

CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/18/2008
Claim Number	: 909032-001
Claimant	: Eddyville Riverport and Industrial Development Authority Inc
Type of Claimant	: Corporate (US)
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$13,838.73

FACTS:

Oil Spill Incident: On September 15, 2008, the Kentucky Department of Environmental Protection was contacted by the Eddyville River Port Authority (ERIDA) about a strong diesel fuel smell coming from the vicinity of Rottgering Marine, located on the Cumberland River, a navigable waterway of the US. Kentucky DEP responded to the scene. After interviewing Mr. ██████████, it was discovered that strong winds from the night before allowed a 50 foot sailboat to come untied and drift downriver. The sailboat collided with an Eddyville River Port barge and sunk. The Kentucky DEP response officer worked with the Environmental Protection Agency (EPA) for FOOSC coordination. ERIDA hired SWS to remove the vessel to further mitigate the risk of remaining fuel spilling into the water. The NPFC has issued an RP Notification Letter to the owner of the vessel.

Description of Removal Activities for this claimant: Kentucky DEP and ERIDA conducted initial and follow up response, overseeing SWS removal of the vessel. SWS costs paid by ERIDA included personnel, equipment and removal of the vessel. SWS billed Kentucky DEP for the removal of the oil and disposal costs.

The Claim: On December 1, 2008, ERIDA submitted a removal cost claim to the National Pollution Fund Center (NPFC) for reimbursement of their uncompensated removal and legal costs in the amount of \$13,838.73.

ERIDA is claiming SWS Environmental personnel costs of \$1,392.00 and equipment costs of \$11,022.73. Legal costs come to \$1,424.00.

APPLICABLE LAW:

Under the Oil Pollution Act of 1990 (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. Removal costs are those "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) 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.

Under 33 USC §2713(a) all claims for removal costs or damages, with exceptions not applicable here, shall be presented first to the responsible party or guarantor of the source designated.

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].

Under 33 USC §2715(a) any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing 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 136.107,

“(a) The claims of subrogor (e.g., insured) and subrogee (e.g., insurer) for removal costs and damages arising out of the same incident should be presented together and must be signed by all claimants.

(b) A fully subrogated claim is payable only to the subrogee.”

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.”

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. This is a de novo review. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

DETERMINATION OF LOSS:

A. Overview:

1. BMI [REDACTED] and EPA Region III provided FOSC coordination.
2. The incident involved the 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 has certified no suit has been filed in court for the claimed uncompensated removal costs.
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 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.

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 \$12,414.73 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 #909032-001. In accordance with 33 CFR 136.105 (e)(8), the NPFC can not reimburse the claimant for attorney’s fees. Therefore, the \$1,424.00 submitted by the claimant in this regard is denied. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident on September 15, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$12,414.73 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 909032-001. 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: \$12,414.73

Claim Supervisor:

Date of Supervisor’s review:

Supervisor Action: