

CLAIM SUMMARY / DETERMINATION

Claim Number:	919002-0001
Claimant:	City of Charlotte Storm Water Services
Type of Claimant:	Local Government
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$36,758.10
Action Taken:	Offer in the amount of \$36,757.79

EXECUTIVE SUMMARY:

An off-road red-dyed diesel fuel was observed in an unnamed tributary and the upper reach of Little Sugar Creek in Charlotte, NC, a navigable waterway of the US. The Charlotte Fire Department and Charlotte-Mecklenburg Storm Water Services (CMSWS) personnel responded and hired an oil spill removal organization (OSRO) for cleanup and disposal of contaminated materials.¹ No responsible party (RP) was identified by CMSWS.² The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$36,757.79 is compensable and offers this amount as full and final compensation for this claim.³

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On January 14, 2018, a red-dyed diesel fuel was reportedly observed in an unnamed tributary of Little Sugar Creek in Charlotte, NC, both tributaries of the Catawba River, a navigable waterway of the United States. The spilled substance was believed to be off road red-dyed diesel due to its red color, diesel odor, and the fact it floated on the water's surface. The discharge site was determined to be a storm-drain drop inlet located at 707 N. Brevard Street in Charlotte, NC.⁴ The spill impacted approximately 300 feet of vegetation, soil, and rock within the upper tributary of Little Sugar Creek, and approximately 2400 feet of vegetation, soil, and rock within the lower tributary of Little Sugar Creek.⁵ There was also a fish kill associated with this discharge as approximately 35 catfish and sunfish were observed dead in the tributary.⁶

It was claimed that CMSWS personnel contacted the United States Coast Guard's National Response Center⁷ (NRC) and the North Carolina Dept. of Environmental Quality (DEQ) to report the incident; however, the DEQ provided no report number for reference.⁸ CMSWS

¹ Charlotte Fire Department Incident Detail for Incident report #18-0085652, Page 1 of 3, Incident Remarks section

² Page 4 of claim submission, Section 4: Has claimant communicated with the responsible party?

³ 33 CFR 136.115.

⁴ Page 3 of claim submission, Section 2: Incident Information, Brief Description of Incident

⁵ Page 5 of claim submission, Section 9: Description of the nature and extent of damages

⁶ NC DWR Fish Kill Field Investigation Form, Page 1 of 2, Total Finfish Mortality section, dated January 16, 2018

⁷ NRC report # 1201984 dated January 14, 2018

⁸ Page 4 of claim submission, Section 2: Incident Information, Brief Description of Incident

contacted Haz-Mat Environmental Services (Haz Mat), who began cleanup of the discharged oil on January 14, 2018.⁹

Responsible Party

CMSWS identified no RP for this incident.

Recovery Operations:

Haz-Mat personnel vacuumed oil from the stream with the use of a vacuum truck, used absorbent pads to collect pockets of oil, and used hydrocarbon booms to contain and absorb the oil from the surface of the water. According to CMSWS, remedial activities continued until January 30, 2018.¹⁰

Additionally, a microbial product called BioRem 2000 was applied to the soil, vegetation, and rocks that had been impacted by the oil spill.¹¹ BioRem 2000 is a microbial technology used to help break down the hydrocarbons within the soil. CMSWS personnel received permission from Mr. [REDACTED], Senior Environmental Specialist with the NC DEQ, to apply the BioRem 2000 on the spill as the product was on the EPA's National Contingency Plan (NCP) product schedule for microbial technology at the time of the incident.¹²

At the conclusion of the cleanup, all contaminated water, solids, and absorbents were properly disposed of by the contractor.¹³

II. CLAIMANT

On October 17, 2018, the NPFC received a removal cost claim from the City of Charlotte Storm Water Services, hereinafter known as the Claimant, for reimbursement of their uncompensated removal costs paid to Haz-Mat Environmental Services for personnel, materials, and equipment, in the total amount of \$32,249.96.

The Claimant also requested reimbursement of its own uncompensated removal costs paid to CMSWS internal staff for labor, oversight of the pollution removal activities, and investigation into the source of the spill, in the total amount of \$4,508.14. The total requested sum-certain amount for the claim was \$36,758.10.

The Claimant provided an Optional OSLTF Claim Form; Incident-area map and numerous photographs; Charlotte Fire Dept. Incident Detail Report 18-0085652; Haz-Mat Invoice # 81179; City of Charlotte proof of payment to Haz-Mat (Check Number 00622050); labor cost breakdown for CMSWS internal staff; North Carolina Division of Water Resources (DWR) Fish Kill Field Investigation Form; Haz-Mat daily worksheets; BioRem-2000 Surface Cleaner Material Safety Data Sheet; Non-hazardous waste manifests.

III. DETERMINATION PROCESS:

⁹ Page 3 of claim submission, Section 2: Incident Information, Brief Description of Incident

¹⁰ Page 3 of claim submission, Section 2: Incident Information, Brief Description of Incident

¹¹ Page 6 of claim submission, Section 11: Incident Information, Description of actions taken by claimant...

¹² Email from [REDACTED] to [REDACTED] dated November 16, 2018

¹³ Haz-Mat Waste Disposal Manifest Numbers 82815; 82817 - 82819; 82821 - 82832; 82834

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁴ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant's claim against the OSLTF.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.¹⁵ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁶ If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and finds facts and makes its determination based on the preponderance of the credible evidence.

IV. DISCUSSION:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.¹⁷ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.¹⁸ The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.¹⁹

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

- (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 directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.
- (d) That the removal costs were uncompensated and reasonable.²⁰

Upon initial review of the claim submission, the NPFC made a request for additional information to the Claimant as described below:²¹

¹⁴ 33 CFR Part 136.

¹⁵ See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2011 WL 5187292, (E.D. La. 2011), “[T]he Fifth Circuit specifically recognized that an agency has discretion to credit one expert's report over another when experts express conflicting views.” citing *Medina County v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010).

¹⁶ See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them).

¹⁷ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

¹⁸ 33 CFR Part 136.

¹⁹ 33 CFR 136.105.

²⁰ 33 CFR 136.203; 33 CFR 136.205.

²¹ Email from [REDACTED] to [REDACTED] dated October 25, 2018

1. Requested a signed service agreement/contract/standing agreement between the City of Charlotte and these staff members that delineated the rates of compensation for these staff members;
2. Requested sample/testing analysis that confirmed the spilled substance as an oil;
3. Requested the Haz-Mat Environmental rate schedule that delineates the rates of charge/pricing schedule for the services/labor which they provided to the City of Charlotte);
4. Requested information to confirm if there was State of North Carolina, USCG, or EPA oversight of the pollution removal activities

In response to the NPFC's request for additional information, the Claimant provided the following:²²

1. Master Agreement for Professional Services between the City of Charlotte and Haz-Mat for environmental emergency and rapid response services (Contract # 2018000239);
2. Charlotte – LUESA Water Quality & NPDES MS4 Permit Program Work Plan FY2018

The NPFC made a request for information to Mr. [REDACTED] of NC DEQ regarding his role in the spill response, and regarding his authorization to use a bioremediation agent, as described below:²³

1. Explain your role in the spill cleanup;
2. Describe the type of information needed from a requestor in order to allow usage of the product BioRem-2000;
3. Did he have to consult with the EPA to allow usage of BioRem-2000, and if so, with whom did he consult;
4. Describe how BioRem-2000 works on an oil spill

In response to the NPFC request for additional information, Mr. [REDACTED] stated that “since this product was listed on the EPA's NCP product schedule, the product's MSDS, applications, how it works, etc. were reviewed along with the product's specific application for this spill event.” He noted that if the product wasn't listed on the NCP's product schedule, it would not have been considered/approved for usage. The NCP product schedule lists BioRem-2000 as a bioremediation agent.

In addition, Mr. [REDACTED] stated that the Division of Water Resources' Emergency Response Coordinator (DWRERC) is contacted when use of a product is proposed, as he has years of EPA coordination for spill response and cleanup efforts. The DWRERC has also attended EPA spill training programs and coordinated spill training for DWR Regional staff.

Lastly, Mr. [REDACTED] stated that BioRem-2000 “. . . is a formulated blend of microbes that attack the hydrocarbons and produce enzymes that allow them to absorb the molecules as food, with carbon dioxide and water as the byproducts of the digestion process. These microbes can

²² Email from [REDACTED] to [REDACTED] dated November 7, 2018

²³ Email from [REDACTED] to [REDACTED] dated November 8, 2018

biologically convert a wide range of hydrocarbons (including free product) into carbon dioxide and water, with applications being performed in groundwater, open water, and soil remediation.”²⁴

It’s apparent that Mr. [REDACTED] coordinated closely with the DWRERC before allowing the use of BioRem 2000 for remediation of this spill. It’s also apparent that Mr. [REDACTED] was confident, based upon those discussions and his years of EPA coordination for oil spill response and cleanup efforts, that the product discharged into the Little Sugar Creek was red dyed diesel, and that BioRem 2000 was an appropriate bioremediation agent for the incident. Based upon Mr. [REDACTED] coordination, expertise, and the preponderance of other credible evidence submitted in support of this claim, it is more likely than not that the material discharged and subsequently recovered from the Little Sugar Creek and its unnamed tributary on the day of discovery of the spill, and subject to this claim, was a red dyed diesel fuel.

The NPFC made a second request for information to the Claimant as described below:²⁵

1. The hourly rates and position descriptions of City and County personnel who responded to the spill;
2. A breakdown of the rates charged that delineated direct and indirect expenses for City and County personnel;
3. Clarification of the remediation activities of certain City and County personnel;

In response to this second request for additional information, the Claimant provided responses on:²⁶

The NPFC contacted the Claimant via telephone on February 14, 2019. After speaking with the claimant, the NPFC followed the conversation with a final request to the Claimant, and asked the for following information:²⁷

1. Requested that the Claimant provide the methodology used to calculate indirect costs for City and County personnel.
2. Clarification of Haz-Mat documentation that was submitted, and also a copy of the missing Haz-Mat Daily Activities Worksheet for January 30, 2018.

In response to this final request for additional information, the Claimant provided responses on March 18, 2019.²⁸

As such, based upon the preponderance of credible evidence, the actions undertaken by the City of Charlotte Storm Water Services in its capacity as the State On Scene Coordinator (SOSC), is determined by the NPFC to be consistent with the National Contingency Plan (NCP) and

²⁴ Email from [REDACTED] to [REDACTED] dated November 16, 2018

²⁵ Email from [REDACTED] to [REDACTED] dated December 3, 2018

²⁶ Email from [REDACTED] to [REDACTED] dated December 12, 2018

²⁷ Email from [REDACTED] to [REDACTED] dated February 14, 2019

²⁸ Email from [REDACTED] to [REDACTED] dated March 18, 2019

necessary to mitigate the effects of the spill on the surface waters of the Little Sugar Creek and its unnamed tributary.²⁹

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the Claimant's request for uncompensated removal costs in the amount of \$36,757.79 is approved. An overcalculation of pay of \$0.01 was presented for [REDACTED] Friday on January 15, 2018. Overcalculation of pay totaling \$0.30 was presented for [REDACTED] on the days of January 16, 2018, January, 18, 2018, and January 22, 2018. The NPFC denies the Claimant's request for \$0.31 in regards to the overcalculation of these costs.

Because this determination is a settlement offer³⁰, the claimant has 60 days in which to accept; the failure to do so automatically voids the offer.³¹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.³² Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

<p>[REDACTED]</p> <p>Claim Supervisor: [REDACTED]</p> <p>Date of Supervisor's review: <i>3/21/19</i></p> <p>Supervisor Action: <i>Approved</i></p>
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²⁹ The NPFC has determined that the actions undertaken by the Claimant are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the NCP 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)

³⁰ Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the compensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person. 33 CFR §136.115(a).

³¹ 33 CFR §136.115(b).

³² *Id.*