

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/31/2009
Claim Number	: E07805-001
Claimant	: Dixon Rural Fire Department
Type of Claimant	: Local Government
Type of Claim	: Real or Personal Property
Claim Manager	: ██████████
Amount Requested	: \$2,415.60

### **FACTS:**

***The Oil Spill Incident:*** On Wednesday, April 25, 2007 the initial action for the mystery oil spill was taken by the Confederated Salish & Kootenai Tribes (CSKT) of the Flathead Reservation by placing booms in the sewer lagoon and removing approximately 500 gallons of the oil by using a skimmer and vacuum truck. A spokeswoman for the CSKT requested the help of the United States Environmental Protection Agency (USEPA) to clean up and remediate the situation.

On that same day, the United States Environmental Protection Agency (USEPA), Region 8 requested the Pacific Strike Team's assistance for a mystery oil spill from an unknown source near the Clark Fork River in Dixon, Montana, a navigable waterway of the US. The spill site was located along the north side of Highway 200, approximately one mile west of Dixon in the county of Sanders, Montana. The spill caused contamination of the town of Dixon's sewer lagoon.

The threat consisted of the potential for overflow or breaching of the berm surrounding the lagoon and flowing to a nearby creek, as well as to the Flathead River which is located about 0.5 miles to the north. The potential for wildlife damage was evidenced by one dead duck found at the site, as well as an oil-covered mouse that survived.

On April 26, 2007 the USEPA's Emergency and Rapid Response Services (ERRS) contractor arrived at the site at 3:30 AM and assessed the situation. The contractor then waited until the Federal On-Site Coordinator (FOSC), ██████████, arrived at approximately 3:00 PM.

The lagoon was well constructed with a thick layer (approximately 2 feet) of bentonite. For at least 25 years, the lagoon has served as the repository for ██████████, MT. The bottom of the lagoon was filled with soft, muddy material. Therefore, it was determined that the best approach for remediation was to pump the water out from under the oil's surface, and then allow the area time to dry where the oil had soaked into the berm walls before removing the oil-stained soil. At the time of the clean-up, samples were collected and sent for analysis. Finger printing was also performed.

On April 27, 2007, sorbent booms were tied together to reach across the 140 yards long and 45 yards wide lagoon. This gradually eased the surface oil to a centralized area for collection by a skimmer. Three trash pumps were used to pump the water into a lagoon adjacent to the contaminated lagoon. The sewer material was also sent to that lagoon.

By the morning of April 28, 2007, the water had been lowered by approximately 3 feet. An estimated 10 feet wide ledge was exposed with the ring of contamination near the junction of the ledge and slope of the berm. Approximately 2700 gallons of oil was recovered.

***Claimant Information:*** Dixon Rural Fire Department (Dixon RFD) provided materials for clean-up of the mystery oil spill to the Pacific Strike Force Team. Dixon RFD provided eighteen 4" x 10' diking booms, four 18"x18" absorbent pads, and twelve loose absorbent bags.

***Additional Information:*** On May 11, 2007, NPFC Case Officer [REDACTED] opened a \$90,000.00 ceiling, after the FOOSC requested the current ceiling of \$50,000.00 be raised. To date, \$61,393.28 was spent of the \$90,000.00 ceiling.

**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".

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(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident.

Claims may be presented first to the Fund if the President or his delegated representative has advertised or notified claimants that the Fund is accepting claims resulting from an oil discharge. 33 U.S.C. §2713(b)(1)(A).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:

“(a) Uses generally

The Fund shall be available to the President for –

(4) [T]he payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages; . . .

(b) Defense to liability for Fund

The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of the claimant.”

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 U.S.C. §2712(h)(2).

In any case in which the President has paid an amount from the OSLTF for any removal costs or damages specified under 33 U.S.C. §2712(a), no other claim may be paid from the Fund for the same removal costs or damages. 33 U.S.C. §2712(i).

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. Further, a claim presented to the Fund should include, as applicable:

“[T]he reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney’s fees or other administrative costs associated with preparation of the claim.” 33 CFR 136.105(e)(8).

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, et seq.

Pursuant to the provisions of 33 CFR 136.231, claims for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

“In addition to the requirements of Subparts A and B of this part, a claimant must establish the following—

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant’s income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant’s profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.” 33 CFR 136.233 (a) – (d)

If a third party claimant or an RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF. But the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for net reductions or

losses must clearly reflect adjustments for the following: all income resulting from the incident; all income from alternative employment or business undertaken; potential income from alternative employment or business not undertaken, but reasonably available; any saved overhead or normal business expenses not incurred as a result of the incident; and state, local, and Federal tax savings. 33 CFR 136.235(a)–(e).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713. The OSLTF claims adjudication regulations at 33 CFR Part 136, provide for paying claims.

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 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. 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. Findings:***

1. The FOOSC Coordination was provided by Mr. ██████████, USEPA Region 8. MST2 ██████████ and YN2 ██████████ were also on site for immediate response.
2. The incident involved the discharge and 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 certified no suit has been filed in court for the claimed 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 costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable und OPA and 33 CFR § 136.205 as set forth below.

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

No depreciation has been applied to the replacement cost of the consumable items since they are a one time use product. Confirmation that the materials were provided on site has been made by FOOSC.

The NPFC hereby determines that the OSLTF will pay \$2,415.60 as full compensation for reimbursable real property costs provided by the Claimant and submitted to the NPFC under claim# E07805-001.

**AMOUNT: \$2,415.60**

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *4/6/09*

Supervisor Action: *Approved*

Supervisor's Comments: