

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP924004-URC001
Claimant:	Oregon Department of Environmental Quality
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$14,970.14
Action Taken:	Offer in the amount of \$14,967.04

EXECUTIVE SUMMARY:

On December 7, 2021, Oregon Department of Environmental Quality (“ORDEQ” or “Claimant”) received a report from the Portland Parks and Recreation of a strong diesel smell near the Children’s Arboretum located in Portland Oregon.² ORDEQ coordinated response and investigation of the diesel smell with the Bureau of Environmental Services (BES). BES was unable to determine the source of the smell.³ On December 9, 2021, ORDEQ performed its own investigation and discovered pockets of red-dyed diesel in the Columbia Slough which is a tributary to the Willamette River which then leads to the Columbia River, navigable waterways of the United States.⁴

ORDEQ notified the United States Coast Guard’s (“USCG”) National Response Center (“NRC”) of the mystery sheen via NRC Incident Report # 1324154.⁵ On December 9, 2021, ORDEQ, as the State On Scene Coordinator (SOSC) for the incident, hired US Ecology (“USE” or “OSRO”) to respond, clean, and mitigate the oil spill incident from causing further damage.⁶ Based on the location of this incident, the Federal On Scene Coordinator (FOSC) was the United States Environmental Protection Agency Region X (“USEPA” or “FOSC”).⁷ In accordance with the Oil Pollution Act of 1990 (OPA), the owner/operator of the source which caused the oil spill is the Responsible Party (RP) for the incident.⁸ Based on the administrative record, an RP has not been identified for this discharge.

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 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 State of Oregon DEQ POLREP #1 – Initial and Final dated October 21, 2022, under Narrative section. P. 5/96 of claim submission.

³ *Id.*

⁴ *Id.*

⁵ See, NRC Incident Report # 1324154 dated December 9, 2021. P. 10/96 of claim submission.

⁶ US Ecology Incident Report dated December 9, 2021. P. 17/96 of claim submission.

⁷ See, 40 CFR 300.120(a)(2).

⁸ 33 U.S.C. § 2701(32).

On November 6, 2023, the National Pollution Funds Center (NPFC) received ORDEQ's removal cost claim submission in the amount of \$14,970.14.⁹ The NPFC has thoroughly reviewed all documents submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that \$14,967.04 is compensable and offers this amount as full compensation of this claim.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On December 9, 2021, ORDEQ notified the NRC of a discharge of red dyed diesel and a strong petroleum odor was found in the Columbia Slough.¹⁰ A children's arboretum and residential neighborhood are in the vicinity of the spill site along with local wildlife.¹¹

Responsible Party

In accordance with the Oil Pollution Act of 1990 (OPA), the owner/operator of the source which caused the oil spill is the Responsible Party (RP) for the incident.¹² ORDEQ's investigation into the source of the spill has not identified a responsible party (RP) as defined by the Oil Pollution Act of 1990 (OPA).¹³

Recovery Operations

On December 9, 2021, ORDEQ personnel responded to the incident and began response actions. The SOSC attended the scene on December 10, 2021, and on successive dates as needed to evaluate site conditions, effectiveness of containment measures and other aspects of the response.¹⁴ The SOSC oversaw the response in coordination with the FOSC.¹⁵

On December 9, 2021, at 4:00 p.m. local time, United States Ecology ("USE") personnel responded to the incident and began response actions by inspecting the creek and identified three large areas with red dyed diesel impacts as well as emulsified petroleum product along the creek. USE personnel deployed containment boom downstream from the impacted areas and deployed absorbent boom to begin collecting the product. USE personnel identified an additional pocket of diesel at a beaver's dam which led them to deploy absorbent boom downstream from the beaver's dam.¹⁶

On December 10, 2021, USE personnel deployed 50 feet of containment boom downstream from the absorbent boom and applied absorbent material to remove the diesel impacts. Absorbent

⁹ See, OSLTF Form, dated November 2, 2023. P. 1 and 2/96 of claim submission.

¹⁰ See, NRC Incident Report # 1324154 dated December 9, 2021. P. 10/96 of claim submission.

¹¹ See, OSLTF Claim Form. P. 2/96 of claim submission.

¹² 33 U.S.C. § 2701(32).

¹³ State of Oregon DEQ POLREP #1 – Initial and Final dated October 21, 2022. P. 5/96 of claim submission.

¹⁴ See, DEQ Time Reporting Daily Log. P. 23/96 of claim submission.

¹⁵ See, Email between USEPA and ORDEQ dated November 11, 2022. P. 95/96 of claim submission.

