

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/03/2010
Claim Number	: E10404-001
Claimant	: Weavertown Environmental Group
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$427,410.39

### **FACTS:**

***Oil Spill Incident:*** The United States Environmental Protection Agency (USEPA) reports that on November 6, 2009, at 16:00 hours, approximately 3200 gallons of a crude oil-brine mixture was discharged from a tank farm on the Cornerstone Minerals (Cornerstone) production facility into a creek that is a tributary of Big Caney Creek, a cold-water stock pond that drains into Grayson Lake Reservoir, all navigable waterways in the US.<sup>1</sup> This incident was reported to the National Response Center by Mr. ██████████, of Cornerstone, the Responsible Party (RP) for this incident.<sup>2</sup>

Mr. ██████████ contacted Weavertown Environmental Group (WEG) about the spill, stating that he believed 60-70 percent of a 100-barrel tank was released into the creek and, ultimately, the stock pond. WEG then mobilized to the site for cleanup.<sup>3</sup>

***Description of removal actions performed:*** The claimant, WEG, was hired by Cornerstone to contain and remove the spilled product. WEG arrived on-scene by 16:40 hours on November 6, 2009, and assessed the grounds and waterway. Oil was recorded as present along the unnamed tributary into Big Caney Creek for approximately one-half mile. The U.S. EPA was the federal on-scene coordinator for this spill response and determined that the cleanup was consistent with the National Contingency Plan (NCP).<sup>4</sup>

Both WEG and the Kentucky Department of Environmental Protection Environmental Response Team (ERT) began to construct an earthen underflow dam below the lowest affected area of the tributary. WEG deployed the use of a vac truck, which remained in operation throughout that night.

The next day, November 7, 2009, WEG began excavating along the tributary, with the vac truck still in operation along the tributary. A skid steer was being used to spread gravel along the farm lane for accessing the necessary equipment. Soil samples were taken to test for VOCs, chloride, oil and grease. Hefner Environmental (HE), a sub-contractor hired by WEG, personnel removed contaminated debris and placed absorbent booms and pads along the tributary.

Work continued on November 8, 2009. WEG and ERT crews constructed an intersecting trench and a large underflow dam and containment area below the spring location, capturing a new

<sup>1</sup> See EPA Cornerstone Oil POLREP ONE, dated 11/06/2009.

<sup>2</sup> See NRC Report # 922838, opened on 9/06/2009.

<sup>3</sup> See KY DEP Incident Response Report for Incident # 2303992, submitted with the claim by WEG to the NPFC on 4/29/2010.

<sup>4</sup> See EPA Cornerstone Oil POLREP ONE, dated 11/06/2009 and KY DEP Incident Response Report for Incident # 2303992, submitted with the claim by WEG to the NPFC on 4/29/2010.

crude oil leak. A controlled flush of the tributary was performed, at the request of the EPA On-Scene Coordinator. The vac truck was still in use operation, collecting free product from the tributary, while workers removed contaminated debris by hand.<sup>5</sup>

From November 9, 2009 onward, general cleanup activities were performed by WEG, with the last of the materials being disposed of by January 27, 2010. EPA demobilized from the scene on November 9, 2009.<sup>6</sup>

***The Claim:*** On or about November 30, 2009, the claimant submitted its claim to the responsible party. On April 29, 2010, Weavertown Environmental Group (doing business as Weavertown Transport Leasing, Inc.) submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$427,410.39 for the services provided November 6, 2009 through January 27, 2010. This claim is for removal costs based on the rate schedule in place at the time services were provided. WEG submitted this claim to the RP on November 30, 2009, but did not receive payment. Additionally, the claimant has not filed an action in court to recover these costs.

This claim consists of copies of the invoicing and associated dailies, a copy of WEG contracted rate schedule, copies of the EPA Region IV POLREPS for this spill, a copy of NRC Report # 922838, copies of the KY DEP Incident Response Reports for Incident # 2303992, a copy of the WEG contract signed by a representative for Cornerstone, copies of proof of payments to third-parties, copies of the Disposal of Non-Hazardous Waste Manifests, a copy of the Precision Analytical, Inc. Analytical Reports for Order # 0911399, EPA and WEG maps and photographs, various news articles and internal email correspondence.

The review of the actual cost invoicing and dailies 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 consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented.

### **APPLICABLE LAW:**

Under OPA 90, each responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters is liable for the removal costs and damages specified in subsection (b) of this section. 33 USC § 2702(a).

“Responsible party” means “in the case of an onshore facility any person owning or operating the facility.” 33 U.S.C. § 2701(32)(B).

“Facility” means “any structure, group of structures, equipment or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.” 33 U.S.C. § 2701(9).

“Removal costs” means “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 such an incident.” 33 U.S.C. § 2701(31).

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<sup>5</sup> See EPA Cornerstone Oil POLREP TWO, dated 11/08/2009 and KY DEP Incident Response Report for Incident # 2303992, submitted with the claim by WEG to the NPFC on 4/29/2010.

<sup>6</sup> See EPA Cornerstone Oil POLREP THREE, dated 11/09/2009, KY DEP Incident Response Report for Incident # 2303992 and Disposal Manifests for Big Run Landfill, both submitted with the claim by WEG to the NPFC on 4/29/2010.

“Removal costs referred to in subsection 2702 (a) are all 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). , to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Except as otherwise provided all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source. 33 U.S.C. § 2713(a). If the claim is presented to the responsible party and each person to whom the claim is presented denies all liability for the claim; or the claim is not settled by any person by payment within 90 days upon which the claim was presented, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 U.S.C. § 2713(c).

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 costs that are the subject of the claim.

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 FOSC coordination has been established via United States Environmental Protection Agency Region IV OSC Mr. ██████████.<sup>7</sup>
2. The incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23).
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 timely submitted to the Fund, within three years after completion of the removal action.
5. Presentment of costs to the RP was made by the claimant, prior to the submission of the claim, on November 30, 2009. The NPFC also made presentment of costs to the RP, who denied the ability to pay this claim.<sup>8</sup>
6. 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.

The Claims Manager confirmed that the claimant did perform a site assessment with the EPA OSC, Mr ██████████, on November 7, 2009. The Claims Manager validated the costs incurred and determined they were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP). Upon examination of the claim, the NPFC has denied a total of \$1,266.00 due to math errors on the part of the claimant.<sup>9</sup>

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$426,144.39 of uncompensated removal costs and that that 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 #910097-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident from November 6, 2009 through January 27, 2010. The claimant represents that all costs paid by

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<sup>7</sup> See EPA Cornerstone Oil POLREPS 1-4, dated 11/06, 11/08, and 11/10/2009, as well as the EPA Website for this spill, found at: [http://www.epaosc.org/site/site\\_profile.aspx?site\\_id=5590](http://www.epaosc.org/site/site_profile.aspx?site_id=5590).

<sup>8</sup> See email from Mr. ██████████ to Ms. ██████████, NPFC, dated 5/10/2010.

<sup>9</sup> See WEG Invoice #7034947, 11/08/2009, “Technician Hours DT, 4 @ 13.5 hours each = 64 hours.” This amount should total 54 hours. Also see WEG Invoice #7034947, 11/12/2009, “Excavator Hours, 3 @ 13.5 hours each = 41 hours” and “Roll-Off Truck hours, 3 @ 13.5 hours each = 41 hours.” Both these amounts should total 40.5 hours. The total difference in these three errors equals \$1266.00.

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 \$426,144.39 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim E10404-001. 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: \$426,144.39**

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *6/3/10*

Supervisor Action: *Approved*

Supervisor's Comments: