

CLAIM SUMMARY / DETERMINATION

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| Claim Number: | 921010-0001 |
| Claimant: | South Carolina Department of Health & Environmental Control |
| Type of Claimant: | State Government |
| Type of Claim: | Removal Costs |
| Claim Manager: | (b), (b) (6) |
| Amount Requested: | \$13,701.56 |
| Action Taken: | Offer in the amount of \$8,604.90 |

EXECUTIVE SUMMARY:

On July 8, 2020, at approximately 1636 local time, the Columbia Fire Department notified the South Carolina Department of Health and Environmental Control (“SCDHEC” or “claimant”) that a three hundred (300) gallon tank of diesel fuel apparently fell off of a trailer into a small ditch on the side of Old Bluff Road. SCDHEC Incident Report states that approximately one hundred fifty (150) gallons spilled from the tank and that approximately 50 gallons made it into the surface water of the ditch and was carried approximately 300 feet where it was contained by an earthen dam that was performed by the Columbia Fire Department.¹ Due to rising concerns of impending inclement weather, the SOSC determined that the incident posed a threat of discharge into Cedar Creek, a navigable waterway of the United States.² SCDHEC, in its capacity as the State On Scene Coordinator (SOSC), reported the incident to the National Response Center (NRC) via report # 1281441 and stated that the Fire Department dammed up between 50 to 75 gallons of diesel fuel.³ The SCDHEC hired A&D Environmental Services Inc. on July 11, 2020 to remove the contaminated soil and petroleum contaminated surface water.⁴ A potential responsible party (PRP) investigation was performed as reported by SCDHEC.⁵

SCDHEC presented its uncompensated removal for \$13,701.54.⁶ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$8,604.90 of the requested \$13,701.56⁷ is compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

¹ SCDHEC Incident Report, page 3 of 8.

² SCDHEC Incident Report, page 3 of 8, section dated July 8, 2020 at 9:38pm.

³ NRC Report # 1281441 dated July 8, 2020 and SCDHEC Incident Report 202001498 updated November 19, 2020.

⁴ SCDHEC Incident Report 202001498 updated November 19, 2020 and A&D Env Invoice #SVC019848 dated August 27, 2020.

⁵ SCDHEC Incident Report 202001498 updated November 19, 2020.

⁶ 33 CFR 136.103(c).

⁷ NPFC notified SCDHEC that the original amount requested was deficient by \$.02 based on the claim submission documentation. SCDHEC provided an amended OSLTF Claim Form dated February 22, 2021 with a sum certain of \$13,701.56.

On July 8, 2020, at approximately 1636 local time, the Columbia Fire Department notified the South Carolina Department of Health and Environmental Control (“SCDHEC” or “claimant”) that a three hundred (300) gallon tank of diesel fuel apparently fell off of a trailer into a small ditch on the side of Old Bluff Road. SCDHEC Incident Report states that the approximately one hundred fifty (150) gallons spilled from the tank and that approximately 50 gallons made it into the surface water of the ditch and was carried approximately 300 feet where it was contained by an earthen dam that was performed by the Columbia Fire Department.⁸ Due to rising concerns of impending inclement weather, the SOSC determined that the incident posed a threat of discharge into Cedar Creek, a navigable waterway of the US.⁹

SCDHEC, in its capacity as the State On Scene Coordinator (SOSC), reported the incident to the National Response Center (NRC) via report # 1281441¹⁰ and stated that the Fire Department dammed up between 50 to 75 gallons of diesel fuel.¹¹ The SCDHEC hired A&D Environmental Services Inc. on July 11, 2020 to remove the contaminated soil and petroleum contaminated surface water.¹² A potential responsible party (PRP) investigation was performed.

On October 22, 2020, SCDHEC reported the incident a second time to the NRC via report # 1290403.¹³ A potential responsible party (PRP) was identified and SCDHEC requested a copy of any reports associated with the identification of a responsible party and was advised by Mr. (b), (b) (6) Chief CBRNE Investigator for the Richland County Hazardous Materials Division, that a positive identification of a responsible party was made. Mr. (b), (b) (6) further stated that if additional information was needed, a FOIA request would to be submitted.¹⁴ SCDHEC decided to report the incident a second time prior to making contact with the United States Environmental Protection Agency (USEPA) who is the Federal On Scene Coordinator (FOSC) for this incident.

SCDHEC sent a form to the FOSC, Mr. (b), (b) (6) of USEPA Region 5 that states in relevant part.....”The attached NRC# 1290403 serves as a record of notification, consistent with the requirements of the National Contingency Plan (NCP), regarding an incident that resulted in a discharge of oil from a vessel or a fixed or mobile facility into waters within the state of South Carolina. The signatures below indicate that, because of this incident, oil was discharged either, directly into, or into other waters presenting a substantial threat to, the navigable waters of the United States, as defined by the Oil Pollution Act (OPA). The signatures below also indicate that, because the notifications and response actions of state personnel were performed in coordination with the Federal On-Scene Coordinator (FOSC) and were consistent with the National Contingency Plan (NCP), SCDHEC is eligible to receive reimbursement, from the Oil Spill Liability Trust Fund (OSLTF), for expenses incurred during response operations implemented to prevent or reduce the effects of the discharge, as documented by the State On-Scene Coordinator (SOSC).”

⁸ SCDHEC Incident Report, page 3 of 8.

⁹ SCDHEC Incident Report, page 3 of 8, section dated July 8, 2020 at 9:38pm.

¹⁰ NRC Report # 1281441 dated July 8, 2020.

¹¹ SCDHEC Incident Report 202001498 updated November 19, 2020.

¹² SCDHEC Incident Report 202001498 updated November 19, 2020 and A&D Env Invoice #SVC019848 dated August 27, 2020.

¹³ NRC Incident Report # 1290403 dated October 22, 2020.

¹⁴ See March 16, 2021 email between Mr. (b), (b) (6) and Mr. (b), (b) (6) of SCDHEC.

Upon receipt and review by the FOSC, Mr. (b), (b) (6) of USEPA Region 5, signed the SCDHEC Acknowledgment of Response Actions form on December 1, 2020.¹⁵

Responsible Party

A Potential Responsible Party (PRP) investigation was performed. The Chief CBRNE Investigator for Richland County Hazardous Materials Division has confirmed a positive identification has been made by an eye witness. He further stated that if additional information is needed, a FOIA request must be submitted.¹⁶ On March 24, 2021, the NPFC made a Freedom of Information Act request for the information associated with responsible party.¹⁷ To date, the NPFC has not yet received a response to its request.

Recovery Operations

A&D Environmental Services Inc. was hired by SCDHEC to respond to this incident and remove contaminated soil and petroleum contaminated surface water that resulted from the tank that fell off of a trailer that became dislodged from the truck it had been attached and landed in a ditch off Old Bluff Road.¹⁸

A&D Environmental was hired on July 11, 2020 and responded that date and returned to the site location on July 16, 2020 at which time cleanup was concluded and disposal was completed.¹⁹

II. CLAIMANT AND NPFC

On December 17, 2020, the NPFC received a claim for uncompensated removal costs from SCDHEC. The claim included an OSLTF Claim Form dated December 17, 2020, SCDHEC Incident Report 202001498 updated November 19, 2020, SCDHEC Authorization of Response Actions form signed by Mr. (b), (b) of SCDHEC dated November 12, 2020 and signed by the FOSC on December 1, 2020, A&D Env Invoice #SVC019848 dated August 27, 2020, and NRC Report # 1290403 dated October 22, 2020.²⁰

SC DHEC has presented its uncompensated costs claim to the NPFC for \$13,701.56.²¹

SC DHEC broke down its claim via the following invoiced costs:²²

¹⁵ SCDHEC Authorization of Response Actions form signed by Mr. (b), (b) of SCDHEC dated November 12, 2020 and signed by the FOSC on December 1, 2020. This form is intended to provide an after-the fact FOSC coordination statement for submission of the claim to the NPFC.

¹⁶ See March 16, 2021 email between Mr. (b), (b) (6) and Mr. (b), (b), (b) (6) of SCDHEC.

¹⁷ March 24, 2021 email from NPFC to ombudsman@RichlandCountySC.gov for RP information.

¹⁸ SCDHEC Incident Report 202001498 updated November 19, 2020 and SCDHEC claim submission dated December 17, 2020.

¹⁹ A&D Environmental Invoice #SVC019848 dated August 27, 2020.

²⁰ SCDHEC claim submission dated December 17, 2020.

²¹ 33 CFR 136.103(c).

²² See the Summary of Costs spreadsheet as an enclosure to this determination for an itemized breakdown of claimed costs.

1. A&D Environmental Services Inc. Invoice # SVC019848 in the amount of \$13,701.56 for personnel, materials, equipment, disposal and third party rental costs.

Total claimed costs: \$13,701.56

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²³ As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its decision. This determination is issued to satisfy that requirement.

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.²⁴ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁵ 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 makes its determination based on the preponderance of the credible evidence.

IV. DISCUSSION:

An RP is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.²⁶ An RP's liability is strict, joint, and several.²⁷ When enacting OPA, Congress "explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills."²⁸ OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred removal costs where the responsible party has failed to do so. 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."²⁹ The term "remove" or "removal" means "containment and removal of oil [...] from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate

²³ 33 CFR Part 136.

²⁴ 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)).

²⁵ 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).

²⁶ 33 U.S.C. § 2702(a).

²⁷ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²⁸ *Apex Oil Co., Inc. v United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002) (citing S. Rep. No. 101-94 (1989), reprinted in 1990 U.S.C.C.A.N. 722).

²⁹ 33 U.S.C. § 2701(31).

damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”³⁰

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³¹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³² 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.³³

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.³⁴
- (d) That the removal costs were uncompensated and reasonable.³⁵

The NPFC analyzed each of these factors and determined the costs incurred by SCDHEC and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined all costs that it has approved as OPA compensable, were invoiced in accordance with the contract A & D has in place with SCDHEC.

Upon adjudication of the claim, the NPFC made a request for additional information to SCDHEC on January 28, 2021 which requested the following:

1. Proof of payment for the A & D Invoice # SVC019848;
2. The A & D rate sheet pricing for the services provided;
3. A copy of the rental agreement and proof of payment for the rental of a mini excavator during response;
4. The NPFC requested clarification of the sum certain as the supporting documents amounted to more than the amount requested on the claim form;
5. A copy of all disposal documentation; and
6. The NPFC requested any and all reports such as Police Reports, Fire Report, and/or RP Investigation report or associated documentation.

On February 22, 2021, SCDHEC responded to the request for information in part. It provided the following documentation:

1. A copy of the SCDHEC Purchase Order with price sheet attached;

³⁰ 33 U.S.C. § 2701(30).

³¹ *See generally*, 33 U.S.C. §2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³² 33 CFR Part 136.

³³ 33 CFR 136.105.

³⁴ FOSC coordination statement dated by the FOSC on December 1, 2020.

³⁵ 33 CFR 136.203; 33 CFR 136.205.

2. A copy of the Payment made for the A & D invoicing in the amount of \$13,701.56;
3. A copy of an amended OSLTF Claim Form dated February 22, 2021 whereby the claimant changed the sum certain to match the A & D invoiced costs in the amount of \$13,701.56; and
4. The claimant advised that it would provide any and all reports once obtained.

The NPFC made two Freedom of Information Requests (FOIA) and they are:

1. On March 9, 2021, the NPFC contacted the Columbia Fire Department and was advised to request the fire report via the FOIA process, which it did and as of the date of this Determination, the FOIA has not been answered; and
2. On March 24, 2021, the NPFC contacted the Richland County government and requested via the FOIA process, a copy of any and all information available as it pertains to the Responsible Party Investigation that was performed. As of the date of this Determination, the FOIA has not been answered.

