

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 914095-0001
Claimant	: BP Exploration & Production, Inc.
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested:	\$1,491.32

FACTS:

A. Oil Spill Incident:

On February 15, 2014, the CG National Response Center (NRC) received notification of a large amount of surface residual tar balls (SRBs) washed up on the beach on Elmer's Island, Jefferson Parish, LA, located on the Gulf of Mexico, a navigable waterway of the United States.¹ The CG Gulf Coast Incident Management Team (CG GCIMT) was notified and responded to the report and found SRBs spread throughout Segments LAJF01-004-20, LAJF01-004-40 and LAJF01-004-60 / Zones 2 and 3. As the SRBs were in a quantity that exceeded the CG's capacity to mitigate, an email directive was issued to BP Exploration & Production (BP) to activate an oil spill response organization (OSRO) to respond for cleanup operations on Elmer's Island as directed.²

B. Description of removal actions performed:

On February 15, 2014, Danos & Curole Marine Contractors (BP's OSRO), responded to the CG's directive of response and met with 2 CG active duty personnel on-scene. Cleanup of what appeared to be SRBs of MC252 origin began and extended through Zones 2 and 3 on the beach. Approximately 37.13 pounds of SRBs were recovered and properly disposed of at River Birch Landfill, Avondale, LA. During the cleanup operations, CG representatives sampled an SRB from the beach located in segment LAJF01-004-40. It is unclear if BP personnel collected a sample for its own purposes.³ Coast Guard personnel forwarded the sample to the Coast Guard Marine Safety Laboratory (MSL) on April 1, 2014 (MSL Case Number 14-123).

THE CLAIMANT AND THE CLAIM:

On July 15, 2014, BP submitted a removal cost claim associated with the cleanup of SRBs to the Oil Spill Liability Trust Fund (OSLTF or the Fund), asserting that the oil collected was not Deepwater Horizon oil. Claimant sought reimbursement of its uncompensated removal costs in the amount of \$1,491.32 for services provided on February 15, 2014, which included personnel

¹ See NRC Report # 1074076 dated February 15, 2014.

² See email directive to BP dated February 15, 2014.

³ See NPFC Optional OSLTF Form submitted by BP dated July 15, 2014, Attachment D and F state that BP collected a sample but further on Attachment F, it states that BP did not collect a sample.

and vehicle use. The claimed removal costs are based on the rate schedule in place at the time services were provided.⁴

NPFC INITIAL DENIAL:

On October 17, 2014, the NPFC initially denied this claim. The NPFC based its determination on the MSL Oil Sample Analysis Report (April 9, 2014) and a subsequent MSL re-evaluation of gas chromatography and gas chromatography-mass spectrometry data and Memorandum dated October 14, 2014 that clarified the initial Report. In the April 9, 2014, Oil Sample Analysis Report, 14-123, the MSL determined that sample 14-123-1 contained heavy petroleum oil with characteristics different from those samples of MC 252 oil and the sample was not derived from Deepwater Horizon oil.⁵ The MSL concluded that the differences in the PAHs were not attributable to known weathering or non-petroleum contamination. Stated another way, while the differences in the PAHs could indicate that the sample was non-DWH oil, the sample was heavily weathered and the petroleum fingerprint of sample 14-123-1 was consistent with anticipated changes in severely weathered DWH oil. Thus, the MSL determined that the biomarker profiles and PAHs strongly suggested a relationship between DWH oil and sample 14-123-1.⁶

Based on the MSL analysis and memorandum the NPFC denied the claim on October 17, 2014, and noted that if the Claimant sought reconsideration of the claim it should provide further analysis and documentation establishing that the sample was not DWH oil.

REQUEST FOR RECONSIDERATION:

The NPFC's initial determination dated October 17, 2014, is hereby incorporated by reference. A request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d). The claimant has the burden of providing any facts and legal arguments to support its request for reconsideration. 33 CFR 136.105(a). When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including new information provided by the claimant in support of the request for reconsideration. As a fact finder, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of claim as part of adjudicating a claim. If there is conflicting evidence, the NPFC will make a determination as to what evidence is more credible or deserves greater weight.

RECONSIDERATION ANALYSIS:

In a letter dated November 6, 2014, Claimant sought reconsideration of 26 removal costs claims denied by the NPFC. The request included allegations and arguments it considered to be applicable to all the claims.⁷

⁴ NPFC Optional OSLTF Form, Attachment G1 – Rate Sheet.

⁵ See MSL Case # 14-123 dated April 9, 2014.

⁶ See MSL Memo from [REDACTED] to [REDACTED] dated October 14, 2014.

⁷ Claimant, in a letter dated December 17, 2014, to the NPFC confirmed that the facts and arguments set out in the November 6, 2014, request for reconsideration were the basis for each of the 26 claims and should be applied generally to each claim. The letter also noted that BP had no further information to provide at that time.

Claimant first argues that the denials are in error because the NPFC paid two earlier removal costs claims, relying on the MSL sampling analysis, which concluded that the oil mitigated by BP in these two claims was “not derived from the Deepwater Horizon oil spill.”⁸ Claimant now argues that the 26 denied claims are identical to the earlier claims because the initial MSL analysis determined that the oil was not derived from DWH oil. Claimant argues that the NPFC’s reliance on a second analysis of the samples (that the samples were either (1) DWH comingled with non-DWH oils⁹ or (2) severely weathered DWH oil even though it produced a slightly different fingerprint) was in error because the NPFC relied solely on that subsequent analysis.¹⁰

When the Coast Guard and BP initially recovered SRBs from the Gulf Coast beaches they relied on visual observations to determine if the oil was derived from DWH oil. When the Coast Guard and BP began to disagree, based on visual observations, as to whether the SRBs were DWH oil or not, BP argued that a MSL analysis of samples was required. In a letter to [REDACTED] dated May 28, 2014, the BP Incident Commander, [REDACTED] urged the Coast Guard to cease its visual determinations that the SRBs were DWH oil and requested that it send the samples collected to the MSL for analysis.¹¹ Mr. Sanders noted that visual observations were unreliable because of the heavily weathered state of MC 252 oil, which during the four years since the material made landfall it continued to weather and degrade. Additionally, he stated that there is documented history of SRBs and oil from multiple sources in the Gulf of Mexico and SRBs on the beaches could originate from non DWH oil. Thus, BP argued, a sampling process must be followed to both identify and to minimize the false identification of MC 252 oil. “Without the link between the sample and the RP, the USCG’s [removal] costs are not appropriately charged to BP.”¹²

In this claim the sample was heavily weathered. As requested by the NPFC, the MSL re-evaluated the data and analysis for weathered oil and determined that there was a strong relationship to the DWH oil. The NPFC relied on the MSL sample re-evaluation to deny the claim. Claimant could have independently analyzed its sample (if indeed it collected one) and provided any conflicting laboratory analysis to the NPFC on reconsideration. It did not do so.

Based upon the current record, the NPFC determines that the preponderance of the credible evidence establishes that sample 14-123-1 was DWH oil. In making this determination, the NPFC finds the MSL Oil Sample Analysis Report (April 9, 2014) and the MSL re-evaluation and Memorandum dated October 14, 2014 to be very credible evidence. These documents are strong circumstantial evidence that the sample 14-123-1 was DWH oil. Despite arguments of counsel

⁸ BP November 6, 2014 letter requesting reconsideration, page 2.

⁹ BP argues that if DWH oil is comingled with other oils, the NPFC should identify the RP for the other oil and allocate the costs. While comingled samples are not at issue in this claim OPA liability is joint and several and BP would be liable for all removal costs or damages resulting from the comingled oil even if another RP cannot be identified. See, *In re: Oil Spill by the Oil Rig Deepwater Horizon*, 844 F.Supp.2d 746, 754 (E.D. LA 2012), reversed in part on other grounds by 21 F.Supp.3d 657, 755 (E.D. 2014).

¹⁰ Claimant seems to assert that the MSL second analysis that changed the result reflects its inability to determine whether the sample oil was derived from DWH oil.

¹¹ [REDACTED] BP Incident Commander, letter to CAPT [REDACTED] dated May 28, 2014.

¹² *Id.*

to the contrary, Claimant has not produced any credible evidence that undermines this determination.

Claimant attempts to avoid the above conclusion by arguing that there is no clear evidence establishing that BP is the responsible party for the SRBs found on Elmer Island. Claimant cites to the U.S. Coast Guard Marine Safety Manual, which provides regulatory guidance regarding minimum evidence required to identify a responsible party for prosecution of a notice of violation and/or a civil penalty following an oil spill.¹³ Claimant argues that this is a circumstantial evidence case and in a circumstantial evidence case the Coast Guard must either (1) identify the path of the RP's oil to the water and a conclusive match or (2) a conclusive match between the sampled oil and the RP's oil and conclusive non-matches between all other possible sources and the RP's oil.

The protocols for evidence provide in the Marine Safety Manual are specific to evidence required for prosecution of notices of violation or civil penalties and are not applicable to the sampling and evidence in this claim because the Coast Guard is not seeking a notice of violation or civil penalty prosecution. This distinction is important because the Coast Guard carries the burden of proof in the penalty actions referred to in the Marine Safety Manual and the Claimant has the burden of proof when seeking reimbursement from the OSLTF. Any failure of Coast Guard personnel to follow the procedures designed to assist with the Coast Guard's burden of proof in a penalty action does not assist Claimant with carrying its burden of proof when seeking reimbursement against the OSLTF. Moreover, even if the authorities cited by Claimant applied to claims against the OSLTF, those protocols would not be binding because, under the Marine Safety Manual's express language, its procedures are simply intended to improve the internal management of the Coast Guard, not create mandatory procedures.

In summary, Claimant provided no credible evidence to support its argument that sample 14-123-1 was not DWH oil. To the contrary, the credible preponderance of evidence in this claim shows that sample 14-123-1 was DWH oil. Because Claimant is the responsible party liable for DWH oil, it may not recover these removal costs.

For these reasons, this claim is denied in its entirety upon reconsideration.

Claim Supervisor:

Date of Supervisor's Review: *April 21, 2015*

Supervisor Action: *Reconsideration denial approved*

Supervisor's Comments:

¹³ The Marine Safety Manual is intended only to improve the internal management of the Coast Guard. Neither the manual nor any guidelines, procedures, instructions, directives, rules or regulations implementing this manual shall create, or shall be construed to create, any right or benefit, substantive or procedural, legally enforceable by any party against the U.S., its agencies, officers, employees or any other person. *See* USCG Safety Manual, Volume V, Part A: Administration.