

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	916046-0001
<b>Claimant:</b>	Watchtower Defense, Inc.
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$88,379.01

### FACTS:

**Oil Spill Incident:** On November 29, 2015, a vehicle struck a fuel dispenser attached to The Old Timer gas station in Medina, Texas, resulting in an estimated 507 gallons of petroleum discharging into the surrounding soil and roadway.<sup>1</sup> The Medina Volunteer Fire Department (MVFD) was dispatched to the scene and manually shut off the damaged fuel dispenser. MVFD personnel diverted the discharged fuel to a nearby drainage system to the Medina River, a navigable waterway of the United States.<sup>2</sup> In addition to the MVFD, the Texas Department of Transportation and the Texas Department of Environmental Quality also responded to the spill incident. The owner of The Old Timer, [REDACTED] (Ms. [REDACTED]), hired Watchtower Defense to conduct pollution removal activities. [REDACTED] (Mr. [REDACTED]), United States Environmental Protection Agency Region 6 in his capacity as the Federal On Scene Coordinator (FOSC) for the incident, provided after the fact FOSC concurrence.<sup>3</sup>

**Description of Removal Activities for this Claimant:** On November 29, 2015, Watchtower Defense responded at the request of Ms. [REDACTED] further containing and removing the discharged fuel.<sup>4</sup> In addition to supplying personnel and equipment, Watchtower Defense hired multiple vendors to assist its pollution removal activities, which included two separate oil spill removal organizations (OSROs), SWS Environmental Services (SWS) and A Clean Environment (ACE). Watchtower Defense responded to the fuel discharge site from November 29, 2015, through January 8, 2016, placing absorbent materials, removing contaminated soil and water, and conducting remediation efforts. Specifically, both sections of the highway's shoulder and the adjacent ditch were removed due to impacted soil.<sup>5</sup> The recovered petroleum contaminated soil was properly disposed of at Waste Management, San Antonio, Texas.<sup>6</sup> The petroleum contaminated water was properly disposed of at Alamo 1 Petroleum Exchange, San Antonio, Texas.<sup>7</sup>

**Responsible Party:** Ms. [REDACTED] is the owner of The Old Timer gas station. Maxey Energy Company, owned and operated by [REDACTED], is the owner and operator of the damaged fuel

<sup>1</sup> See email from Mr. [REDACTED], Watchtower Defense to Mr. [REDACTED], NPFC dated April 27, 2016.

<sup>2</sup> See letter dated April 11, 2016, from Mr. [REDACTED], Watchtower Defense to Mr. [REDACTED], NPFC.

<sup>3</sup> See email from Mr. [REDACTED] USEPA to Mr. [REDACTED], NPFC dated June 7, 2016.

<sup>4</sup> See Work Authorization Form dated November 29, 2015.

<sup>5</sup> See Optional OSLTF form dated April 11, 2016, submitted by Watchtower Defense Inc.

<sup>6</sup> See Waste Management Certificates of Disposal dated December 29 - 30, 2015.

<sup>7</sup> See Alamo 1 Petroleum Exchange invoice number 15250AP dated December 1, 2015.

dispenser.<sup>8</sup> Watchtower Defense made presentment of the costs associated with this claim to Ms. [REDACTED] on January 18, 2016.<sup>9</sup> In response, The Old Timer paid Watchtower Defense a total of \$10,000, the maximum amount available on its insurance policy, for the claimed pollution removal activities.<sup>10</sup> On April 20, 2016, Ms. [REDACTED] was issued an RP notification letter by the NPFC notifying her of the pending claim from Watchtower Defense.<sup>11</sup> In response to this letter, Ms. [REDACTED] contacted the NPFC by phone, stating that The Old Timer's contract with Watchtower Defense was signed "under duress" and that she believes the owner of the pumps, [REDACTED], to be a responsible party.<sup>12</sup> Subsequent to the NPFC's issuance of the April 20, 2016, RP notification letter, Ms. [REDACTED] obtained legal representation from The Nunley Firm. The Nunley Firm contacted the NPFC by letter dated May 11, 2016, asserting that Maxey Energy Company is the sole owner of the above-described damaged fuel dispenser and "Pursuant to the contractual agreement with Maxey Energy Company, neither [REDACTED] nor Old Timer have any responsibility associated with the gas pump or the maintenance and operation of the gas pump."<sup>13</sup> By email dated May 12, 2016, the NPFC issued an RP notification letter to [REDACTED], notifying him of the pending claim with Watchtower Defense.<sup>14</sup> Mr. [REDACTED], by letter from his legal counsel dated June 3, 2016, denied responsibility for the claimed spill incident.<sup>15</sup>

**The Claim:** On April 19, 2016, Watchtower Defense submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of its uncompensated removal costs totaling \$88,379.01.<sup>16</sup> As evidence for its claim, Watchtower Defense submitted numerous invoices, daily worksheets, and proof of payment documents. Subsequently, the NPFC issued a request for additional information to Mr. [REDACTED] on May 10, 2016, requesting additional documentation supporting the claimed costs for Watchtower Defense personnel and equipment, rate schedules "for multiple third party vendors", and proof of payment documentation for the analytical testing conducted by San Antonio Testing Laboratory.<sup>17</sup> Mr. [REDACTED] submitted several new documents via emails dated May 11, 2016, and May 16, 2016, including time sheets for Watchtower Defense personnel and equipment, rate schedules for SWS Environmental Services, and invoices and proof of payment information for San Antonio Testing Laboratory.

In response to the received additional information, the NPFC submitted a second request for additional information via email dated June 22, 2016, requesting clarification on several pieces of evidence previously submitted.<sup>18</sup> Mr. [REDACTED] responded to this request by email dated June 22,

<sup>8</sup> See letter from Mr. [REDACTED] The Nunley Firm to Mr. [REDACTED], NPFC dated May 11, 2016.

<sup>9</sup> See letter from Mr. [REDACTED], Watchtower Defense to Ms. [REDACTED], The Old Timer dated January 18, 2016.

<sup>10</sup> See Optional OSLTF form dated April 11, 2016, submitted by Watchtower Defense Inc.

<sup>11</sup> See RP notification letter issued by the NPFC to Ms. [REDACTED] dated April 20, 2016.

<sup>12</sup> See notes taken from telephone conversation between Ms. [REDACTED], The Old Timer and Mr. [REDACTED] NPFC dated April 26, 2016.

<sup>13</sup> See letter from Mr. [REDACTED] The Nunley Firm to Mr. [REDACTED], NPFC dated May 11, 2016.

<sup>14</sup> See RP notification letter issued by the NPFC to Mr. [REDACTED] dated May 12, 2016.

<sup>15</sup> See letter from Ms. [REDACTED], Esq. to Mr. [REDACTED], NPFC dated June 3, 2016.

<sup>16</sup> See Optional OSLTF form dated April 11, 2016, submitted by Watchtower Defense Inc.

<sup>17</sup> See email from Mr. [REDACTED], NPFC to Mr. [REDACTED], Watchtower Defense, Inc. dated May 10, 2016.

<sup>18</sup> See email from Mr. [REDACTED], NPFC to Mr. [REDACTED], Watchtower Defense, Inc. dated June 22, 2016.

2016, providing a detailed response to the NPFC's request, to include the submission of both 2015 and 2016 Watchtower Defense rate schedules.<sup>19</sup>

**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

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<sup>19</sup> See email from Mr. [REDACTED], Watchtower Defense, to Mr. [REDACTED], NPFC dated June 22, 2016.

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. [REDACTED], USEPA Region 6, as the Federal On-Scene Coordinator (FOSC) for this incident, determined that the actions undertaken by Watchtower Defense were consistent with the NCP<sup>20</sup> for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4).;
2. The incident involved 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 within the six year statute of limitations. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that 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 to be consistent with the NCP, and (4) whether the costs were adequately documented and reasonable.

The NPFC has determined that the majority of the costs incurred by the Claimant for this incident were reasonable and necessary in order to mitigate the effects of the incident. Upon

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<sup>20</sup> See email from Mr. [REDACTED], USEPA to Mr. [REDACTED], NPFC dated June 7, 2016.

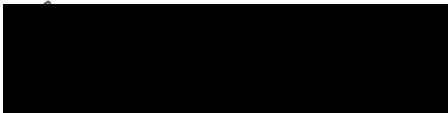

review of the information provided by the Claimant, the NPFC has determined that the payable costs were billed in accordance with the rate schedule(s) in place at the time the services were rendered by all vendors and were determined by the FOSC to be consistent with the NCP. Costs denied by the NPFC include<sup>21</sup>:

- the replacement of the damaged baker tank listed on the December 30, 2015, SWS Environmental Services invoice, to include the additional associated markup;
- A Clean Environment per diems; several miscellaneous items not listed on the rate sheet, to include barrier/caution tape, duct tape, orange construction fence, fence posts, and marker paint; and
- excess Watchtower Defense personnel hourly rate charges.

In addition to the aforementioned denied costs, the tax claimed for the daily worksheets provided by SWS Environmental Services is approved for the percentage of the approved costs only which therefore results in the denial of \$59.30. Lastly, the NPFC has determined that \$2,845.15 in claimed costs by Watchtower Defense are not adequately described in either the Watchtower invoices or in the associated responses to the NPFC's multiple requests for additional information. Based on the foregoing, the NPFC is unable to properly identify and adjudicate any particular claimed item, personnel, or equipment cost that is affiliated with the \$2,845.15 and as such, that amount is denied as unsubstantiated.

The NPFC therefore determines that the OSLTF will pay \$82,086.84 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 9160046-0001. 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: \$82,086.84**


Claim Supervisor: 
Date of Supervisor's review: <i>7/7/16</i>
Supervisor Action: <i>Approved</i>
Supervisor's Comments:

<sup>21</sup> See, Enclosure (1) Summary of Costs Spreadsheet