

CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/5/2010
Claim Number	: 910075-001
Claimant	: State of Wisconsin
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$6,246.70

FACTS:

- 1. Oil Spill Incident:** On May 29, 2004 twenty-five gallons of petroleum was discharged at the intersection of 45th Street and 26th Avenue in Kenosha, Wisconsin, by way of a storm sewer culvert under 45th Street which discharged the fuel into Pike Creek from an unknown source. The discharge ran from the storm sewer into Pike Creek, which empties into the harbor at Lake Michigan. Lake Michigan is a navigable waterway of the United States. The State On- Scene Coordinator, [REDACTED], of the Wisconsin Department of Natural Resources (WDNR), detected a sheen and deployed absorbent boom across Pike Creek approximately 100 feet downstream of the weir and contacted Onyx Special Services, Incorporated (OSS) to respond to the spill.
- 2. Description of Removal Activities for this Claimant:** OSS was hired and began the cleanup upon arrival. OSS deployed containment boom downstream from the weir in the farthest location where the discharge had been detected and deployed absorbent boom and pads upstream to contain the spill. On June 1, 2004, OSS returned to the incident site to evaluate the location. The deployed boom was then collected and replaced with new boom. Again on June 15, 2004, when they determined there was no longer oil present in the culvert, the absorbent boom was removed and placed in drums for disposal and the remaining containment boom was removed from the creek. Eight drums were taken to OSS for disposal.
- 3. The Claim:** On February 18, 2009, the claimant submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$6,246.70.

WDNR is claiming expenses of \$6,246.70 for the services provided by OSS. The claim consists of the WDNR spill report, an invoice, an incident summary, maps, dailies, waste manifests, a rate schedule and a Federal On-Scene Coordinator memorandum.

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 FOOSC coordination was provided by Ms. [REDACTED] of the United States Environmental Protection Agency- Region 5 on 01/28/10.
2. The incident involved a 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 costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 as set forth below.

B. Analysis:

The NPFC Claims 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 FOOSC, and (4) whether the costs were adequately documented and reasonable.

Upon review of the claim, the Claims Manager hereby determines that there are discrepancies with regards to the reimbursement requested and the cost documentation provided by the claimant. The OSS invoice billed for two hours of work performed by the Emergency Response Project Manager at the regular pay rate of \$70.00 per hour for a total of \$140.00. According to the OSS ER Crew Timesheets, [REDACTED] was the Emergency Response Foreman, billing at the \$55.00 per hour regular pay rate during the incident. Mr. [REDACTED] was also noted as the Project Manager in the OSS Incident Response Report. However, the work of the Project Manager was not provided in the daily timesheets. The reimbursement of \$140.00 for two hours of work at \$70.00 per hour is denied. Therefore, the NPFC has adjusted the amount payable to \$6,106.70, for a total denied amount of \$140.00.

Based on the NPFC's denial of \$140.00, the NPFC determines that the OSLTF will pay \$6,106.70 as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #910075-001.

C. Determined Amount:

The NPFC determines that the OSLTF will pay \$6,106.70 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 910075-001. 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 Claimant.

AMOUNT: \$6,106.70

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *4/6/10*

Supervisor Action: *Approved*

Supervisor's Comments: