

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 5/5/2010
Claim Number	: 910094-001
Claimant	: State of Wisconsin
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$4,993.00

### **FACTS:**

- 1. Oil Spill Incident:** On April 5, 2005, the Wisconsin Department of Natural Resources (WDNR) was alerted of a storm sewer in Milwaukee, WI that was discharging petroleum products into the Lincoln Creek, a navigable waterway of the US. The discharge had been occurring for an undetermined period of time. Upon arrival, approximately five gallons of product had been discharged into the creek. Investigation revealed no known source of the spill.
- 2. Description of Removal Actions:** WDNR Spills Coordinator, [REDACTED], proceeded to hire Onyx Special Services (OSS) to assist in the cleanup. OSS stretched containment boom across the waterway to prevent oil from escaping and corralled the oil into one area with a leaf blower and absorbent boom. The oil was then removed from the water via absorbent pads and placed in drums and disposed of in accordance with the NCP.
- 3. The Claim:** The WDNR submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs associated with this incident in the amount of \$4,993.00. The claim consisted of invoices, proof of payment, OSS spill report, contractor dailies, OSS rate schedule, EPA FOOSC coordination form, and Disposal Manifest.

### **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. US EPA provided FOSC coordination via a letter dated April 6, 2010.
2. The incident involved the report of a discharge of “oil” and a substantial threat as defined in OPA 90, 33 USC § 2701(23) to navigable waterways.
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 majority of 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 incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC to be consistent with the NCP or directed by the FOSC, 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. On the OSS invoice for April 5, 2005, an ‘ER Clerical – Regular’ is billed for \$44. However, on the OSS personnel signed daily, a clerk is not listed. Additionally, on the OSS invoice for April 7, 2005, one absorbent pad at \$60.00/bale is billed for. On the OSS equipment daily, however, only .5 absorbent pad bales were used.

Finally, while OSS did provide a waste manifest for the five 55-gallon drums disposed of, a receipt/invoice was not provided. The NPFC Claims Manager understands that ‘waste disposal’ is an inter-company charge but must have the waste disposal price listed on a rate schedule or invoice in order to determine whether the pricing was appropriate. If the State of Wisconsin chooses to come back on reconsideration, please provide the inter-company agreement with OSS that determines the price of the waste disposal.

Based on the NPFC’s denial of \$602.00, the NPFC determines that the OSLTF will pay \$4,391.00 as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #910094-001.

***C. Determined Amount:***

The NPFC hereby determines that the OSLTF will pay \$4,391.00 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim 910094-001. 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: \$4,391.00**

Claim Supervisor: [REDACTED]

Date of Supervisor’s review: *5/6/10*

Supervisor Action: *Approved*