

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	916063-0001
<b>Claimant:</b>	ES&H of Dallas, LLC
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$194,964.79

### FACTS:

**A. Oil Spill Incident:** On November 4, 2015, the Rockwall Fire Department responded to reports of gasoline present near a creek located in Rockwall, Texas. “According to the Fire Department, the product appeared to be coming out of subsurface into the creek from the One Stop Express gas station.”<sup>1</sup> Subsequently, on November 5, 2015, the Texas Commission on Environmental Quality (TCEQ) conducted an Incident and Modified Compliance Evaluation Investigation (CEIMOD) of the One Stop Express. The inspection resulted in the TCEQ environmental investigator determining that the underground tank system, consisting of three 10,000-gallon fiberglass reinforced plastic (FRP) tanks, had not been bolted and sealed properly, resulting in a “slow fuel leak for an indeterminate amount of time.”<sup>2</sup> Consequently, the slow leak of oil from the One Stop Express began discharging oil underground, resulting in the leaching of oil into the creek located adjacent to the facility.<sup>3</sup> US Environmental Protection Agency (EPA) personnel responded to the spill and identified the One Stop Express as the responsible party (RP). The State agency, TCEQ, provided oversight of the daily cleanup activities.<sup>4</sup> ES&H of Dallas, LLC, was hired to act as an oil spill removal organization (OSRO), to handle cleanup and response actions for this incident.

**B. Description of response actions performed:** On November 4, 2015, ES&H responded to the One Stop Express spill site, discovering discharged oil heavily present in the adjacent creek. Prior to ES&H’s arrival on-scene, the discharged oil had “traveled approximately 1/4 mile west before being contained with absorbent boom by the Rockwall Fire Department.”<sup>5</sup> ES&H placed additional boom in the creek to prevent oil from entering Lake Ray Hubbard, a navigable waterway of the U.S.<sup>6 7</sup> ES&H conducted additional oil removal actions from November 5, 2015, through December 18, 2015, utilizing vacuum trucks in the collection of over “3000 gallons of impacted water.”<sup>8</sup> Additionally, ES&H coordinated response actions with local, state, and federal agencies; positioned sorbent materials; and removed and decontaminated equipment and materials.<sup>9</sup>

<sup>1</sup> See Texas Commission on Environmental Quality Investigation Report # 1289548

<sup>2</sup> Id.

<sup>3</sup> See ES&H Incident Report dated November 4, 2014.

<sup>4</sup> See email from Mr. [REDACTED] US EPA, to Mr. [REDACTED], NPFC, dated September 15, 2016.

<sup>5</sup> See ES&H Incident Report dated November 4, 2014.

<sup>6</sup> See Texas Commission on Environmental Quality Investigation Report # 1289548.

<sup>7</sup> See email from Mr. [REDACTED] US EPA, to Mr. [REDACTED], NPFC, dated September 15, 2016.

<sup>8</sup> See ES&H Incident Report dated November 4, 2015.

<sup>9</sup> Id.

**C. Presentment to the Responsible Party:** Notwithstanding the EPA’s initial RP determination, Marty Mechanical, Inc. (Marty Mechanical) has been identified as the registered owner of the underground storage tank that discharged oil. As a result, Marty Mechanical is a RP for this incident. [REDACTED] is employed by both Marty Mechanical and One Stop Express, Inc. dba One Stop Express. These companies appear to be separate entities.<sup>10</sup> ES&H presented its costs associated with this claim to Mr. [REDACTED] on April 14, 2016, by way of ES&H Invoices numbered 8-4606 in the amount of \$103,660.49, 8-4678 in the amount of \$49,925.90, 8-4758 in the amount of \$37,126.37, 8-4922 in the amount of \$3,310.25, and 8-5237 in the amount of \$941.78. The ES&H invoices were billed to One Stop Express and shipped to “One Stop Express/Marty Mechanical, Inc.”<sup>11</sup>

On August 3, 2016, NPFC issued a RP Notification Letter to One Stop Express, Attn: [REDACTED] [REDACTED] that provided notice of the claim filed by ES&H of Dallas, LLC.<sup>12</sup> In response to this letter, Mr. [REDACTED] contacted the NPFC by phone on August 3, 2016, asserting that his insurance company was expected to pay the claimed amount. Also, Mr. [REDACTED] stated that he is currently taking legal action against both the insurance company and the manufacturer of the leaking tank.<sup>13</sup>

During the NPFC’s adjudication of ES&H’s claim, the NPFC determined that the administrative record did not clearly show that ES&H properly presented its claim to Marty Mechanical. Although Mr. [REDACTED] worked for both Marty Mechanical and One Stop Express, the current evidence available showed that Marty Mechanical was clearly a RP because it was the registered owner of the underground storage tank. In order to ensure that presentment was made to Marty Mechanical, ES&H re-issued its invoices and mailed them to Marty Mechanical along with correspondence explaining why the invoices had been re-issued.<sup>14</sup> Similarly, on November 16, 2016, the NPFC sent a RP Notification letter to Marty Mechanical, Inc., Attn: Mr. [REDACTED] & Mr. [REDACTED].<sup>15</sup>

In addition, by way of a phone conversation on November 29, 2016 between the NPFC and, Mr. [REDACTED], he acknowledged receipt of ES&H’s April 14, 2016 invoices. Mr. [REDACTED] also admitted that Marty Mechanical hired ES&H at the recommendation of TCEQ, the state agency on site for this incident.<sup>16</sup> In the same phone conversation, Mr. [REDACTED] provided the NPFC details associated with his recently filed litigation via case # 1-16-0783 filed in the 439<sup>th</sup> District Court in the State of Mississippi on August 8, 2016. The case is entitled *Marty Mechanical, LLC dba One Stop Express v. All-Tech Fuel Systems & Bennett Pump Company*. Additionally, Mr.

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<sup>10</sup> One Stop Express, Inc. is a Texas Corporation that filed an Assumed Name Certificate to do business as One Stop Express. In this company’s filings with the Texas Secretary of State, [REDACTED] was identified as the President. On July 27, 2012, One Stop Express, Inc. forfeited its corporate existence under Section 171.309 of the Texas Tax Code. Marty Mechanical, Inc. is another Texas Corporation that identifies [REDACTED] as its President. Although NPFC’s research did not show that Marty Mechanical, Inc. has filed an Assumed Name Certificate, it’s lawsuit identified the company as “Marty Mechanical, LLC dba One Stop Express”. Also, the Texas Commission on Environmental Quality identified the company as “Marty Mechanical, Inc. dba One Stop 46”.

<sup>11</sup> See ES&H Invoices numbered 8-4606, 8-4678, 8-4758, 8-4922, and 8-5237.

<sup>12</sup> See RP Notification Letter by the NPFC to Mr. [REDACTED] dated August 3, 2016.

<sup>13</sup> See record of phone conversation between Mr. [REDACTED], RP, and Mr. [REDACTED], NPFC, dated August 3, 2016.

<sup>14</sup> See ES&H Invoices numbered 8-4606, 8-4678, 8-4758, 8-4922, and 8-5237 dated November 18, 2016.

<sup>15</sup> See RP Notification Letter by the NPFC to Mr. [REDACTED] dated November 16, 2016.

<sup>16</sup> See email from Mr. [REDACTED], NPFC, to Mr. [REDACTED], RP, dated November 30, 2016.

██████████ stated that he is denying payment of the ES&H invoices on the basis that: (1) he takes issue with the prices charged; (2) his insurance company, Tank Owner Members Insurance Company, was obligated to pay for the response services and to date have not done so; and (3) he asserts the incident resulted from faulty pump equipment which is why he filed a civil case against the manufactureur.<sup>17</sup>

Based on the foregoing, the RP has acknowledged the costs presented to the NPFC for payment and has also denied payment of those costs.

**D. The Claim:** On August 1, 2016, ES&H submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs totaling \$194,964.79.<sup>18</sup> As evidence for its claim, ES&H submitted numerous invoices, daily worksheets, the ES&H Emergency Response Rate Schedule for January 2015, and several emails containing correspondence between ES&H and the RP. Subsequent to reviewing these documents, the NPFC submitted a request for additional information, requesting documentation in which both demonstrates proof of payment by ES&H to all third party contractors and ES&H's terms and conditions for the claimed per diem costs.

Mr. ██████████ subsequently responded by email dated October 7, 2016, in which included the 2015 Emergency Response Rate Sheet and One Stop Express Vendor Payments attachment.

**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".

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<sup>17</sup> Id

<sup>18</sup> See Optional OSLTF Claim Form dated August July 27, 2016.

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. [REDACTED], USEPA, as the Federal On-Scene Coordinator (FOSC) for this incident, determined that the actions undertaken by ES&H were consistent with the NCP<sup>19</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);

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<sup>19</sup> See email from Mr. [REDACTED], USEPA to Mr. [REDACTED], NPFC dated September 15, 2016.

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 which of 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 in this claim submission were reasonable and necessary to mitigate the effects of the incident. Upon review of the information provided by the Claimant, the NPFC has determined that the payable costs were billed in accordance with the rate schedule in place at the time the services were rendered and were determined by the EPA FOOSC to be consistent with the NCP.<sup>20</sup> Costs denied by the NPFC include: undetermined overages for disposal costs totaling \$1,978.18<sup>21</sup>, the \$60.00<sup>22</sup> in additional markup for the delivery of the tractor truck associated with ES&H Invoice #8-4606, and the \$500.00 in claimed costs associated with the cleaning of the “Frac Tank” associated with ES&H Invoice # 8-4922.

With regard to the costs associated with the cleaning of the Frac Tank, in the October 7, 2016, email response to the NPFC’s request for additional information, Mr. [REDACTED] stated:

On Invoice 8-4922 there was a line item listed as “Clean Frac Tank” which is not on our published rate sheet. This was on the daily ticket for 1/18/16, if you look at the ticket for that day you will also see there were (3) technicians that were billed at \$0.00 and there were no charges for the PPE utilized or any of the other cleaning equipment utilized to clean the frac tank.

This response does not resolve the outstanding deficiency, as the NPFC requires that all items claimed be adequately described in the ES&H published rate schedule. The absence of claimed costs for separate personnel and equipment contained on the same invoice does not meet this requirement. Therefore, we are unable to associate the amount claimed for the cleaning of the frac tank with any particular claimed item, personnel, or equipment cost. Additionally, because

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<sup>20</sup> Id.

<sup>21</sup> See Summary of Costs spreadsheets

<sup>22</sup> Id.

the cleaning of frac tank(s) is not identified on the ES&H rate schedule, there is no evidence that the RP was given advance notice of such costs prior to being invoiced.

The NPFC therefore determines that the OSLTF will pay \$192,426.61 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 916063-0001. 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: \$192,426.61**

Claim Supervisor:

[REDACTED]

[REDACTED]

Date of Supervisor's review: 12/15/2016

Supervisor Action: Offer Approved

Supervisor's Comments: