

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 916058-0001
Claimant	: A Clean Environment
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$37,586.00

**FACTS:**

**1. Oil Spill Incident:** On March 15, 2016, at approximately 2100, A Clean Environment (ACE) received a notification from the Grayson County Fire Department (GCFD). The Fire Marshall and the Grayson County Assistant Fire Chief requested that the Claimant respond to a fuel situation whereby they were concerned that the fuel may enter the Choctaw Creek, a navigable waterway of the US. ACE Project Manager [REDACTED] was informed that the incident involved a tractor and trailer that had caught on fire and had pulled off to the side of the road on Highway 82 in Bell, TX. According to the Claimant, the GCFD was concerned about the fuel entering Choctaw Creek. The highway was shut down by the Texas Highway Patrol and the Texas Department of Transportation and the Grayson Fire Department. After arriving onsite and evaluating the scene, Mr. [REDACTED] (ACE Project Manager), dispatched ACE personnel, materials, equipment and supplies to handle response.

It is important to note that the Responsible Party (RP) has been identified by the Texas Commission on Environmental Quality (TCEQ) in its capacity as the State On Scene Coordinator (SOSC), to be Colvins Trucking. Mr. [REDACTED] of TCEQ stated the RP was cooperative during the response, but once cleanup was completed, he refused to respond. It is also important to note that the RP did not sign the ACE response contract paperwork and TCEQ informed the National Pollution Funds Center (NPFC) that all invoices were presented to Colvins Trucking's insurer identified as National Indemnity Company, Claims Operations, P.O. Box 31361, Omaha, NE 68131-0361. The RP's insurer has not responded to the SOSC, nor has it paid any of the invoices to the Claimant.

This incident has been reported to the NRC via Report # 1142963.

**2. Description of removal actions performed:**

Upon arrival ACE personnel placed sorbent boom at the creek bank, where approximately 60-80 gallons of diesel fuel had been released from the tractor and trailer. As fuel and water from the fire fighting operations had impacted the down slope side of the highway towards the creek, ACE spread absorbents to collect the free diesel, claiming to stop it from entering Choctaw Creek. Approximately 80 gallons of a mixture of fuel and water were recovered and stored in poly drums.

ACE also worked with the wrecker company to hookup and remove the burned out tractor and trailer. It was necessary to tarp and wrap the entire frame because components were falling off the tractor, as it had melted through to the asphalt. When lifting the unit, the oil pan released motor oil onto the asphalt shoulder and sorbents were placed, allowing the rest

of the pan to drain. When the truck was removed, ACE began to clean up the road way and shoulder. Everything was pushed off the road onto the dirt along the shoulder's edge.

The following day, fuel was leaching throughout the impacted area and sorbents were used to collect the free liquids. A WTC #37(Water Tight Container) was brought on site with approximately fifteen cubic yards of clean backfill. It was then lined and filled with the contaminated diesel/oil, impacted soils, debris and absorbents. A Multi Ray PPB Monitor was used on site to determine the extent of the impacted soil. Samples were taken and analyzed. Over the next several days, impacted soil was removed and containerized and the affected area was backfilled with clean soil. The oily debris and soil was then disposed of at the Southern Oklahoma Regional Disposal, Inc landfill.

- 3. The Claim:** On July 11, 2016, ACE submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$37,586.00 for the services provided from March 15 through March 19, 2016. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim submission.

### **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 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. There was no FOSC coordination for this incident as required by regulation. 33 U.S.C. § 1321(d)(2)(K).
2. The incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23); however, it did not pose a substantial threat to navigable waters.
3. A Responsible Party was determined and subsequently notified by the NPFC. However, no response has been received from the RP to date. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1)
5. 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.

#### **B. Analysis:**

NPFC CA reviewed the actual cost invoices and dailies to confirm whether or not 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.

Upon adjudication of the costs subject of this claim, the NPFC Claims Manager was unable to validate that the costs that were incurred were reasonable, necessary and performed in accordance with the National Contingency Plan (NCP) as determined by the FOSC.<sup>1</sup>

The Claimant requests a total of \$37,586.00 in uncompensated removal costs although in order to receive compensation from the NPFC and in accordance with the governing claims regulations found at 33 CFR §136.203 &205, it states that 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]

While there was a discharge of oil, it is not clear from the documentary evidence presented to the NPFC that this discharge posed a substantial threat of discharge into to a navigable waterway as determined by the FOSC. The NPFC has communicated with the Claimant and gave the Claimant the opportunity to contact the United States Environmental Protection Agency (USEPA) in its capacity as the Federal On Scene Coordinator (FOSC) for this incident but, to date, no coordination has been provided.

Based upon the preponderance of the evidence, this claim is denied because (1) the response has not been coordinated with a Federal-On Scene Coordinator (FOSC) in accordance with 33 CFR §136.203, (2) no FOSC has determined that the actions undertaken by the Claimant were deemed consistent with the National Contingency Plan (NCP) in accordance with 33 CFR §136.205, nor were the actions undertaken by the Claimant directed by the FOSC, and (3) the Claimant has failed to meet its burden to demonstrate that the incident posed a substantial threat of discharge of oil into or upon a navigable waterway. Should ACE choose to request reconsideration of this claim, it would need to provide the latitude and longitude for the spill location, along with coordinating its response efforts and obtain a written statement from the USEPA Region 6 FOSC.

C. **Determined Amount: \$0.00**

The NPFC hereby determines that the OSLTF will pay \$0.00 as full compensation for the claimed removal costs incurred by the Claimant and submitted to the NPFC under claim 916058-0001.

Claim Supervisor: [REDACTED]
Date of Supervisor's review: 8/9/16 [REDACTED]
Supervisor Action: <i>Denial approved</i>
Supervisor's Comments:

<sup>1</sup> See, 33 CFR §136.203 &205.