

CLAIM SUMMARY / DETERMINATION

Claim Number:	E18504-0001
Claimant:	Kirby Corporation
Type of Claimant:	Corporation
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$17,507.04

FACTS:

Oil Spill Incident: On October 17, 2017, BP Oil Refinery reported an unknown sheen incident in the Indiana Harbor Canal to the National Response Center (NRC) via report # 11193530. The Federal On Scene Coordinator (FOSC) Mr. ██████████ of the United States Environmental Protection Agency (USEPA) Region V, met with representatives of the Indiana Department of Environmental Management (IDEM), The Army Corps of Engineers (ACOE) and representatives of BP Refinery (BP). Mr. ██████████ reported that oil and sheen were visible in the Indiana Harbor Canal, a navigable waterway of the US that leads to Lake Michigan.¹

USEPA hired its START Contractor, Tetra Tech, who provided oversight of response activities from October 18, 2017 through November 2, 2017.²

On October 31, 2017, Kirby Corporation reported an unknown sheen in the Indiana Harbor Canal to the local Coast Guard, Marine Safety Unit (MSU) Chicago. MSU Chicago then contacted the National Response Center (NRC) to report the sheen and the NRC generated NRC report #1194742.³ The sheen was believed to have been caused by an ongoing oil incident in the EPA zone from a damaged pipeline.⁴ The EPA FOSC opened a federal project on October 18, 2017, FPN E18504, in response to the report made by BP of an unknown sheen in the Indiana Harbor Canal, NRC report #1193530.⁵

Description of Removal Activities: Kirby Corporation hired Environmental Restoration, LLC to conduct removal activities of the sheen in the waterway and to remove the oil residue on the barge, KIRBY 10219. Environmental Restoration deployed personnel, sorbent boom, sorbent pads, work vehicles, and a work boat during the removal activities from October 31 through November 8, 2017.^{6,7} In addition to Environmental Restoration, Kirby Corp hired a tankerman from Midwest Tankermen, Inc to monitor the barge during the removal activities.⁸

¹ See, USEPA Region V Polrep # 1 dated October 19, 2017.

² See, January 8, 2018 ltr from Tetra Tech, EPA START contractor to USEPA, ██████████ providing site report.

³ See, NRC report #1194742 dated October 31, 2017.

⁴ See, Kirby Corporation claim submission, page 30 entitled "Incident Report", final paragraph identified as Root Cause dated 10/31/17..

⁵ See, January 8, 2018 ltr from Tetra Tech, EPA START contractor to USEPA, ██████████ providing site report.

⁶ See, January 8, 2018 ltr from Tetra Tech, EPA START contractor to USEPA, ██████████ providing site report.

⁷ See, October 31, 2017 ltr from Environmental Restoration, LLC to Kirby providing detailed description of work performed between 11/1/17 and 11/8/17 when disposal was performed.

⁸ See, Email dated February 1, 2018 from ██████████ of Midwest Tankerman to ██████████ of Kirby providing description of work performed by Midwest Tankerman..

The Claim: On February 6, 2018 the National Pollution Funds Center (NPFC) received a removal cost claim from Kirby Corporation in the amount of \$17,507.04 for reimbursement of their uncompensated removal costs for their removal activities in response to an oil sheen in the Indiana Harbor Canal from October 31 through November 8, 2017.⁹

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."

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

⁹ See, OSLTF Claim Form dated January 26, 2018.

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. [REDACTED], USEPA, was the USEPA Region V Federal On-Scene Coordinator (FOSC) for this incident and he determined that the actions undertaken by Kirby Corporation and Environmental Restoration, LLC were consistent with the NCP¹⁰ for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C § 2702(b)(1)(B) and 2712(a)(4);
2. The incident involved the discharge of “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 suit has been filed in court for the claimed uncompensated removal costs;
4. The claim was submitted within the six-year statute of limitations. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of the 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

¹⁰ See, Email from [REDACTED], USEPA to MST1 [REDACTED] dated February 14, 2018.

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 adjudication of the claim, the NPFC considered the Claimant's evidence which consisted of proof of payment, invoices from Environmental Restoration and Midwest Tankermen, rate schedule of prices for Environmental Restoration and Midwest Tankermen, third-party receipts, NRC report, Contractor incident reports, and disposal manifests. The NPFC requested additional information and also requested an explanation of costs and actions throughout the adjudication process.¹¹

Based on its review, the NPFC has determined that the majority of the costs incurred by the Claimant are determined compensable under OPA. The costs were reasonable and necessary to mitigate the effects of the incident and were determined by the FOSC's START contractor who provided oversight for the FOSC and as such, the FOSC determined the response actions to be consistent with the NCP. The NPFC has determined that the majority of the costs were billed in accordance with the rate schedules in place at the time services were rendered. Disposal of soiled materials was conducted in accordance with all applicable laws and regulations. The NPFC identified \$312.00 in labor costs billed by Midwest Tankerman that appear to be a billing error and as such, the costs are denied.¹²¹³

The NPFC hereby determines that the OSLTF will pay \$17,195.04 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # E18504-0001. 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.

DETERMINED AMOUNT: \$17,195.04

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *3/26/18*

Supervisor Action: *Approved*

¹¹ See, NPFC requests for additional information to Kirby dated 2/24/18, 3/7/18, 3/12/18, and 3/23/18.

¹² See, Email from Mr. [REDACTED] to [REDACTED] in regards to Midwest Tankermen Invoice received March 13, 2018.

¹³ See, NPFC Summary of Costs spreadsheet identified as Enclosure (1) to this Determination Package.