

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: E12704-0001
Claimant	: Missouri Department of Natural Resources -- Environmental Emergency Response
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$10,131.00

FACTS:

Oil Spill Incident: The United States Environmental Protection Agency (US EPA) Region VII¹ reports that on June 20, 2012, the Missouri Department of Natural Resources Environmental Emergency Response (MDNR) (“the Claimant”) alerted it of spilled diesel fuel that had leaked into the Kelly Creek on the southeast corner on Monett, MO. According to MDNR, this fuel had leaked out of a 250 gallon tote that had fallen out of the back of a pickup truck. According to MDNR, the tote reportedly was stolen from a nearby fruit business in the early morning hours of June 20, 2012. The person that allegedly stole the tote, Mr. [REDACTED] (the potential Responsible Party (RP)), was discovered while fleeing the scene in his four-wheel drive truck, and was pursued by the local police into the Kelly Creek.

Upon arriving on scene, it was determined that the tote spilled an estimated 150 gallons into the streambed prior to it being uprighted. The tote rested in the middle of the streambed, where the stream had pockets of surface water roughly 150 feet from the release. Historical data showed the creek had risen as much as four feet from a single rain event. Since the local weather report showed a 50% chance of rain for the next day, June 21, 2012, the Federal On-Scene Coordinator (FOSC) and the State On-Scene Coordinator (SOSC) believed it was likely that water would be encountered during the over-excavation given the nearby surface water. Therefore, it was important to contain and clean up the oil as quickly as possible.

This incident was reported to the National Response Center (NRC) via Report # 1015086. According to the claimant, the RP is currently incarcerated as a result of this incident.

Description of removal actions performed: The claimant, MDNR, hired Sunbelt Environmental Services, Inc. (Sunbelt) for cleanup and removal activities. The fuel clean up began immediately due to concerns of product spreading due to an approaching rain storm. The State On-Scene Coordinator (SOSC) [REDACTED] from MDNR provided oversight of Sunbelt. The 25-gallon steel reinforced plastic tote released roughly 100 gallons of diesel within the dry streambed prior to being uprighted by fire department personnel. Just over 130 gallons of fuel remained in the tote. As the spilled fuel had already soaked into the gravel upon the SOSC’s arrival, Sunbelt and WDNR personnel worked to pump the fuel remaining in the tote to three 55- gallon steel drums. Sunbelt used a backhoe to over-excavate the

¹ See US EPA Region VII POLREP 1, dated 8/20/2012, as well as the coordination email sent by [REDACTED], US EPA Region VII FOSC, dated 6/03/2015.

diesel impacted gravel and soil within the stream bed. The contaminated soil was stockpiled on a nearby concrete paved parking area that serves Monett Recycling. Free product was encountered roughly four feet below the surface, down-gradient of the spill. Petroleum absorbents were used to recover the pooled material. Excavation proceeded until clean soil was reached.

A rain event occurred the morning of June 21, 2012 that produced a localized sheen, which was absorbed by the boom. On June 22, 2012, Sunbelt transported 14.65 tons of diesel fuel contaminated soil and debris to the Springfield Sanitary Landfill for disposal. The fuel recovered from the tote was received by the City of Monett (Recycling Facility) to be used as fuel in the city's tractor. The clean up was completed on June 22, 2012. The excavated area returned to grade using available creek gravel and rock.

The Claim: On December 2, 2015, MDNR presented a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of its uncompensated removal costs in the amount of \$10,131.00 for the services provided from June 20 through June 22, 2012.

The 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 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. FOSC Coordination has been established via US EPA Region VII.² 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1)
4. A Responsible Party has been determined. 33 U.S.C. § 2701(32).

² See US EPA Region VII POLREP 1 for this incident, dated 8/20/2012.

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.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined what removal costs presented were for actions in accordance with the NCP, and if 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 by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable. The Claims Manager validated the costs incurred and determined what of those presented were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

The Claimant, MDNR, provided a well-documented claim to demonstrate that the actions it performed were for OPA-related costs and that the work performed mitigated the effects of the oil that was released into stream bed at the Monett city recycling center. Additionally, the US EPA Region VII confirmed the actions performed for this incident. Upon adjudication of the claim, the NPFC confirmed that the rates charged were billed in accordance with the published rates for both the Claimant and its contractor and as such, the NPFC has determined what of the amount invoiced and paid was reasonable. \$399.00 in claimed Indirect Costs are denied as the A-87 guidelines show that these types of charges apply to contracts/grant programs. The OSLTF is not a grant program, nor was the USCG in contract with the claimant at the time these costs were incurred. Therefore, this does not apply, and these costs are denied. Additionally, \$0.02 in claimed costs are denied due to a math error on the part of the Claimant regarding the contractor invoicing.

On that basis, the Claims Manager hereby determines that the Claimant incurred \$9,731.98 of uncompensated removal costs and that that amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #E12704-0001. The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident from June 20 through June 22, 2012.

C. *Determined Amount:*

The NPFC hereby determines that the OSLTF will pay \$9,731.98 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim E12704-0001. 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. \$399.02 in claimed costs are denied.

AMOUNT: \$9,731.98

Claim Supervisor: [REDACTED]

Date of Supervisor's review: 12/23/20

Supervisor Action: *Approved*

Supervisor's Comments: