

CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/21/2009
Claim Number	: 910015-001
Claimant	: State of Florida
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$10,836.97

FACTS:

Oil Spill Incident: On October 27, 2008, Florida Department of Environmental Protection (FL DEP) received a call from the Hillsborough County Sheriff's Office stating that there was an abandoned, 300-gallon diesel fuel tank leaking into a ditch off of Owens Road in Wamauma. This drainage ditch is approximately .42 miles from Pierce Branch, a tributary of the Little Manatee River, which flows into Tampa Bay, all navigable waters of the US. Additionally, this ditch is located within close proximity to Little Manatee River to the west, the Alafia River to the east and Carlton Lake located 1.5 miles to the southeast, also all navigable waterways in the US.¹

BER responded by meeting the Sheriff's Office on-scene, conducting an initial investigation. They observed that approximately 150 gallons of diesel fuel had spilled from the tank, impacting soil and vegetation which posed a substantial threat of discharge into nearby navigable waters. BER contracted Southern Waste Services (SWS) to not only clean the spill site, but also to collect pre-burn and confirmatory samples, backfill the excavation and set up MOT protocol. This incident was reported to the National Response Center (NRC) on October 27, 2009 via Report # 888420. BER determined that the Responsible Party (RP) was unknown.²

Description of Removal Activities for this claimant: On November 4, 2008, SWS responded by removing three dump trucks full of contaminated soil using a Grad-All excavator. An OVA/PID was utilized to collect readings. SWS personnel took a soil confirmatory and sent it to Phoslab Environmental Services (Phoslab) to be analyzed. The excavation was backfilled and compacted. The final measurement for the excavation was 42' long by 17' wide by 4' deep. During the excavation, groundwater was discovered four feet below land surface, and therefore required SWS, along with BER, to install a temporary well and to send a soil sample to Phoslab for analysis. The final analysis reports returned with both soil and groundwater cleanup target levels met.³

The Claim: On October 7, 2009 the FL DEP submitted a removal cost claim to the National Pollution Fund Center (NPFC) for reimbursement of their uncompensated removal costs of State personnel, equipment and administrative costs in the amount of \$10,836.97.

FL DEP is claiming \$969.66 in State personnel expenses, \$9,505.39 in State contractor expenses, \$339.92 in State equipment expenses and \$22.00 in State administrative

¹ See Claim submission forms, submitted by State of Florida to the NPFC on 10/7/2009.

² See Claim submission forms, submitted by State of Florida to the NPFC on 10/7/2009 and NRC report # 888420, dated October 27, 2008.

³ See Claim submission forms, submitted by State of Florida to the NPFC on 10/7/2009.

documentation/photo fees. The removal costs are based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim submission.

This claim consists of copies of the invoicing and associated dailies, copies of contracted rate schedules, a copy of NRC Report #888420, a copy of State of Florida Emergency Response Incident Report (including a signed copy from the US EPA), a copy of FL BER Contracts/Work Authorization Forms, a copy of Phoslab analytical reports, a copy of the Non-Hazardous Waste Disposal Manifest, photographs, and internal email correspondence.

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.

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 coordination has been established via Ms. [REDACTED] with the US EPA.⁴
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. No RP was identified.
6. 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

⁴ See Claim submission forms, submitted by State of Florida to the NPFC on 10/7/2009.