Upon receipt of all information, the NPFC has determined that all costs approved are supported by adequate documentation and have been coordinated with the FOISC, Mr. (b), (b), (b) (6) of USEPA Region 5, who has determined that the actions performed are consistent with the NCP.³⁶

The amount of compensable costs is \$8,604.90, while \$5,096.66 is deemed denied for the following reasons:

1. Overtime rate of \$107.00 per hour was charged for a Foreman, however the state's contract with A & D does not provide for an overtime rate and as such, all hours are reduced to the quoted straight time contracted rate of \$74.00 per hour. The NPFC denies \$99.00 for July 11, 2020 and \$132.00 for July 16, 2020;
2. Overtime rate of \$92.00 per hour was charged for a Technician however the state's contract with A & D does not provide for an overtime rate and as such, all hours for each Technician are reduced to the quoted straight time contracted rate of \$63.00 per hour. The NPFC denies a total of \$194.00 for July 11, 2020 and \$216.00 for July 16, 2020;
3. Overtime rate of \$103.00 per hour was charged for an Equipment Operator however the state's contract with A & D does not provide for an overtime rate and as such, all hours were reduced to the quoted straight time contracted rate of \$68.00 per hour. The NPFC denies a total of \$103.00 for July 11, 2020 and \$116.00.00 for July 16, 2020;
4. The NPFC denies a charge of \$105.00 on July 11, 2020 for a pressure washer as the item is not listed on the A & D rate sheet and no other justification for the pricing has been provided;
5. The NPFC denies the rental charge of a mini excavator in the total amount of \$1,989.74 as the claimant never provided a copy of the rental agreement for the item and is unsubstantiated;

³⁶ SCDHEC Authorization of Response Actions form signed by Mr. (b), (b) of SCDHEC dated November 12, 2020 and signed by the FOISC on December 1, 2020. This form is intended to provide an after-the fact FOISC coordination statement for submission of the claim to the NPFC.

6. PVC Gloves were billed at a rate of \$3.20 per pair when the A & D rate sheet charges \$3.00 per pair. The NPFC has reduced the rate accordingly and denies \$.40 for gloves on July 11, 2020;
7. White Tyveks were billed at a rate of \$6.00 per pair when the A & D rate sheet charges \$5.75 per pair. The NPFC has reduced the rate accordingly and denies \$.50 for white tyveks on July 11, 2020;
8. A & D invoiced disposal on July 16, 2020 at a rate of 18.00. No disposal invoicing and manifests have been provided in order to substantiate the amount claimed therefore the NPFC denies the charge for disposal;
9. A & D invoiced Tank Disposal on July 16, 2020 at a rate of \$275. The A & D contract calls for waste disposal to be billed at cost plus a 30% markup however no tank disposal invoicing or proof of payment have been provided therefore the NPFC denies the charge of \$275.00 as unsubstantiated;
10. A & D invoiced the disposal of contaminated soil at a rate of \$95.00 per ton. The total amount invoiced on July 16, 2020 is \$380.00. No disposal invoicing for contaminated soil or proof of payment have been provided therefore the NPFC denies the charge of \$380.00 as unsubstantiated; and
11. A & D invoiced for an ESI 12% Recovery fee in the amount of \$1,468.02 on July 16, 2020. The recovery fee is not part of the A & D contract with SCDHEC and as such, the cost is denied as not agreed to per the contracted rates.

Overall Denied Costs = \$5,096.66³⁷

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, SCDHEC request for uncompensated removal costs is approved in the amount of **\$ 8,604.90**.

This determination is a settlement offer,³⁸ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁹ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁰ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

³⁷ See the Summary of Costs spreadsheet as an enclosure to this determination for a further breakdown of denied costs.

³⁸ 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 uncompensated 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.

³⁹ 33 CFR § 136.115(a).

⁴⁰ 33 CFR § 136.115(b).

Claim Supervisor: (b), (b) (6) (b), (b) (6)

Date of Supervisor's review: *April 5, 2021*

Supervisor Action: *Approved*