

CLAIM SUMMARY / DETERMINATION FORM

Date	: 1/22/2009
Claim Number	: 908108-001
Claimant	: Atlantic Response Inc
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$396,183.70

FACTS:

1. Oil Spill Incident: On November 26, 2007, Morris County Hazmat (MCH) requested assistance from New Jersey Bureau of Emergency Response (NJ BER) with a No. 2 home heating oil spill from an above-ground storage tank located at Royal Terminals in Netcong, NJ. According to [REDACTED] of MCH, more than 500 gallons of home heating oil had migrated off site and impacted the Musconetcong River, a navigable waterway of the US. The Responsible Party hired Atlantic Response to remediate the spill. NJ BER responders were dispatched to the site in order to assist with the incident.

Once on site, NJ BER confirmed that MCH's findings were accurate. NJ BER also determined oil was migrating into a storm catch basin located along the roadway directly in front of the Royal Terminal's tank farm. Initial investigation revealed that an above ground storage tank was overfilled which caused the discharge of oil. The oil sprayed out of the tank's vent pipe directly onto the roadway and into the tank's containment area. The oil that pooled within the containment area migrated outside of the tank farm because the containment berm was not continuous around the tank farm. Concrete barrier berms were being used as temporary containment walls.

The berms were placed side by side along the roadside portion of the tank farm. However, large gaps existed that allowed the oil to migrate onto the roadway and the catch basin. The claimant's personnel focused on stopping the discharge into the catch basin. NJ BER Responder Weeks remained at the Royal Terminal location in order to supervise the claimant's activities. NJ BER Responder Camargo deployed with MCH to the Musconetcong River in order to determine and establish containment locations along the river. NJ BER's Acting Region 1 Supervisor, [REDACTED], was advised of the incident findings and a request was made for additional responders along with deployment of the BER 1's river containment boom. Responders [REDACTED] and [REDACTED] deployed to the incident location.

At approximately 1700, state contractor, EPS, arrived on-site with sufficient manpower and equipment to perform the following tasks: (1) the site location was divided into 3 work zone areas. Zone 1 area was from the Royal Terminal facility to the storm box entrance location along the roadway; Zone 2 area was from the storm box entrance point to its exit location on the Musconetcong River; and Zone 3 area was from the oil impacted outfall pipe in the Musconetcong River to the furthest downstream oil recovery location in Waterloo Village. EPS was scheduled to meet with NJ BER Responders [REDACTED] and [REDACTED] in Zone 3, to deploy workboats within Waterloo Village Park for the deployment of sorbent and hard containment boom near the entrance to the park; (2) EPS would also continue the deployment of containment boom upriver towards the spill location and toward Atlantic Response's boom containment lines; once containment lines were deployed, Atlantic Response would assume the maintenance and

cleanup of any collected oil; and (3) NJ BER Responder Weeks and ██████ would remain within Zone 1 with Atlantic Response and oversee cleanup operation at these locations.

The incident was reported to the National Response Center (NRC) via report # 855526 and the incident was coordinated with the Federal On Scene Coordinator (FOSC), who was Mr. ██████ of the United States Environmental Protection Agency (USEPA) Region 2. The FOSC issued a pollution report on November 29, 2007. Additionally, the NPFC opened communication with Mr. ██████; USEPA FOSC, who later took over the case and had a coordination statement issued, dated November 3, 2008 and signed by Mr. ██████, Chief of the USEPA Region 2, Response and Prevention Branch. (See, Enclosure 1 – FOSC coordination statement).

2. Description of removal activities: On November 26, 2007 through November 28, 2007, the claimant vacuumed spilled product and stored it in a Baker Tank; they used absorbents to collect product that was flowing into the creek and they set collection points with filter fences and they provided overnight vac service to continue collecting product. The claimant began disposal of the oil/water to Lorco Petroleum Services for proper disposal and 24 hr vacuum truck recovery continued in this period. Complete change out of all absorbents and maintenance of creek and debris removal continued.

For the period of November 29, 2007 through December 6, 2007, the following services were performed: excavation and stockpiling of contaminated soil from the tank farm; continue to collect oily water; change out absorbents as needed; continue recovery of oil/water from excavation; transport of oily water to Lorco for disposal; use trash pump behind retaining wall to slow the flow of water to the tank farm; inspect and change out absorbents as needed; on 12/3/07, a temporary system was set up to divert and slow storm water runoff from entering the tank farm and excavation area.

For the period of December 7, 2007 through December 12, 2007, the following services were performed: excavation and stockpiling of contaminated soil; continue to remove contaminated water from the excavated areas and store in a frac tank; inspect all absorbents in creek, outflow, river and excavation site; change absorbents as needed; continue excavation of tank farm; de-water open excavation and store in a frac tank; change out absorbents placed in Musconetcong River by NJ BER; backfill excavated areas with certified clean fill; and prep area for recovery well installation.

