

CLAIM SUMMARY / DETERMINATION

Claim Number:	918033-0001
Claimant:	Lenoir County Emergency Services
Type of Claimant:	Local Government
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$15,950.00

FACTS:

Oil Spill Incident:

On March 6, 2018, at 12:00 p.m., a mystery sheen of oil was observed on the Neuse River at Pearson Park and the Neuse Nature Center, Kinston, NC, by the Kinston Fire Department Commander.¹ The Neuse River is a tributary of Pamlico River, which is a navigable waterway of the United States. Lenoir County Emergency Management personnel responded, traced the sheen to an outfall and determined that oil was being dumped into the County's drainage system where it was traveling through the sewer system and washing out into Neuse River.

On April 1, 2018, the Kinston Fire Department Commander was checking the Neuse River² when he observed a second discharge of oil from the same County sewer outfall, causing the same area on the river to become contaminated with oil.³

Description of Removal Activities for this incident:

On March 7, 2018, Lenoir County contacted Eastern Environmental Management, LLC, (Eastern Environmental), who responded to the oil spill with an emergency response trailer, personnel, trucks, absorbent boom, and absorbent pads.⁴

Eastern Environmental contained the oil in the river in the vicinity of the outfall with eight-inch and five-inch booms. They removed all saturated booms and pads and used a 3800 CFM vacuum truck to remove film and oil at the mouth of the drain. Cleanup continued through March 8, 2018. Eastern Environmental disposed of the waste generated during the cleanup at its own disposal facility which included 225 pounds of oil saturated boom and pads,⁵ as well as 537 gallons of oily water.⁶

On April 1, 2018, Lenoir County contacted Eastern Environmental again to respond to the oil discharging from the outfall. Eastern Environmental responded with an emergency response trailer, personnel, trucks, absorbent boom, and absorbent pads.⁷ Cleanup continued through

¹ See, Email between NPFC Claims Manager and Mr. [REDACTED] dated August 14, 2018.

² See, Email between NPFC Claims Manager and Mr. [REDACTED] dated August 14, 2018.

³ See, Email conversations between the NPFC and the SOSC, Mr. [REDACTED], dated July 6, 2018 through July 10, 2018.

⁴ See, Eastern Environmental Management, LLC Invoice # 76789.

⁵ See, Eastern Environmental Management Non-Hazardous Waste Manifest dated March 7, 2018.

⁶ See, Eastern Environmental Management Non-Hazardous Waste Manifest dated March 7, 2018.

⁷ See, Eastern Environmental Management, LLC Invoice # 76789.

April 4, 2018, and all waste generated during the response was disposed at their facility which included a total of 3100 pounds of oiled containment boom and 387 gallons of oil water.^{8 9 10}

Lenoir County paid Eastern Environmental's invoice # 76789, in full on June 22, 2018, for all work performed on March 7, 2018, March 8, 2018, April 2, 2018, and April 4, 2018 and subsequent disposal costs.¹¹

Claim:

On July 5, 2018, the NPFC received a removal costs claim from Lenoir County Emergency Services (Claimant) for reimbursement of their uncompensated removal costs for personnel, materials, and disposal costs in the total amount of \$15,950.00.¹² The Claimant provided an Optional OSLTF Claim Form, a copy of NRC Report # 1206029 dated March 6, 2018, Eastern Environmental invoice # 76789 dated June 18, 2018 in the amount of \$15,950.00, field logs created by Eastern in support of its invoicing, disposal manifests for both solids and liquids on March 7, 2018, April 2, 2018, and April 4, 2018, as well as two news articles from the Kinston Free Press.¹³

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].

⁸ *See*, Eastern Environmental Management Non-Hazardous Waste Manifest dated April 2, 2018.

⁹ *See*, Eastern Environmental Management Non-Hazardous Waste Manifest dated April 2, 2018.

¹⁰ *See*, Eastern Environmental Management Non-Hazardous Waste Manifest dated April 4, 2018.

¹¹ *See*, Check # 32141 dated June 22, 2018, in the amount of \$15,950.00.

¹² *See*, OSLTF Claim Form dated June 26, 2018.

¹³ One Article was dated, April 2, 2018 and the other was dated April 11, 2018.

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] from the USEPA Region 4 was the Federal On-Scene Coordinator (FOSC). Via an email dated July 9, 2018, Mr. [REDACTED] stated that based on the information he was provided, he has determined that 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)¹⁴.
2. Evidence does not indicate the discharged oil is an OPA oil, as defined in OPA 90, 33 U.S.C. §2701(23), to navigable waters.
3. In accordance with 33 CFR § 136.105(e) (12), the 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, none of its costs are allowable under OPA and 33 CFR § 136.205.

