

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/8/2010
Claim Number	: 910078-001
Claimant	: City of Concord
Type of Claimant	: Local Government
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$10,392.16

FACTS:

- 1. Oil Spill Incident:** On August 13, 2009, Mr. ██████████, Emergency Management Coordinator for the City of Concord, North Carolina received notification from an employee of the Concord Streets Department while conducting routine maintenance (mowing) that an oily brown substance in a drainage ditch was found. The drainage system empties into a perennial stream which feeds Irish Buffalo Creek. Irish Buffalo Creek is a tributary of Rocky River which is a navigable water of the United States.

Concord Fire Department Hazardous Material Response Team and Emergency Management arrived on the scene to find a few hundred gallons of contaminated water trapped in the ditch line with brown soil and dead vegetation along an estimated 150' area. The Hazmat Team field tested the oily substance and the test proved that the substance was in-fact a petroleum product. The Concord Police Department interviewed the occupants of Melrose Avenue but could not identify the source of the spill once the residents stated that the liquid may have been there for over a week.

The National Response Center (NRC) was notified on August 14, 2009 and issued an Incident Report # 914920.

- 2. Description of Removal Activities:** To mitigate the impact to navigable waters, Mr. ██████████ retained an environmental contractor, Contaminant Control, Inc. (CCI) who arrived on scene and immediately began to pump out the oily water and placed absorbent boom along the ditch line. Field notes state that the spill area stretches 137' through the ditch line and 2' wide.¹

On August 17, 2009, CCI began excavation from the west end of the ditch and worked eastward. The contractor had stated, in his field notes, that the soil on the west end was extremely wet. Excavation went down into the clay layers to get past the contamination, approximately 1' deep in this area. A composite sample of the contaminated soil was taken, sample # 11440D01, this was a disposal sample.

As the excavation proceeded toward the East end, water with product began seeping out of the bottom of the excavation site. The clay layers began to come up and the excavation changed to 6 to 8". At this point the second confirmation sample was collected (sample # 11440-C02). The east end of the ditch appeared that the soil had been disturbed in the past as the ground was not packed as tight as the rest of the ditch. The disturbed soil area began at the location of where the gas line had been marked. The

¹ See, Daily Project Notes.

contractor pulled another sample (sample # 11440-C04). Samples were pulled down to an estimated 120' from the start of the dig. The contractor excavated the area down an additional 5 or 6' and down an additional 6" which extended the ditch to the East an additional 10' to the same depth. At this point all visible contamination from the bottom of the ditch has been removed. A final confirmation sample was taken, (sample # 11440-C05). A background sample on the opposite side of the street was taken (sample # 11440-BG01). The soil on the opposite side of the street was mostly a top soil and clay sand mixture.

Disposal of 23.82 tons of non-hazardous TPH soil was taken to Soil Remedies, Inc. Mebane, North Carolina for disposal, (Manifest # 11440-004) and 55 gallons of contaminated water was taken to Chase Environmental in Erwin, North Carolina for disposal (Manifest # 90258 A).² The samples were taken to Compu Chem, a division of Liberty Analytical Corp in Cary, North Carolina.³

To date the Responsible Party has not been identified.

- 3. *The Claim:*** On March 1, 2010, the City of Concord submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of the uncompensated removal costs in the amount of \$10,392.16 that the city provided on Melrose Drive in Concord, North Carolina from August 14, 2009 through September 25, 2009. This claim is for removal costs based on the contractor's (CCI) rate schedule in place at the time services were provided.

This claim consists of CCI dailies, disposal manifests, analytical reports, field notes, pictures, maps, NRC report, and rate schedules.

The review of the actual cost invoicing and dailies focused on: (1) whether the actions taken were compensable "removable 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 FOSC, and (4) whether the costs were adequately documented.

- 4. *Additional Information:*** Two bags of what appeared to be cocaine were found in the roadway. The police were notified.

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".

² See, Waste Manifests.

³ See, Analytical Reports.

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 NPFC has determined that the actions undertaken by the claimant are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the National Contingency Plan (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 and continuing 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 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 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 the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable "removable 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 and reasonable.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$10,392.16 of uncompensated removal costs and the 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 # 910078-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of August 14, 2009 through September 25, 2009. 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 \$10,392.16 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under Claim # 910078-001. 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 Claimant.

AMOUNT: \$10,392.16

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *3/8/10*

Supervisor Action: *Approved*

Supervisor's Comments: