

CLAIM SUMMARY / DETERMINATION

Claim Number:	915018-0001
Claimant:	SpillTek Environmental Services
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$94,109.10

FACTS:

Oil Spill Incident: On May 11, 2013, U.S. Coast Guard, Marine Safety Unit Toledo, OH received a report from the National Response Center (NRC #1046789) of an oil sheen on the waters at Deep Water Marina in Sandusky, OH. The marina waters connect to Sandusky Bay, a tributary of Lake Erie and a navigable waterway of the United States.

Coast Guard pollution responders were told that the source of the petroleum sheen came from roofing material that failed to bond when applied and a heavy rain washed about 30 gallons of residual petroleum based material from the roof to a drainpipe that emptied into the waters at the marina.

Federal On-Scene Coordination: Coast Guard personnel in their capacity as the Federal On-Scene Coordinator (FOSC) followed the progress of the cleanup during the following week. Actions taken to remove the oil were determined to be consistent with the National Contingency Plan (NCP).¹

Responsible Party: The owner of the building and designated the responsible party for the incident is Sireco III, LLC. Sireco III is represented by attorneys, [REDACTED] and [REDACTED] of Taft, Stettinius & Hollister of Cleveland, OH. Sirocco's parent company is Sandusky Management Company, LLC.

Based on the evidence presented, this incident appears to have been caused by Myers Paint and Recycling (Myers). Myers Paint and Recycling hired Spill Tek Environmental Services (Claimant) to contain and clean up the spill. Myers Paint and Recycling sought recovery under pollution coverage from its liability carrier, MESA Underwriters Specialty Insurance Company and Myers Paint has brought a civil suit in County Court against its insurance carrier.²

Claim: On December 5, 2014, the National Pollution Funds Center (NPFC) received Spill-Tek's claim to the Oil Spill Liability Trust Fund (Fund) for uncompensated removal costs in the amount of \$94,109.10.

Description of Removal Actions: Spill-Tek deployed several response vehicles (trucks) and two response vessels along with response trailers from May 11 through May 17, 2013. Spill-Tek employed between seven and ten employees over the course of the seven days that it took to

¹ See copy of Coast Guard MISLE Case Report #635648

² See copy of Spill Tek's contract with [REDACTED] and Myers Paint and Recycling dated May 11, 2013.

remove the oil and tar like roofing residue from the marina. Spill Tek provided dailies delineating the personnel, materials and equipment used. Spill Tek's employees consisted of four to six Field Technicians, one Equipment Operator, a Supervisor, and a Project Manager. Spill-Tek's personnel deployed various booms and sorbent materials to contain and remove the oil and set-up an oil-water separator at the base of the drainpipe to catch any residual product. Spill Tek hired a subcontractor (Fox and Son) who pressure washed the drainpipe. Spill Tek incurred additional costs for the use of public water.³ Additionally, Spill-Tek transported and disposed of all contaminated water and materials.

Background: As an initial matter, [REDACTED], owner of Myers Paint and Recycling (Myers), stepped up in its capacity as the Company that applied the faulty petroleum based roofing material and assumed primary responsibility for hiring a response contractor to handle the cleanup. However, after Spill Tek presented Myers with its invoice, Myers chose not to pay the \$94,109.10.⁴ Instead, Myers submitted Spill Tek's invoice to its commercial insurance company, Mesa Specialty Underwriters Insurance Company (MUSIC). MUSIC subsequently denied the pollution claim asserting that its Commercial General Liability policy specifically excludes pollution. Myers has filed a civil suit against its insurer, MUSIC, in County Court arguing that the removal costs should be covered. Sireco III and Spill Tek are party to Myers' suit against MUSIC. However, Myers' suit in County Court has been stayed pending the outcome of MUSIC's counter suit filed in U.S. District Court Northern District of Ohio (Toledo) (case # 3:14-cv-02201-JGC).⁵ MUSIC seeks a Declaratory Judgment to determine whether or not MUSIC's Commercial General Liability policy specifically excludes pollution. As of this date, the federal suit has not been decided. Furthermore, the outcome of that case would not have bearing on the merits of this claim.

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".

³ See Receipts and proof of payments.

⁴ See claimant's Exhibit J letter presenting Spill Tek's invoice to Sireco III August 8, 2014

⁵ See copy of stay granted to defendant Myers pending the outcome of a federal lawsuit

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. Coast Guard Marine Safety unit Toledo in its capacity as the Federal On Scene Coordinator (FOSC) for this incident, determined that the actions undertaken by SpillTek Environmental Services, LLC were consistent with the NCP. 33 USC 2702(b)(1)(B) and 2712 (a)(4);⁶
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters. In accordance with 33 CFR § 136.105(e)(12);
3. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1);

⁶ See Coast Guard MISLE Case # 63548.

4. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined which 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 cost invoices and dailies to verify that Spill-Tek incurred costs as 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 submission, the NPFC determined the costs presented were incurred and billed in accordance with the rate schedule that was in effect at the time the services were provided.⁷ The NPFC Claims Manager reviewed the documentation submitted by Spill-Tek and finds that the actions taken by the Claimant and its subcontractors, were reasonable and necessary in order to prevent the further discharge of diesel fuel into a navigable waterway.

Upon adjudication of the detailed costs associated with this response, the NPFC has determined that all costs are reasonable and determined OPA compensable with the exception of the 25% markup applied to the [REDACTED] and Son invoice. The Claimant applied a 20% markup on all subcontractors and as such, the markup for this invoice was adjusted accordingly, resulting in a denial of \$34.00. Additionally, the NPFC reduced the 15% fuel and insurance recovery surcharge based on the total determined OPA compensable costs, resulting in a denial of \$5.10 for a total denied amount of \$39.10.⁸

The Claimant submitted a waste disposal manifest documenting proper disposal of the hazardous waste.⁹

Claimant represents that all costs claimed are for uncompensated removal costs incurred by the claimant arising from the incident on May 11, 2013. And, claimant represents that all costs submitted are uncompensated removal costs and payable by the Oil Spill Liability Trust Fund (Fund) as presented by the claimant.

Based on the above, the Claims Manager hereby determines that Spill-Tek did in fact incur \$94,070.00 in uncompensated removal costs and that this amount is payable by the Fund as full compensation for reimbursable removal costs incurred by the Spill-Tek and presented to the NPFC under claim #915018-0001.

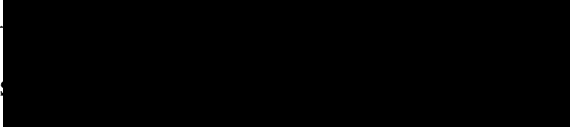
⁸ See NPFC spreadsheet attached

⁹ See copies of Chemtron waste manifests in administrative record

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$94,070.00 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 915018-0001. All costs claimed and presented by Spill-Tek are for removal actions as defined under OPA and, are compensable removal costs payable by the OSLTF.

AMOUNT: \$94,070.00

Claim Supervisor: 

Date of Supervisor's review: *1/22/15*

Supervisor Action: *Approved*

Supervisor's Comments: