

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP922014-URC001
Claimant:	Oregon Department of Environmental Quality (Oregon DEQ)
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$69,814.32
Action Taken:	Offer in the amount of \$69,814.07

EXECUTIVE SUMMARY:

On May 13, 2021 at approximately 2:11 pm local time, the National Response Center (NRC) was notified by Oregon Department of Environmental Quality (Oregon DEQ), in its capacity as the State On Scene Coordinator (SOSC), of a heating oil released from a suspected heating oil tank in a neighborhood that discharged into an abandoned storm water line that leads to an existing operational storm line which leads to Hall Creek, a navigable waterway of the United States.² The spill was first discovered on April 26, 2021, Clean Water Services (CWS) observed oil with red coloration and odor emitting from an outfall from their stormwater system to Hall Creek. The United States Environmental Protection Agency (USEPA) Region 10 was identified as the Federal On Scene Coordinator (FOSC) for the incident.³ In its capacity as the FOSC, The USEPA handed the jurisdictional lead on the cleanup to the SOSC, Oregon DEQ and agreed to receiving updates as appropriate.⁴

Oregon DEQ eventually identified a residence in a neighborhood at (b) (6) (b) (6) where a historical heating oil tank had been abandoned and was a potential source, however, by the time the abandoned tank was discovered, the oil was no longer migrating through the storm system to surface waters and no significant additional oil was observed even after the start of the next rainy season cycle.⁵

¹ This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant's rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant's rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

² National Response Center Incident Report # 1304973 dated May 13, 2021.

³ National Response Center Incident Report # 1304973 dated May 13, 2021.

⁴ See, Email from FOSC to NPFC dated July 26, 2022 affirming coordination for the response actions having been determined to be consistent with the National Contingency Plan (NCP).

⁵ Oregon DEQ PolRep dated June 15, 2022.

Oregon DEQ presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$89,082.32. on June 29, 2022⁶ and on August 13, 2022, the claimant amended their sum certain to \$69,814.32.⁷ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that \$69,814.07 of the requested \$69,814.32 is compensable and offers this amount as full and final compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On April 26, 2021, Clean Water Services (CWS) observed oil with noticeable red coloration (free product) and odor emitting from an outfall of their stormwater system to Hall Creek.⁸ CWS hired US Ecology (USE aka National Response Corporation) to perform containment and collection of the oil at the outfall and within catch basins in the upgradient stormwater conveyance system. The oil was traced to the stormwater line and several catch basins were also observed to be impacted. The last point of observation was a catch basin located in the SW Homewood area at (b) (6), which was the first point where this stormwater system is readily accessible (via a catch basin). It was determined that the oil was moving into the existing stormwater line via an abandoned stormwater line. The abandoned line was connected to the new system via a historical connection to the Homewood neighborhood catch basin.⁹

Responsible Party

Oregon DEQ only suspected a potential source of the spill, a historical abandoned heating oil tank that had been located at (b) (6), Portland, Oregon. One of the property owners of (b) (6), Portland, Oregon is (b) (6). The name of her husband is unknown. Oregon DEQ canvassed the neighborhood in search of potential sources, primarily heating oil tanks. No active heating oil tanks were identified in the area.¹⁰

On August 2021, Oregon DEQ initiated an investigation for a potential abandoned/historic heating oil tank at (b) (6). Oregon DEQ previously had difficulty conferring with the property owners and gaining access to this location as the husband was undergoing treatment for cancer and both he and his wife were unavailable during treatments and other work.¹¹

On September 2021, the fall precipitation had started to increase flows again within the storm system and only light sheen was observed moving through the system. In early October 2021, access agreements had been completed and a tank survey was conducted at (b) (6) (b) (6). Evidence of an abandoned tank including clipped copper supply/return lines that

⁶ See, ORDEQ claim submission dated June 16, 2022.

⁷ See, email from ORDEQ to NPFC dated August 13, 2022, amending their sum certain to \$69,814.32.

⁸ Oregon DEQ PolRep dated June 15, 2022.

⁹ Oregon DEQ PolRep dated June 15, 2022.

¹⁰ Oregon DEQ PolRep dated June 15, 2022.

¹¹ Oregon DEQ PolRep dated June 15, 2022.

were noted in the basement of the residence. During the survey, information was also elicited that the owners of the property that they had "finished a big backyard project with French drains in February of 2021 which made Oregon DEQ conclude that the drainage restructuring may have helped facilitate mobilization of the oil to the utility trench. Subsequently, Oregon DEQ performed an investigative sweep of the front yard of the residence and evidence of an abandoned tank was discovered there by the house under a dogwood tree near the entrance.¹² The homeowners indicated surprise at the report of the suspected presence of an abandoned tank and were unwilling to permit the collection of soil samples from this area and stated they intended to seek legal counsel.¹³ Ultimately, no responsible party has been identified for the incident.¹⁴

Recovery Operations

US Ecology was hired by CWS to contain and remove oil from the storm water conveyance system and Hall Creek. On April 27, 2021, Oregon DEQ personnel deployed as State On-Scene Coordinator (SOSC) on behalf of the State of Oregon to provide removal oversight and assist on finding the source area and established a Unified Command between Oregon DEQ and CWS.¹⁵