For the period of December 13, 2007 through December 21, 2007, the following services were performed: transfer of remaining product in tanks 1 & 3 into a tanker truck; vacuum out residual oil and store in a frac tank; inspection of all frozen absorbents was performed; clean internal tanks 1 & 3; vacuum out sludge and water; wash floors and walls up to the first seam - discharge into the frac tank; subcontractor charges for excavation performed from 11/26/07 – 12/3/07; backfill the excavated area from the retaining wall to the curb with certified clean fill; and repair and replace damaged PVC pipes for the sump system.

For the period of December 23, 2007 through December 31, 2007, the following services were performed: responded to a call of heavy sheen on the property; deployed absorbents and inspected the creek area; completed change out of all absorbents in creek and Musconetcong River; bagged waste and put it in a roll off container for future disposal; and subcontractor charges for solid disposal.

For the period of January 7 through January 18, 2008, the following services were performed: decontamination of mini excavators; subcontractor charges for mini excavators and

birdsall engineering; transportation of 20 cyd roll off of absorbent waste to Clean Earth of NJ for disposal; rental charges for the roll off box for 37 days (included in this period).

For the period of February 5, 2008 through February 12, 2008, the following services were performed and/or billed: vacuum 3000 gallons of oily water out of the frac tank; gauge tank afterwards; transport oily water to Lorco for disposal; remove ice and oil contaminants from Baker Tank; clean tank and vacuum out all free liquid; place ice into roll off container and stage on site; transport liquid to Lorco for proper disposal; and cover soil pile.

For the period of February 19, 2008, the subcontractor billed the claimant for services associated with frac tank rental and removal for January 21, 2008 through February 7, 2008.

For the period of February 21, 2008, the subcontractor billed the claimant for engineering services that are for services provided in the month of January 2008 which pertain to analytical services.

3. *The Claim:* On September 18, 2009, Atlantic Response submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$396,183.70 for the services provided to Royal Terminals Inc. from November 26, 2007 through February 7, 2008. This claim is for removal costs based on the contracted rate schedule in place with Royal Terminals at the time services were provided.

This claim consists of copies of the invoicing and associated dailies, disposal manifests, contracted rate schedule, NJ BER Spill Summary Report, NRC report, sample analysis and associated results and EPA FOOSC coordination. The review of the actual cost invoicing and dailies 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 consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented.

It is important to note that the claimant filed an action in Court which was the subject of this claim and therefore went back to the Court and obtained a Dismissal Without Prejudice in order to have the claim adjudicated on its merits through the National Pollution Funds Center (NPFC). Upon receipt of the claim, the NPFC sent a Responsible Party Notification letter to both the owner of the facility: Royal Terminals and to the operator of the facility: Kendall Financial. Royal Terminals responded to the NPFC’s notification and took the position that Mr. [REDACTED], who executed a contract for services with Atlantic Response on behalf of Royal Terminals at the time of the incident, was not an authorized agent of Royal Terminals. Royal Terminals stated that Mr. [REDACTED] was an employee of Kendall Financial (operator) and therefore the executed contract is not valid and they are not liable for the incurred response costs. The NPFC Claims Manager provided information to Royal Terminals regarding the definition of a Responsible Party under the Oil Pollution Act (OPA) and since that communication; no response has been received by either the owner or the operator.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party’s liability will include “removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan”. 33 USC § 2702(b)(1)(B).

"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 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. The FOSC has provided FOSC coordination. A coordination statement has been provided via a Pollution Report dated November 29, 2007 and a statement dated November 3, 2008 from Mr. [REDACTED]. (See, Enclosure 1).
2. The incident involved the discharge and continuing substantial threat of 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 had his pending litigation dismissed without prejudice on January 9, 2009. (See, Enclosure 2 – Dismissal Without Prejudice)
4. The claim was submitted on time.
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 with the exception of the following: (See, Enclosure 3 – Summary of Vendors)

- * Interest billed on invoice # 6729 in the amount of \$10,132.74
- * Interest billed on invoice # 6803 in the amount of \$5,518.33
- * Interest billed on invoice # 6490 in the amount of \$7,577.68
- * Interest billed on invoice # 6561 in the amount of \$5,066.37

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 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.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$367,888.58 of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim# 908108-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of, November 26, 2007 through February 7, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

The Claims Manager has determined the costs are reasonable in accordance with the contracted rate schedule that was in place at the time services were provided.

The Claims Manager has had numerous phone discussions with both the claimant and the EPA FOSC regarding the coordination and actions performed by the claimant. Mr. [REDACTED] of USEPA Region 2 has stated that had he hired the claimant to perform the work for USEPA, he would have had the exact same services provided. The Claims Manager has confirmed by way of supporting documentation that the substantial threat remained during the entire response period and was disposal was performed in accordance with the NCP.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$367,888.58 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 908108-001. 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 Claimants.

AMOUNT: \$367,888.58

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: