July 10, 2017, at 11:37a.m., (Seven days after the discovery of the abandoned drum and oil spill), the National Response Center (NRC) was contacted by Guilford County, resulting in NRC Incident Report number# 1183627. The NRC report states, a single 55-gallon drum was dumped and was overturned and believed to contain used motor oil. It further states, there is a Creek about 20 feet away but there appeared to be no creek involvement.<sup>3</sup>

### **REMOVAL AND CORRECTIVE ACTIONS TAKEN:**

On July 25, 2017, (22 days after the discovery of the abandoned drum and oil spill), the North Carolina, Department of Environmental Quality, Waste Management Division, issued a Notice of Regulatory Requirements in accordance with, 15A NCAC 2L .0106(f), for corrective actions to be taken. The letter was issued to Southwest Renewal Foundation, attention to Ms. ██████████. The letter identified, Southwest Renewal Foundation, as the responsible party (RP) because it is the landowner subject of where the incident occurred. The letter contained a list of two (3) State required corrective action items that were to be performed and they were as follows:

1. All contaminated soil that exceeded the soil-to-groundwater maximum containment concentrations must be disposed of;
2. Soil assessment must be performed in order to confirm the removal of all contaminated soil; and
3. An Initial Assessment Report must be prepared in accordance with the most recent Version of the, *UST Section Guidelines for the Investigation and Remediation of*

<sup>1</sup> See, Guilford County Dept. of Public Health, Division of Environmental Health, Incident Report Number 063-17, pg 1 of 2.

<sup>2</sup> See, Guilford County Dept of Public Health, Division of Environmental Health, Incident Report Number 063-17, pg 2 of 2.

<sup>3</sup> See, Incident Report# 1183627, identified as Claimant's Attachment A.

*Contamination from Non-UST Petroleum Releases*, which indicates the nature and extent of the release and describes the initial response and abatement actions.<sup>4</sup>

On July 27, 2017, (24 days after the discovery of the abandoned drum and oil), the Claimant contacted, Pyramid Environmental & Engineering, P.C., (Pyramid) to assess the oil spill incident and to perform the cleanup. On the same day, Pyramid's Project Manager, Mr. [REDACTED], responded to the spill at the Claimant's request. It is important to note, Mr. [REDACTED] responded to the oil spill site with absorbent materials and plastic sheeting in order to cover and secure the oil because there had been thunderstorms in the area.<sup>5</sup> Mr. [REDACTED] had placed absorbent materials on the down gradient side of the oily area, and secured it with wooden stakes.<sup>6</sup>

On July 28, 2017, (25 days after the discovery of the abandoned drum and oil), Pyramid hired Fulp's Environmental Services (Fulp) to respond to the oil spill. On the same day, Fulp mobilized its equipment to the oil spill site.<sup>7</sup> Fulp excavated the soil to a depth of six inches by twelve inches across the area. Field screening of soils was used to detect oily soil vice clean soil. The field screening indicated a low volatile reading in the oily soils and non-detect in clean soils. Visual indications of oil were also used to determine how far to excavate. All visually stained soils were excavated and placed in a stockpile.<sup>8,9</sup> Pyramid's Cleanup Report stated that fortunately there was a rock wall near the creek and a slight elevation rise prevented migration toward the creek.<sup>10</sup>

Soil samples were taken and analyzed. The evaluation indicated, the soils were acceptable for disposal at the EVO Corporation facility as non-hazardous petroleum contaminated soil. Based on the composite analyses, the Pyramid Cleanup Report stated that the most likely source of the oil was determined to be from an automotive shop's used oil.<sup>11</sup>

On October 19, 2017, (nearly three months after excavation and high DRO levels were revealed) the stockpiled soil and the oil waste drum were removed from the site. The soil was loaded on the dump truck and at this time, additional excavation was near completion. Several scoops of soil was taken from the area and a second soil sample was collected at 1.5 feet below the original surface. The central part of the former oiled area was excavated and placed in the dump truck. Additional soil samples were collected 1.5 feet below surface and analyzed for lead (Pb). Sample analyses was completed by, Pace Analytical Services.<sup>12</sup>

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<sup>4</sup> See, July 25, 2017 letter from NC Dept of Environmental Quality, Waste management Division to SW Renewal Foundation of High Point, Inc.

<sup>5</sup> See, Pyramid Environmental & Engineering, P.C. Cleanup Report dated November 14, 2017, Section 2.0 Initial Response.

<sup>6</sup> *Id.*

<sup>7</sup> See, Fulp's Environmental Invoice to Pyramid, stamped entered on October 26, 2017.

<sup>8</sup> See, Pyramid Environmental & Engineering, P.C. Cleanup Report dated November 14, 2017, Section 3.0 Spill Containment, Cleanup, Sampling and Waste Profiling.

<sup>9</sup> See, Attachment C to claim submission identified at site photos.

<sup>10</sup> See, Pyramid Environmental & Engineering, P.C. Cleanup Report dated November 14, 2017, Section 3.0 Spill Containment, Cleanup, Sampling and Waste Profiling, p. 3.

<sup>11</sup> See, Pyramid Environmental & Engineering, P.C. Cleanup Report dated November 14, 2017, Section 4.0 Soil Analytical Results.

<sup>12</sup> See, Pyramid Environmental & Engineering, P.C. Cleanup Report dated November 14, 2017, Section 5.0 Waste Disposal Activities.

Approximately 23 tons of contaminated soil was disposed of at, EVO Corporation.<sup>13</sup> The analytical results for the post excavation samples, near the creek, showed no signs of petroleum. The analyses confirmed, the additional excavations were sufficient to remove the remaining soil contaminants.<sup>14</sup>

On December 04, 2017, (Five months after the discovery of the abandoned drum and oil), the North Carolina Department of Environmental Quality, Waste Management Division issued a Notice of No Further Action (15A NCAC 2L .0106), Corrective Action Letter to Southwest Renewal Foundation, Inc.. The letter stated that a review of the report filed indicated after soil excavation, the soil contamination no longer exceeds the TPH action levels. In closing, the Underground Storage Tank Section of Waste Management determined that based on the information provided to date, no further action was warranted for this incident.<sup>15</sup>

### **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".

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."

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<sup>13</sup> See, The EVO Waste Profile and Pace Analytical Results and photos identified as Claimant's Attachment D.

<sup>14</sup> See, Pace Analytical letter to Pyramid dated October 30, 2017 providing analytical results for samples received by them on October 20, 2017 and associated photos, identified as Claimant's Attachment E.

<sup>15</sup> See, North Carolina Dept. of Environmental Quality, Waste Management Division, Notice of No Further Action letter to the Claimant dated December 04, 2017.

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. A Federal On-Scene Coordinator (FOSC) did not direct the response for this incident, nor did one determine the actions undertaken by the Claimant were consistent with the National Contingency Plan (NCP). 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4).
2. An FOSC did not determine an OPA incident occurred, nor has the Claimant proven the incident involved a discharge or substantial threat of discharge of oil to “navigable waters.”
3. In accordance with 33 CFR § 136.105(e)(12), Claimant has certified no law suit has been filed in court for the claimed costs.
4. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that none of its costs are allowable under OPA and 33 CFR § 136.205.

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

NPFC CA reviewed the documentation provided. 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.

Upon review and adjudication of the claim, the NPFC made various requests for additional information from several parties, including but not limited to:

1. The Claimant
2. Guilford County
3. Pyramid Environmental, and
4. USEPA.

The NPFC requested the following information from the Claimant in order to support the claimed costs:

1. Copy of the Pyramid Invoice(s),
2. Proof of payment to Pyramid and a copy of the Pyramid rate schedule in support of their invoiced costs;
3. Copy of any and all disposal manifests from Evo Corporation (disposal facility);
4. Requested proof of USEPA communications and coordination for the response cleanup; and
5. Requested whether North Carolina Department of Environmental Quality (NCDEQ) and Guilford County Env. Health were on site and requested contact information for both agencies.

Because the claim appeared to have no Federal On Scene Coordination (FOSC) as required by the interim claims regulations found at 33 CFR 136.203 & 205, the NPFC requested the following detailed information as it related to Pyramid Environmental:

- a. Project Set up (not on rate schedule)
- b. Sorbent pads and boom installed (not on rate schedule)
- c. Walmart plastic sheeting and stakes (not on rate schedule and no receipts provided)
- d. Charge associated with the preparation and submission of UST-62 form to the State
- e. Equipment mobilization fee (not on rate schedule)
- f. Excavation equipment and personnel
- g. Plastic charged to stockpile the soil and drum (not on rate schedule)
- h. Transport and Supply charges (not on rate schedule)
- i. Lab Analysis (not on rate schedule therefore provide all Pace documentation)
- j. Pyramid daily field notes/logs, and
- k. Contract between Pyramid and Claimant

Because the State was involved in the response to this incident, the NPFC contacted Ms. [REDACTED] of Guilford County and asked for a statement explaining Guilford County's role in the cleanup and disposal. The NPFC also asked for the contact info for any state or County person(s) that was on scene and to provide any and all witness statements as well as a copy of the NCDEQ complete file.

Finally, the NPFC reached out to the United States Environmental Protection Agency (USEPA) as the FOSC for this incident and requested assistance on whether after the fact FOSC coordination could be provided. During the NPFC's initial communication with the FOSC, Mr. [REDACTED], initially, Mr. [REDACTED] could not recall the incident but after the NPFC forwarded some claim incident information, he responded via email on, June 26, 2018, with a copy of the "WebEOC" log entry dated, July 10, 2017, ID # 1064235.<sup>16</sup>

The only information contained in the Action Information section of the log entry was the following... "Called and spoke with RP for Guilford County. Offered OSC coordination for potential cost recovery from OSLTF in case property owner was unable to perform removal." Mr. [REDACTED] said that he barely remembered this from a year ago. He stated that he called them and went over the specifics and due to impending rain, he felt there was an adequate threat to take an action.<sup>17</sup>

It is important to note, when the NPFC reviewed the, Guilford County Incident Report form, the report contained a section, at the bottom of the form, that is intended for the Federal On-Scene Coordinator (FOSC) to sign. If the incident response was reasonable, necessary, properly coordinated, and determined to be in accordance with the National Contingency Plan (NCP), the FOSC would endorse the report. This report was not signed-off by an FOSC and therefore begs the question whether an actual substantial threat of a discharge into a navigable waterway even existed. Additionally, during the NPFC's adjudication, it performed independent research, using NOAA historic records which showed the year, month, and day, of historic temperature, precipitation, evaporation, and soil temperature.<sup>18</sup>

Historic scientific evidence revealed that during the month of July 2017, High Point, NC received 1.53 inches of rain, August 2017, High Point, NC received 2.58 inches of rain, Septemeber 2017, High Point, NC received 3.18 inches of rain, and in October 2017, High Point, NC recieved 3.83 inches of rain. The rain total for this area between July 2017 and October 2017 totalled 11.12 inches of rainfall. The abandoned drum and contaminated soil(s) were not removed until October 2017 and yet, at no time during the rains and several days of being unattended and exposed to adverse weather conditions, the oil did not move down gradient to the creek or enter the water.

Based on the foregoing, the preponderance of the credible evidence in this case, does not support a finding that an OPA-incident occurred. While oil did leak onto the ground, the Claimant has not provided evidence to demonstrate that a substantial threat of discharge into a navigable waterway occurred, as required under the Oil Pollution Act of 1990 (OPA). High Point, North Carolina experienced many rain events in the area between July 03, 2017 (date the oil drum was discovered) through October 19, 2017 (when disposal was completed). The NPFC does not see any indication that the product that spilled onto the ground in fact posed a substantial threat of discharge into a navigable waterway.

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<sup>16</sup> See, Email between Mr. [REDACTED], USEPA and Ms. [REDACTED], NPFC, dated June 26, 2018.

<sup>17</sup> See, Email between Mr. [REDACTED], USEPA and Ms. [REDACTED], NPFC, dated June 26, 2018.

<sup>18</sup> See, Record of Climatological Observations from 7/2017, 08/2017, 9/2017, and 10/2017 obtained through the Department of Commerce, National Oceanic & Atmospheric Administration (NOAA).

Furthermore, the claim submission does not demonstrate that the Claimant's actions were directed by an FOSC or that an FOSC determined the response efforts were determined to be consistent with the National Contingency Plan (NCP). Although, State and County coordination was made, a claimant must establish, the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC, 33 CFR 136.203. The Claimant provided no documentation demonstrating direction given for response by an FOSC.

Finally, it is important to note that on June 28, 2018, the NPFC sent the USEPA FOSC, Mr. [REDACTED], an email which contained the NOAA historic records<sup>19</sup> as well as, all of the facts that are presented in this determination. The NPFC inquired as to whether the USEPA FOSC (in accordance with the provisions of the NCP found at, 40 CFR Part 300) would certify, in writing, whether the oil spill response was cleaned and disposed of in accordance with the NCP, and whether the oil spill posed a substantial threat of discharge to a navigable water way.

The NPFC requested written coordination and advised the FOSC needed to have his response to the NPFC no later than close of business on July 8<sup>th</sup> to allow the NPFC to move forward with its adjudication of the claim. As of the date of this determination, the NPFC has not received the requested confirmation from the FOSC that would support that the oil spill incident was determined to be a substantial threat. The NPFC has not received anything from the FOSC stating that even the cleanup and removal actions were performed in accordance with the NCP.

Based on the foregoing, this claim is denied. The NPFC hereby determines the evidence presented, to the NPFC, does not demonstrate there was a substantial threat of a discharge, of oil, into navigable waters of the United States, there is no evidence submitted to the NPFC to demonstrate the actions taken were directed by an FOSC and determined to be consistent with the NCP.

Should the Claimant request reconsideration, it must provide evidence of a substantial threat of discharge of oil into or upon a navigable waterway of the US and it must obtain FOSC coordination from the USEPA, Mr. [REDACTED], that articulates his decision and the sources for which relies upon to make such a determination considering the time period involved in the response, weather conditions, and how all afctors correlate to the substantial threat determination.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *7/12/18*

Supervisor Action: *Denial Approved*

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<sup>19</sup> See, Record of Climatological Observations from 7/2017, 08/2017, 9/2017, and 10/2017 obtained through the Department of Commerce, National Oceanic & Atmospheric Administration (NOAA).