On May 10, 2021, Oregon DEQ initiated coordination and communication on the response activities with USEPA Federal On Scene Coordinator (FOSC) (b) (6) and discussed findings to date along with removal and source investigation strategies moving forward. On May 13, 2021, Oregon DEQ noted that the National Response Center had not been officially notified of this spill and a report was then filed.¹⁶ USEPA oversight was formally transferred to FOSC (b) (6) on May 14, 2021.¹⁷ Oregon DEQ consulted with the FOSC on all changes in response and investigative activities throughout the life of the response.¹⁸

By the end of October 2021, the rainy season began and significant stormwater flow and Oregon DEQ found no additional sheen or odor observed on the water in the storm system and decided to terminate the response, investigation and site access efforts.¹⁹ In November 2021, absorbents that had been left within the storm system as preventive measures were removed and disposed of as final measures.²⁰

II. CLAIMANT AND NPFC:

On June 29, 2022 the NPFC received a claim for uncompensated removal costs from Oregon DEQ dated June 16, 2022. The claim included the Optional OSLTF Claim form, Incident Report, US Ecology Invoices and proof of payment, disposal manifest from Waste Management,

¹² Oregon DEQ PolRep dated June 15, 2022.

¹³ Oregon DEQ PolRep dated June 15, 2022.

¹⁴ Oregon DEQ PolRep dated June 15, 2022.

¹⁵ Oregon DEQ PolRep dated June 15, 2022.

¹⁶ National Response Center Incident Report # 1304973 dated May 13, 2021.

¹⁷ Oregon DEQ PolRep dated June 15, 2022.

¹⁸ Oregon DEQ PolRep dated June 15, 2022.

¹⁹ Oregon DEQ PolRep dated June 15, 2022.

²⁰ Oregon DEQ PolRep dated June 15, 2022.

Apex Laboratories lab analyses, NRC report, photos of the incident and Oregon DEQ's PolRep.²¹

The NPFC requested additional information and the Claimant provided detailed invoices and breakdown of hours worked per day for US Ecology and Oregon DEQ personnel, (b) (6) signed work order (WO) Agreement dated May 27, 2021, Oregon Emergency Response System report, Oregon DEQ and US Ecology Agreement and Price Schedule, Legible proof of payment to US Ecology and for Rush Locates invoice. Upon request, on September 12, 2022, the claimant provided additional information to support costs claimed, the information included Oregon DEQ Indirect Cost Recovery Methodology, Indirect rate work papers, Oregon DEQ Labor Analysis for the incident and (b) (6) invoice # 43899, which included the invoice for Pacific Northwest Flagging, LLC.²²

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:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁷ The claimant bears the burden of providing all evidence, information, and

²¹ See, ORDEQ claim submission dated June 16, 2022.

²² See, Email from Oregon DEQ to NPFC dated September 12, 2022 which contained the requested additional information to support the costs claimed.

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

²⁷ 33 CFR Part 136.

documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.²⁸

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.²⁹
- (d) That the removal costs were uncompensated and reasonable.³⁰

The NPFC analyzed each of these factors and determined that the majority of all costs incurred and submitted by Oregon DEQ. herein are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced at the appropriate Oregon DEQ's published rates and all approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).³¹

After a complete review of all documentation and after contacting the FOSC who handed the jurisdictional lead to the SOSC for the handling of all response actions, the NPFC was able to obtain confirmation that the actions undertaken by the claimant and its subcontractors were determined to be consistent with the NCP.³² Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$69,814.32 while \$0.25 is deemed non-compensable for the following reasons:³³

1. Oregon DEQ Project # S45700 Invoice contained a discrepancy of \$0.25. NPFC denies this as an unidentified difference.

Overall Denied Costs = \$0.25

V. CONCLUSION:

²⁸ 33 CFR 136.105.

²⁹ Email from USEPA FOSC to NPFC Re Additional Information dated July 26, 2022 acknowledging the actions taken by Oregon DEQ were necessary to prevent, minimize, or mitigate the effects of the incident and all response actions performed were consistent with the National Contingency Plan (NCP).

³⁰ 33 CFR 136.203; 33 CFR 136.205.

³¹ Oregon DEQ claim submission dated June 29, 2022 and additional information requested by NPFC on multiple dates and an email from USEPA FOSC to NPFC Re Additional Information dated July 26, 2022 acknowledging the actions taken by the Oregon DEQ as SOSC, contractors and subcontractors, were necessary to prevent, minimize, or mitigate the effects of the incident and were consistent with the National Contingency Plan.

³² July 26, 2022 email between the FOSC and NPFC confirming that all actions have been determined to be consistent with the NCP.

³³ Enclosure 3 to this determination provides a detailed analysis of these costs.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Oregon DEQ's request for uncompensated removal costs is approved in the amount of **\$69,814.07**.

This determination is a settlement offer,³⁴ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.³⁵ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.³⁶ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

(b) (6)
Claim Supervisor: (b) (6)
Date of Supervisor's review: <i>10/3/2022</i>
Supervisor Action: <i>Offer Approved</i>

³⁴ 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. 33 CFR 136.115(a).

³⁵ 33 CFR 136.115(b).

³⁶ *Id.*