

CLAIM SUMMARY / DETERMINATION

Claim Number:	915021-0001
Claimant:	Massachusetts Department of Environmental Protection
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$55,857.80

FACTS:

- A. **Oil Spill Incident:** On December 20, 2011, Massachusetts Department of Environmental Protection (MassDEP) personnel responded to the report of a sheen of oil on the surface waters of the Acushnet River, a navigable waterway of the United States.
- B. **Background:** The incident began on December 20, 2011¹ and ended October 22, 2013 (23 months) when MassDEP personnel removed the FV CHALLENGE from the Acushnet River. On December 23, 2011, MassDEP hired Frank Environmental Services Corporation (Frank Corp) to contain and remove the sheen. MassDEP continuously monitored the discharge from the vessel and provided on-scene oversight for removal actions performed by its oil spill contractor.
- C. **FOSC Coordination:** MST1 [REDACTED] USCG from Marine Safety Detachment, New Bedford, MA was the acting Federal On Scene Coordinator – Representative (FOSC-R). MST1 [REDACTED] observed petroleum discharging from the FV CHALLENGE. Because the FV CHALLENGE was a wooden vessel and partially submerged with an unknown quantity of diesel fuel onboard, the FOSC-R contacted [REDACTED] of the National Pollution Funds Center (NPFC) Case Management Division for consultation. The FOSC-R and NPFC Case Manager determined that it would be safer to just place boom around the vessel; rather than remove the diesel in the fuel tanks. It was agreed that MassDEP on-scene personnel would monitor the discharge and removal activities of its oil spill contractor and when the discharge was completely abated, MassDEP would submit a claim to the NPFC for its uncompensated removal costs.
- D. **Responsible Party:** MassDEP identified [REDACTED] of Acushnet, MA as the owner of the FV CHALLENGE and the potential responsible party (PRP) for this oil spill incident. MassDEP sent Mr. [REDACTED] a Notice of Responsibility.

On September 17, 2014, MassDEP presented Mr. [REDACTED] an invoice for \$55,857.80 for the removal costs associated with this incident. Additional notices were sent to Mr. [REDACTED] again in November and December 2014. At this time, Mr. [REDACTED] has not paid the removal costs related to MassDEP's Release Tracking Number (RTN): 4-0023730 which are costs subject of their claim submission to the NPFC.

¹ See NRC # 998639

Claim: On January 14, 2015, the NPFC received MassDEP's (Claimant) claim submission with a cover letter seeking uncompensated removal costs totaling \$55,857.80. Included with MassDEP's claim submission were copies of three invoices. The first invoice is for MassDEP's personnel costs (see MassDEP Time-slip Detail Report) totaling \$17,267.17. MassDEP submitted its rate schedule that was in effect at the time of the incident.² The other two invoices are from MassDEP's oil spill removal contractor, Frank Environmental Services Corporation (Frank Corp), which total \$38,590.63. Frank Corp invoice #19339 is for \$29,889.13 for services from December 22, 2011 through February 1, 2012 and invoice # 119523 for \$8,701.50 is for services from March 5, 2012 through June 14, 2012. Frank Corp submitted a copy of its rate schedule that was in effect at the time services were provided.³

- E. **Description of removal actions performed:** Frank Corp. sent a Foreman and two Skill Laborers along with a box truck and motorized barge to place absorbent boom around the vessel in order to contain the spill. Absorbent sweep was used to remove the diesel oil inside the containment area. Frank Corp. personnel packed contaminated materials into 55 gallon drums and transported them to a qualified waste treatment facility.⁴ For the next six months, when MassDEP's personnel requested, Frank Corp. returned on-scene with its three man crew, motorized barge, and box truck to replace the oil contaminated boom and absorbent materials with fresh boom and absorbent materials.

Removal costs include labor, equipment, materials, and disposal fees. Frank Corp. provided its daily activity reports, waste manifests, and rate sheet that correspond with its invoices. MassDEP submitted its Time-slip Detail Report that tracks personnel costs associated with the incident. Also, MassDEP submitted 28 copies of its Release Log Forms and Amended Release Forms that provide the name of the employee along with the date and time and a description of the activity associated with their activities performed during the incident.

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 FOSC, and (4) whether the costs were adequately documented.

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

² See copies of MassDEP's initial submission and additional information supporting documents in the admin record

³ See copy of Frank Corp rate schedule in admin record

⁴ See copies of five waste manifests from Northland Environmental, LLC

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. Coast Guard Marine Safety Detachment, New Bedford, MA acting in its capacity as the Federal On-Scene Coordinator (FOSC) for this incident, determined that the actions undertaken by MassDEP were consistent with the NCP. 33 USC 2702(b)(1)(B) and 2712 (a)(4);⁵
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);
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 invoices and dailies to verify that MassDEP 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.

After review of the initial submission, the NPFC Claims Manager (CM) requested contractor rate sheets and additional information from MassDEP.⁶

MassDEP’s Time-slip Detail Report tracks personnel costs for the incident by date and time which serves as an invoice. The NPFC found that some personnel cost entries on the Time-slip Detail Report had no description of the activity being performed and as such, those costs are denied. MassDEP also submitted 28 copies of

⁵ See Coast Guard MISLE Case # .

⁶ See emails February 2 and 3, 2015

its Release Log Forms and Release Amendment Forms. These Release forms provide the employee name, the date and time, along with a description of the actions performed.

The NPFC requires a description of the activity for the cost to determine if the cost is an OPA compensable response action. On February 2, 2015, the NPFC requested MassDEP submit additional Release forms to support its personnel activity or provide the missing activity on the Time-slip Detail Report. On February 18, 2015, MassDEP submitted a revised Time-slip Detail Report that added about 28 more daily personnel activities to the initial report. The NPFC created a spreadsheet of MassDEP's response costs to determine the compensable removal activity based on MassDEP supplemental Time-slip Detail Report.⁷

The NPFC also reviewed Frank Corp's invoices and compared them to its daily activity reports and corresponding rate sheet. The NPFC found the motorized barge and absorbent sweep were missing from Frank Corp.'s rate sheet. These items were included after MassDEP emailed a letter from Frank Corp's President that provided the rates for the barge and absorbent sweep.⁸ The NPFC then adjusted two cost entries that were \$15.00 more than Frank Corp.'s rate sheet indicated which resulted in a total adjustment of \$30.00. The NPFC has created two separate spreadsheets showing compensable removal costs associated with Frank Corp's invoices.⁹

The NPFC has determined that costs presented were incurred and billed in accordance with MassDEP and Frank Corp's respective rate schedules that were in effect at the time the services were provided.¹⁰ The NPFC has reviewed the documentation submitted by MassDEP and finds that the actions taken by the Claimant and its subcontractor, were in large part reasonable and necessary in order to prevent the continuing discharge of diesel fuel into a navigable waterway.

Upon adjudication of the detailed costs associated with this response, the NPFC has determined that the majority of the removal costs are reasonable and have been determined to be OPA compensable with the exception of the following: 1) MassDEP's Time-slip Detail Report entries that lack a description of the activity or have a corresponding Release form and 2) two items on Frank Corp's invoice # 19339 that exceed its rate sheet pricing. An adjustment was made to MassDEP's invoice resulting in a total denial of \$8,066.06 for MassDEP and the NPFC made an adjustment to MassDEP's contractor invoices in the total amount of \$30.00. Total amount denied by NPFC is \$8,096.06.¹¹

Claimant represents that all costs claimed are for uncompensated removal costs incurred by the Claimant arising from the incident on December 20, 2011. 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.

⁷ See spreadsheet of MassDEP costs attached

⁸ See copy of letter by President of Frank Corp to MassDEP dated February 4, 2015

⁹ See spreadsheet of Frank Corp invoices 19339 and 19523 attached

¹⁰ See copies of rate schedules for MassDEP and Frank Corp in the admin record

¹¹ See NPFC spreadsheet attached

Based on the evidence in the administrative record, the NPFC hereby determines that MassDEP did in fact incur \$47,761.53¹² in uncompensated removal costs and that this amount is payable by the Fund as full compensation for reimbursable removal costs incurred by the MassDEP and presented to the NPFC under claim #915021-0001.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$47,761.53 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 915021-0001. All costs claimed and presented by MassDEP are for removal actions as defined under OPA and, are compensable removal costs payable by the OSLTF.

AMOUNT: \$47,761.53

Claim Supervisor:

Date of Supervisor's review: *3/10/15*

Supervisor Action: *Approved*

Supervisor's Comments:

¹² See total adjusted amounts in spreadsheet summary attached