

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 5/21/2009
Claim Number	: 909079-001
Claimant	: Ken's Marine Services, Inc.
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$37,977.74

### **FACTS:**

- Oil Spill Incident:*** Eval Oil Terminal (Eval Oil) was a bulk oil distribution facility at South River Street & Shafer Place in Hackensack, New Jersey in Bergen County. The facility consisted of approximately thirteen above-ground, bulk storage tanks (ASTs), including a one million gallon AST; several smaller tanks of varying dimensions; earthen containment berms; a filling rack; above-ground and below-ground piping, and several buildings. In 1989, the site had a history of oil spills and no record of remediation activities. The site was abandoned by Eval Oil Terminal leaving all the structures in place. Dornach Management LLC (Dornach) and the City of Hackensack had agreements to allow Dornach to redevelop Eval Oil facility site. Dornach retained Creamer Environmental Inc. (Creamer) to remove the existing tanks to prepare for redevelopment and retained Excel Environmental Resources (Excel) to expedite the site assessment and remediation.

At 5:49 pm on July 31, 2007 at 5:49 pm, ██████████, employee of Creamer, called the New Jersey Department of Environmental Protection, Trenton (NJDEP) Hotline to inform of an 8-gallon release and indicated that the spill had been cleaned up. The NJDEP took the incident report but did not investigate further.

The Hackensack Fire Department drove by the site on August 1, 2007 and detected a smell of fuel and sent their Fire Official, ██████████, to investigate. When Lt ██████████ arrived, he observed oil "all over the ground" and Creamer cutting up steel tanks. Lt. ██████████ immediately notified Bergen County Hazmat and ██████████, the Hackensack Building Sub code Official. A temporary stop work order (in accordance with the terms of Creamer's demolition permit) was issued by Mr. ██████████ and ██████████, Bergen County Hazmat Responders, observed oil "all over the ground." They also observed Creamer's cleanup measures. Mr. ██████████ and Mr. ██████████ noted that there were long intervals when no cleanup action was taking place. They determined that Creamer's cleanup efforts were inadequate based on the volume and extent of the spill and the threat it posed to the adjacent Hackensack River, a navigable waterway of the US. According to Carl Mills, Creamer's representative, Creamer was cleaning up the spill and had recovered approximately 11,000 gallons of oil and water mix; a fifth vac truck was onsite and one worker was recovering water and oil.

Upon his arrival to the site, NJDEP Responder ██████████ observed a 500,000 gallon above ground storage tank (AST) half cut open, with oil pooled in and around the tank, covering several areas along the Hackensack River. It appeared that the oil accumulated in the "footprints" of three previous ASTs. Mr. ██████████ directed Creamer to provide additional resources and requested Dornach on site due to the pace of

the cleanup by Creamer; the proximity of the spill to the Hackensack River; and the inadequate level of response resources on site.

██████████, Excel's on site representative, contacted ██████████, Dornach's Vice President, and Ken's Marine Service, Inc. (Ken's Marine). Ken's Marine deployed two additional vac trucks along with a crew of workers. Creamer deployed a fractionation (frac) truck for the temporary storage of liquids. Mr. H██████████ arrived shortly afterwards. Mr. ██████████ issued a field directive to Mr. ██████████ requiring immediate product removal by Dornach; a follow up site investigation; and remediation in accordance with NJAC 7:26E (New Jersey Administrative Code Technical Requirements for Site Remediation).

At 6:00 pm, Ken's Marine arrived at the site. They deployed sorbent booms around the pooled oil; positioned their vac trucks; and began skimming pooled free product. Creamer's subcontractor delivered a frac tank.

Mr. ██████████ returned to the site on August 2, 2007. He observed minor areas of free product, but substantially, the product removal was complete. He then met with Mr. ██████████, Mr. ██████████ and Mr. ██████████. They recommended that a vac truck and operator be on standby while the tanks are being removed and any release of oil should trigger a stoppage of work; notifications to state and local officials; and an immediate cleanup response. With those additional conditions in place, Mr. ██████████ would lift the stop work order and Bergen County Hazmat would meet with Creamer and monitor their progress through demolition. Mr. ██████████ called Dornach and Excel to update them.

- 2. Description of Removal Activities for this Claim:** On August 1, 2007 Ken's Marine arrived on site to South River Street & Shafer Place in Hackensack, New Jersey (formerly Eval Oil Terminal site) due to an oil spill. After NJDEP and Bergen County Hazmat discovered several hundred gallons of oil that posed a threat to the Hackensack River at the site, Dornach was required to do immediate product removal. Dornach retained Ken's Marine. Ken's Marine deployed three cleanup technicians; four equipment operators; two vacuum trucks; one vacuum trailer with a tractor; two rack lift trucks, a response spill truck; and a utility truck. They applied absorbents to the site.

On August 2, 2007, Ken's Marine deployed three cleanup technicians; four equipment operators; two vacuum trucks; and one vacuum trailer with a tractor. They disposed of the oily water recovered at the site.

Disposal Manifests are included with the claim submission.

- 3. The Claim:** On March 30, 2009, Ken's Marine submitted a removal cost claim to the NPFC, for reimbursement of their uncompensated disposal (removal) costs in the amount of \$29, 924.99. The Claimant also requested \$8,052.75 for 18% yearly interest.

The claim consists of daily work logs (dailies) and invoices for third party services. The National Pollutions Funds Center's (NPFC) review of the actual cost invoices and dailies focused on: (1) whether the actions taken were compensable "disposal 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 are determined to be consistent with the National Contingency Plan (NCP) or directed by the (Federal On-Site Coordinator) FOSC; and (4) whether the costs were adequately documented and reasonable.

**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. Findings:***

1. The NPFC has determined that the actions undertaken by the claimant are deemed consistent with the National Contingency Plan (NCP). This determination is made in accordance with the Delegation Authority for Determination of Consistency with NCP for the payment of uncompensated removal cost claims under section 1012(a)(4), Oil Pollution Act of 1990.
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 some 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 as set forth below.
6. The review of the actual costs, invoices and dailies focused on the evaluation of whether such costs qualify as “Compensation Allowable” under 33 CFR§ 136.205.

#### ***B. Analysis:***

The NPFC Case Manager has 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, and (4) whether the costs were adequately documented and reasonable.

The Claims Manager’s review of the cost documentation reveals charges for 18% yearly interest in the amount of \$8,052.75 are not OPA compensable removal costs as the term is defined. Also, the claimant will be compensated for removal costs based on the rate schedule provided with the claim submission. With regards to the two rugs (36” x 300’) per bale, claimants invoice lists the rate as \$225.00 per bale. However, the provided rate schedule lists \$198.00 per bale. Claimant will be compensated at the \$198.00 per bale rate.