¹⁶ See, USE Incident Report. P. 17/96 of claim submission.

material was removed and replaced as necessary throughout the response. All impacted material and debris were placed into a cubic yard box for disposal.¹⁷

On December 12, 2021, USE personnel removed and replaced the absorbent material where necessary until December 21, 2021. All impacted cleanup material and debris were placed into a cubic yard box for disposal.¹⁸ On December 21, 2021, the diesel impacted sorbents were taken to Waste Management - Hillsboro Landfill in Hillsboro, Oregon for disposal.¹⁹

II. CLAIMANT AND NPFC:

On November 6, 2023, the NPFC received ORDEQ's claim submission for \$14,970.14 in uncompensated removal costs.²⁰ The claim included a signed OSLTF Claim Form, ORDEQ POLREP #1 – Initial and Final, Site Discharge Maps, NRC Incident Report # 1324154, Oregon Emergency Response System (OERS), Incident Report and Photos from US Ecology, DEQ Time reporting and Daily Logs, ORDEQ Costs and Indirect Costs, USE Invoice # 760374 dated March 11, 2022, State of Oregon Price Agreement with NRC Environmental Services, Inc. for Emergency Response/Time Critical Removal of Oil and Hazardous Spills 5858, Disposal Manifest and Receipts, and an FOSC Approval Email to ORDEQ dated November 11, 2022.²¹

The NPFC made a few requests for additional information on February 8, 2024, February 22, 2024, and March 6, 2024.²²

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.

¹⁷ See, USE Daily Work Report. P. 34/96 of claim submission.

¹⁸ *Id.*

¹⁹ See, Claimant's Attachment F: Manifests and Disposal Receipts. Pgs. 81-93/96 of claim submission.

²⁰ Signed OSLTF claim form dated November 2, 2023. P. 2/96 of claim submission.

²¹ See, ORDEQ's claim submission to the NPFC dated November 6, 2023.

²² See, Email requests for information dated February 8, 2024, February 22, 2024, and March 6, 2024, respectively.

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).

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 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

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).

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 Email from FOSC to ORDEQ dated November 11, 2022.

³⁵ 33 CFR 136.203; 33 CFR 136.205.

The NPFC analyzed each of these factors and determined that most of the costs incurred and submitted by ORDEQ are compensable removal costs based on the supporting documentation provided. All costs approved for payment were verified as being invoiced at the appropriate ORDEQ published rates personnel labor, ORDEQ agency indirect costs, ORDEQ Land Quality Division (LQD) Indirect costs, and the governing rate schedule for US Ecology at the time their services were rendered.³⁶

Based on the location of this incident, the FOSC for the incident was the United States Environmental Protection Agency (USEPA).³⁷ All approved costs were supported by adequate documentation and were determined by the FOSC to be consistent with the National Contingency Plan (NCP).³⁸

Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$14,967.04 while \$3.10 is deemed non-compensable for the following reasons.³⁹

ORDEQ Costs:

1. The claimant requested \$882.39 for ORDEQ personnel labor costs.⁴⁰ However, upon adjudication of the individual line items for each person using their respective hourly rates and hours claimed, the personnel costs totaled \$882.34, which is a difference of (\$0.05). The unsubstantiated amount was found under the labor tab for (b) (6). As such, the NPFC denies the unsubstantiated difference.
2. The claimant requested \$2,002.55 for the ORDEQ Agency Indirect Costs. However, upon adjudication of the ORDEQ Agency and Land Quality Indirect Rates it was discovered that the costs totaled \$1,999.50 which is a \$3.05 variance. Therefore, the NPFC denied the unsubstantiated difference found under the ORDEQ Indirect Rates.

Overall Denied Costs = \$3.10⁴¹

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law, and regulations, and for the reasons outlined above, ORDEQ's request for uncompensated removal costs is approved in the amount of \$14,967.04.

³⁶ See, ORDEQ's claim submission to the NPFC dated November 6, 2023.

³⁷ See, ORDEQ claim submission dated November 2, 2023. Also see, email from FOSC to ORDEQ dated November 11, 2022, and POLREP #1 Initial and Final, dated October 21, 2022.

³⁸ Email from FOSC to ORDEQ dated November 11, 2022.

³⁹ See, Enclosure 3 to this determination which provides a detailed analysis of the amounts approved and denied by the NPFC.

⁴⁰ ORDEQ claim submission dated November 2, 2023, p. 25/96.

⁴¹ See, Enclosure 3 NPFC Summary of Costs.

This determination is a settlement offer,⁴² the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁴³ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴⁴ 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: 3/20/24

Supervisor Action: *Offer Approved*

⁴² 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).

⁴³ 33 CFR § 136.115(b).

⁴⁴ 33 CFR § 136.115(b).