¹⁴ See, July 9, 2018 email from Mr. [REDACTED], USEPA and NPFC Claims Manager.

B. Analysis:

NPFC CA reviewed all documentation provided. The review focused on: (1) whether a discharge or substantial threat of a discharge to a navigable water 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 the 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 (4) whether the costs were adequately documented and reasonable.

Upon initial review of the claim submission, the NPFC made various requests for additional information from several parties as described below:

1. United States Environmental Protection Agency (US EPA):¹⁵
 - Whether the oil spill was cleaned per the National Contingency Plan (NCP);
 - FOSC Coordination;
 - Records / information; and
 - If anyone from their office went on scene.
2. North Carolina Department of Environment and Natural Resources (NCDENR):¹⁶
 - Records / information;
 - Were lab analyses performed;
 - If anyone from their office went on scene; and
 - Whether the oil spill response was performed in accordance with the NCP.
3. Eastern Environmental Management LLC:¹⁷
 - Were any oil sample analyses performed before disposal took place;
 - What day was testing conducted, if applicable; and
 - Oil spill analysis documentation, if applicable.

The NPFC also requested information from the Claimant in order to support its claimed costs:¹⁸

1. Copy of Eastern Environmental Management Invoice(s);
2. Proof of payment to Eastern Environmental Management, in order to demonstrate that the Claimant had uncompensated removal costs;
3. The Eastern Environmental Management rate schedule in support of their invoiced costs;
4. Copy of the original claim submission; and
5. Information on whether the second spill was reported to the NRC;

¹⁵ *See*, Email string between Mr. [REDACTED], USEPA and the NPFC Claims Manager dated July 6, 2018 through July 09, 2018.

¹⁶ *See*, Email String between members of NCDENR and the NPFC Claims Manager dated July 6, 2018 through August 02, 2018.

¹⁷ *See*, Email string between Eastern Environmental and the NPFC Claims Manager dated July 13, 2018 through July 18, 2018.

¹⁸ *See*, Email string between Mr. [REDACTED] and Ms. [REDACTED], NPFC, dated July 6, 2018 through July 11, 2018.

6. Information on whether the second spill was reported and/or discussed with Mr. [REDACTED], USEPA FOSC; and
7. Whether any oil spill analyses were performed.

Documentation Provided by all Parties

1. The Claimant provided:
 - A signed Optional OSLTF Claim Form;
 - NRC Incident Report # 1206029;
 - Eastern Environmental Management, LLC, Invoice 76789;
 - Four (4) Eastern Environmental Management, LLC, Non-Hazardous Waste Manifests;
 - Two (2) Newspaper Articles, dated April 2, 2018 and April 11, 2018;
 - Copy of a cancelled check in the amount of, \$15,950.00 and
 - The Eastern Environmental Management, LLC, published rate schedule.
2. U.S. EPA Provided:
 - After the fact FOSC Coordination for both spills, via an email dated July 09, 2018; and
 - Email Communications with the Claimant.
3. NCDENR Provided:
 - Information regarding the second oil spill; and
 - Four (4) Inspection Reports generated by NCDEQ Division of Waste Management – Hazardous Waste Section: DWM-HWS.
4. Eastern Environmental Provided:
 - Via email, dated July 17, 2018, Eastern Environmental stated no analyses were run at the time and nor did they retain an oil sample.

Details Associated with Two Separate Incident Dates

During the review of this claim submission, it became evident that there were two separate and unique oil spill incidents associated with this claim. The first oil spill incident was discovered on March 6, 2018, and was discovered by the Fire Department Commander of the Lenoir County Emergency Services.¹⁹

The second oil spill incident was discovered coming through the same outfall on April 1, 2018, while the Fire Department Commander was checking on the river.²⁰ Eastern Environmental responded and incurred pollution removal costs for both incidents. The NPFC reached out to the Claimant regarding the details of the second spill and inquired as to whether or not the County reported the second incident to the National Response Center (NRC). The Claimant responded

¹⁹ See, Email between Mr. [REDACTED] and NPFC Claims Manager, dated August 14, 2018.

²⁰ *Id.*

that the second spill was not reported to the NRC because the Claimant considered both incidents to be the same and the second spill was simply a continuance of the first spill.²¹

Potential Sources for Both Incidents

Although the incident is identified as a mystery spill and the drainage system associated with the outfall is public, Lenoir County contends there are two potential responsible parties (PRPs) involved with this incident. The first PRP is Donnie Hart Garage. Donnie Hart Garage is an automotive service garage located in the town of Kinston, North Carolina, in Lenoir County. The structure was built in 1964 and is comprised of four service bays. Three of the bays are active with an oil-water separator located in the service area trough within the bays. The inactive fourth bay has a stand-alone service area trough which has been capped off and is no longer used.²² The Donnie Hart Garage has connections to waters of the State.²³

Lenoir County suspects that personnel from Donnie Hart Garage poured used motor oil down the oil-water separator located in the service area trough. Allegedly, the garage owner was not aware he was supposed to hire a professional to pump out the drain to prevent the oil and water from backing-up and washing down the sewer line. Instead, the garage owner washed out the drain with a hose which ultimately pushed the oil and water down the sewer system and into Neuse River.²⁴ It is important to note that Lenoir County has stated that the information provided regarding Donnie Hart Garage is speculation on their part and to date has not been proven.²⁵

The second PRP is Beards Tire and Service Center which is located adjacent to Donnie Hart Garage. Beards Tire and Service Center is an automotive service garage located in the town of Kinston, North Carolina, in Lenoir County. The structure was built in 1986 and is comprised of six service bays which have a service trough in place. Beards Tire & Service Center also has connections to waters of the State.²⁶

As the source of the spill couldn't be readily identified, Lenoir County contacted the North Carolina DEQ Div. of Waste Management – Hazardous Waste Section as State On-Scene Coordinator (SOSC) who responded and conducted site visits to both Donnie Hart Garage and Beards Tire Service Center. The initial site visits took place on April 12, 2018 and were deemed to be Compliance Assistance Visits (CAVs). The SOSC indicated, per DWM-HWS protocol, that any CAV requires a follow-up site visit, and as such Focused Compliance Inspections, (FCIs) were also conducted on May 14, 2018.²⁷²⁸ All four of the Inspection/Investigation Reports cite no violations resulting from any of the site visits for both garages.²⁹

²¹ See, Email between NPFC Claims Manager and Claimant, dated July 11, 2018.

²² See, State of North Carolina, Department of Environmental Quality, Division of Waste Management, Hazardous Waste Section, Activity Report, Focused Compliance Inspection, under Facility Description. Dated, May 14, 2018, EPA ID # NCS000002535.

²³ See, Email dated July 9, 2018 between NPFC Claims Manager and Mr. [REDACTED], NC DENR.

²⁴ See, Note to File – Phone Conference with Claimant dated, July 06, 2018 at 10:00 a.m.

²⁵ See, OSLTF Claim Form dated June 26, 2018, page 1 of 2, questions #4 & 5.

²⁶ See, Email dated July 9, 2018 between NPFC Claims Manager and Mr. [REDACTED], NC DENR.

²⁷ See, Email to NPFC Claims Manager from Mr. [REDACTED], dated July 7, 2018.

²⁸ See, Email July 7, 2018 email from Mr. [REDACTED] of NCDENR to Ms. [REDACTED], NPFC Claims Manager.

²⁹ See, Inspection / Investigation Reports for Donnie Hart Garage and Beards Tire and Service Center.

Federal On-Scene Coordination of this Claim

United States Environmental Protection Agency Region 4 (USEPA), is the designated Federal On Scene Coordinator (FOSC) for the incidents that are subject of this claim submission. The NPFC will discuss the FOSC coordination according to the date of each spill that is subject of this claim.

As FOSC coordination was missing from the original claim submission, the NPFC contacted EPA Region IV FOSC [REDACTED] regarding his role during the spill response. Mr. [REDACTED] stated that he was the FOSC for the incident. He also stated he had been in contact with Lenoir County via telephone on several occasions between March 6 and 7, 2018, to discuss boom placement and use.³⁰ Mr. [REDACTED] further stated that he coordinated with the State in an attempt to determine the source of the discharge and made the NPFC aware that most of his coordination was performed over the telephone and email. Due to the small amount of the oil spill and its location, Mr. [REDACTED] felt it timely and cost effective to coordinate with the local responders and the SOSOC to take the lead on the response.³¹

With respect to the second incident that the Claimant stated was discovered on April 1, 2018, the FOSC contacted the NPFC to advise that he had only learned of the second spill by reading the Kinston Free Press newspaper articles that were submitted as part of the claim submission. He confirmed that he had not discussed a second sheening with the Claimant prior to calling him on July 9, 2018. The FOSC stated that he supported payment for the costs incurred during the response to the second incident as the spill impacted a navigable waterway and the local responders acted accordingly.³²

In consideration of the information obtained as it pertains to the FOSC and his coordination of the incidents, the NPFC has determined that the first incident was coordinated with the FOSC for the purpose of discharge and response although identification of the product as an OPA oil is not supported by the evidence presented. With respect to the second incident, the FOSC has an after the fact FOSC coordination statement via email to the NPFC based on information available after the fact. Again, there is no evidence to indicate that the product cleaned up in April 2018 was an OPA oil.

State On-Scene Coordination of this Claim

The NPFC contacted the North Carolina Department of Environmental Quality Division of Waste Management Hazardous Waste Section – Eastern Region, (NC DENR) who served as the State On-Scene Coordinator (SOSC) for this response and requested any and all information / records relevant to the oil spill incident and the cleanup.³³

³⁰ See, Email from, U.S. EPA, FOSC to NPFC Claims Manager dated July 9, 2018.

³¹ See, Email from, U.S. EPA, FOSC to NPFC Claims Manager dated July 9, 2018.

³² See, July 9, 2018 email from Mr. [REDACTED], USEPA to Ms. [REDACTED], NPFC Claims Manager at 1:12pm.

³³ See, Email from NPFC Claims Manager to Mr. [REDACTED], Environmental Specialist II, dated July 6, 2018.

In an email back to the NPFC, Mr. [REDACTED], NC DENR, stated that an Emergency Report was not generated by the Division of Waste Management – Hazardous Waste Section (DWM-HWS) due to the timing and notification in which DWM-HWS became involved with the event.³⁴

Mr. [REDACTED], Assistant Supervisor, NC DENR, also provided an email in which he stated that the State responded to the spill site on March 8, 2018, and observed Eastern Environmental personnel tending the spill with the use of hard boom, sorbent material and a vacuum truck. State personnel returned to the site in April 2018, as a follow-up and observed Lenoir County personnel as well as Eastern Environmental personnel actively engaged with the second oil spill from the outfall. And while the State's exposure to the pollution removal activities were limited, he believed that the pollution removal activities conducted by Eastern Environmental personnel were conducted in accordance with the National Contingency Plan.³⁵

As such, the State provided limited oversight in its capacity as the SOSC during the pollution removal activities associated with this claim.

Oil Spill Analyses and Disposal

The Claimant provided a copy of five (5) waste disposal manifests with its claim submission. The manifests document that the generator was Lenoir County (Claimant) and that the transporter and receiving facility was Eastern Environmental, the response contractor.³⁶ Since the FOSC and the SOSC were not on scene for the duration of both responses and due to the fact that the claim documentation did not identify a source for the incident, the NPFC requested copies of any lab analysis performed that would demonstrate that the product recovered was an OPA oil.

The Claimant sent an email to the NPFC stating that no oil testing was performed by the Claimant or the City as they do not have the capability. The Claimant further stated that he did not know if the response contractor had done any testing on the product. The Claimant ended the response by stating that the oil did have a smell that mimicked the smell of burnt/used oil.³⁷ Based on the Claimant's response, the NPFC reached out to Eastern Environmental and requested information on sample analysis.³⁸

On July 13, 2018, Mr. [REDACTED] of Eastern Environmental had a phone conversation with Ms. [REDACTED], NPFC where it was confirmed that there was no oil sampling performed and that Mr. [REDACTED] used his experience to determine that the oil was in fact used motor oil.³⁹ Finally, on July 17, 2018 at 6:30pm, Mr. [REDACTED] of Eastern Environmental sent an email to Ms. [REDACTED], NPFC advising that the cleaning and disposal processes used by them as the response

³⁴ See, Email from Mr. [REDACTED] to NPFC Claims Manager, dated July 7, 2018.

³⁵ See, Email from Mr. [REDACTED] to NPFC Claims Manager, dated July 10, 2018.

³⁶ See, Eastern Environmental disposal manifests dated March 7, 2018 (2), April 2, 2018 (2), and April 4, 2018.

³⁷ See, July 11, 2018 email from Mr. [REDACTED], Lenoir County to Ms. [REDACTED], NPFC at 1:06pm.

³⁸ See, July 13, 2018 email from Ms. [REDACTED], NPFC to Mr. [REDACTED], Eastern Environmental.

³⁹ See, July 13, 2018 email from Ms. [REDACTED], NPFC to Mr. [REDACTED], Eastern Environmental at 11:45am that provided a recap of the phone conversation they had.

contractor and disposal facility were based solely on their assumption of where the oil came from and that no sample was retained from the project.⁴⁰

Conclusion

Based on the foregoing, the NPFC has determined that this claim is denied because the Claimant has failed to demonstrate that the product responded to and recovered is an OPA oil. Should the Claimant decide to request reconsideration, it will need to provide chemical analysis to demonstrate that the product associated with this claim is an OPA oil.

[REDACTED]

Claim Supervisor:

[REDACTED]

Date of Supervisor's review: 8/21/2018

Supervisor Action: *Approved*

⁴⁰ See, July 17, 2018 email from Mr. [REDACTED], Eastern Environment to Ms. [REDACTED], NPFC regarding sampling and testing.