

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/17/2010
Claim Number	: 910110-001
Claimant	: Oil Mop, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$3,974.70

### **FACTS:**

**1. Oil Spill Incident:** On Friday, August 29, 2008, a leaking drum was discovered leaking in a container of Mercaptan, a chemical used as a gas odorant. The leak occurred at the World Commerce South Warehouse at the Ocean Exports at the Jacinto Port in Houston Texas. Two storm drains are located in close proximity to the leak. The Jacinto Port is on the Buffalo Bay, which leads to the Gulf of Mexico, a navigable waterway of the United States. That same day, World Commerce, the responsible party (RP), signed an Emergency Service Agreement with the Claimant, Oil Mop, LLC (OMI) to clean up the leak.

**2. Description of Removal Activities for this claimant:** OMI cleaned the drums in the container and discovered one drum leaking Mercaptan from the seal around the top of the drum. The leaking drum was over packed with an 85 gallon steel over pack drum and micro-blaze was sprayed in the container to eliminate vapors. On Saturday, August 30, 2008, OMI removed nine drums of Mercaptan from the container and placed each in an 85 gallon steel over pack drum and reloaded the nine over pack drums into the container.

**3. The Claim:** On June 1, 2010, OMI submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs of \$3,974.70. As noted on the invoice, claimant seeks reimbursement for labor and equipment to decontaminate the leaking drum of Mercaptan.

The claim consists of the signed Emergency Service Contract, invoice, dailies, maps of the incident site, a Site Specific Health and Safety Plan, Daily Tool Box Safety Meeting Record, and the Mercaptan Material Safety Data Sheet.

According to OMI's claim submission, the RP refused to sign the dailies or pay the invoice. The claim was submitted to the RP on December 17, 2008 and OMI made several calls to World Commerce for payment.

### **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. FOSC coordination was not provided for this claim.
2. The incident did not involve 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. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim to determine if 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 FOSC, and (4) whether the costs were adequately documented and reasonable.

The claimant seeks reimbursement of its uncompensated removal costs for the decontamination of the drums of Mercaptan in the container. The claim submission includes the Emergency Service Contract, signed by [REDACTED], Account Supervisor for World Commerce.

Claimant’s Site Specific Health and Safety Plan, indicates that the type of operation required for the incident is “chemical” in section A. Section B of the Plan describes the substance as “a gas odorant.”

In summary, the total amount claimed for removal costs incurred is \$3,974.70. The NPFC hereby determines that the claim is denied because (1) the claimant failed to establish that the actions taken were performed under FOSC coordination in accordance with the National Contingency Plan (NCP), as required under 33 CFR 136.203 and 33 CFR 136.205; (2) the claimant failed to establish that the actions taken were associated with the mitigation of a substantial threat of discharge of "oil" into navigable waters and (3) the product, Mercaptan, which was contained in the drums is CERCLA vice oil therefore this is not an OPA event and therefore not compensable by the Fund.

It is important to note that mercaptan is produced by a chemical reaction. While there may be mercaptans (AKA thiols) in crude petroleum it is not where most mercaptans come from. Some chemicals are considered oil either based on historical precedent or because the chemicals are carried in solvent/diluent oil; neither is the case for this mercaptan mix. Additionally, the mercaptan mix would not be carried on a tank vessel (either oil or chemical), so there will never be a requirement for a spill response plan under MARPOL or OPA 90.