

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: E13505-0002
Claimant	: Sunpro, Inc.
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested:	\$1,884,341.92

FACTS:

A. Oil Spill Incident:

On January 31, 2013, approximately 20,000 gallons of crude oil, drilling mud, and brine were discharged from D&L Energy, Inc. portable storage tanks into a storm sewer, which emptied into an unnamed tributary and into the Mahoning River, a navigable water of the United States. The discharge coated the banks, vegetation, overbanks and sediment in the unnamed tributary and created pools of oil on the Mahoning River. D & L Energy, Inc. is the responsible party for this incident. The state Ohio Environmental Protection Agency (OEPA) was notified of the discharge and they investigated the report and further notified the United States Environmental Protection Agency (USEPA) in its capacity as the Federal On-Scene Coordinator (FOSC).¹

B. Description of removal actions performed:

Under an Order by Consent for Compliance under Section 311 of the Clean Water Act issued by the EPA FOSC,² D & L Energy, Inc assumed responsibility for the oil spill and hired the claimant, Sunpro, Inc. (Sunpro) to conduct pollution removal activities and to provide consultation and oversight of the response. Removal activities involved dividing the unnamed tributary into sections and included the power washing of substrates, the excavation of oil contaminated soil ranging from 1' - 4' in depth from one section of the unnamed tributary and the removal of oil from an oil-contaminated stream bed and bank from a different section of the unnamed tributary.³

In addition, residual oil was removed from the storm sewer by pressure washers and vacuums trucks. The storm drain was inspected with a GoPro video camera and video, which was provided to both the EPA FOSC and OEPA for final inspection and approval. Sorbent material was routinely monitored and replaced from the mouth of the storm drain, the unnamed tributary and the Mahoning River. Overflow and underflow dams were installed as temporary containment in the unnamed tributary and a turbidity curtain and 2 sections of hard boom were placed in the Mahoning River to suspend any liquid material being discharged from the sewer drain or unnamed tributary.⁴

¹ See D & L Energy, Inc Emergency Response Activities Final Report dated August 16, 2013.

² See Order by Consent for Compliance under Section 311 of the Clean Water Act issued by the EPA FOSC dated February 26, 2013.

³ See D & L Energy, Inc Emergency Response Activities Final Report dated August 16, 2013.

⁴ Id.

Overall, the cleanup of the sewer drain, unnamed tributary and the Mahoning River, involved the collection and disposal of approximately 5,000 gallons of oil, 195,000 gallons of oily water mix, 629 cubic tons of oil contaminated soil, and 110 cubic tons of oily sediment, all of which were disposed of properly. The cleanup was deemed complete by the EPA FOOSC on March 21, 2013.⁵ Sunpro continued working through March, as it had a significant amount of equipment to remove and decontaminate. It completed on-site work by April 15, 2013.⁶

THE CLAIMANT AND THE CLAIM:

On May 8, 2015, Sunpro, Inc. submitted a removal cost claim associated with the cleanup of the D & L Energy, Inc oil spill to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the amount of \$1,884,341.92, asserting that D & L Energy, Inc. failed to pay them for a portion of their removal costs, legal and administrative fees.

Specifically, Sunpro billed D & L Energy, Inc weekly for all of the costs associated with its removal actions, totaling \$1,972,009.07 over eight (8) invoices. D & L Energy, Inc. paid Sunpro for invoice 23259 in February 2015 (totaling \$1,174.70) and part of invoice 23259 (totaling \$175,000.00) before failing to pay the remaining invoices. D&L Energy, Inc. filed Chapter 11 bankruptcy on April 16, 2013 in the Bankruptcy Court, Northern District of Ohio, Youngstown Division (Case No. 13-40813); the case was converted to a Chapter 7 Bankruptcy on March 25, 2015. On October 11, 2013, Sunpro filed a proof of claim in the bankruptcy proceeding in the amount of \$2,194,020.92. The amount included on-site cleanup work, as well as administrative and legal costs related to the collection of the debt and interest owed it by the RP. On February 27, 2015, Judge [REDACTED] ordered the amount reduced to \$1,879,790.53.⁷

APPLICABLE LAW:

Under the Oil Pollution Act of 1990 (OPA 90), each responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines, is liable for the removal costs and damages that result from such incident. 33 U.S.C. § 2702(a).

"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".

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". 33 USC § 2701(31).

⁵ See EPA POLREP VI (Final) dated December 12, 2013.

⁶ See Email from Mr. [REDACTED] Sunpro, to [REDACTED], NPFC, dated 7/14/2015.

⁷ See Agreed Order Resolving Debtors Objection to the Allowance of Proof of Claim Number 98, dated February 27, 2015.

Removal costs include any 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).

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.

Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party. 33 U.S.C. § 2712(f).

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. Findings of Fact:

1. Mr. [REDACTED], as the EPA Region V Federal On-Scene Coordinator (FOSC) for this incident, oversaw the removal actions and determined that the actions undertaken by Sunpro, Inc. were consistent with the NCP. 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 to “navigable waters.”
3. Sunpro, Inc filed a proof of claim in the D&L Energy, Inc. bankruptcy proceedings, United States Bankruptcy Court, Northern District Ohio, Youngstown Division, dated

October 11, 2013; in the amount of \$2,194,020.92 (Claim No. 98). The Court ordered that the claim shall be allowed as a general unsecured claim in the reduced amount of \$1,888,128.03 on February 27, 2015. The Chapter 11 proceedings were converted to Chapter 7 proceedings in March 2015.

4. The claim was submitted within the six year period of limitations for removal costs claims. 33 U.S.C. §2712(h)(1).
5. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined which of the costs claimed were associated with removal actions in accordance with the NCP and that the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

B. NPFC Analysis:

The 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 National Contingency Plan or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

As noted above D & L Energy, Inc, paid one of the eight invoices (Invoice # 23259) presented by Sunpro, as well as a partial payment for another (Invoice # 22264REV); The NPFC claims manager reviewed the costs paid in these invoices and the claimed costs associated with the seven unpaid invoices to ensure that there would not be duplicate payments made by the Fund.

The NPFC reviewed the Sunpro rate schedules in place at the time the services were provided; the NPFC based its adjudication of these costs on the rate schedules. Based on its review the NPFC determined that most of the claimed costs are reimbursable from the Fund and were actions taken to minimize and mitigate the effects of the incident and that those actions were reasonable and necessary and were directed by the FOSC. 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 and/or contractual agreements in place at the time the services were rendered, unless otherwise indicated below, and are determined by the FOSC to be consistent with the National Contingency Plan (NCP).

General Categories of denied removal costs total \$5,184.78:

1. Lack of documentation to support actual pollution removal activities of Sunpro, Inc./third-party personnel billed as on-scene;
2. Missing or illegible receipts; and
3. Math errors when calculating invoice/claim totals.

The NPFC also denies the legal fees incurred by Sunpro, Inc. in support of its legal interests in the bankruptcy proceedings in the amount of \$78,449.10 and administrative costs totaling

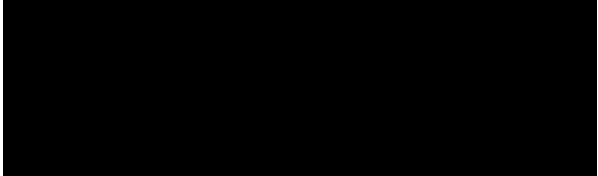

10,058.45 because legal fees and administrative costs are not OPA removal costs that may be paid from the Fund when their primary purpose is something other than removing oil.

The NPFC has not itemized the denied costs in this Claim Summary Determination but has attached the summary of costs spreadsheet created by the NPFC for each invoice. This spreadsheet reflects each item billed, claimed, paid, denied and the reason for each denial.

Based on the foregoing, the NPFC hereby determines that the OSLTF will offer \$1,790,649.59 as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim # E13505-0002. All reimbursable costs are for charges paid 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. \$93,692.33 in claimed costs are denied. Please see the attached summary of costs spreadsheet for a complete description of any and all approved/denied costs.

In order for the Fund to pay these removal costs to Sunpro, the United States Government must acquire all rights of Sunpro by subrogation. Sunpro will execute an Assignment of Claim, authorizing the United States, on behalf of the Coast Guard, to file a Notice of Transfer pursuant to Fed.R. Bankr. Pro. 3001(e) with respect to Claim No. 98 in the above-mentioned D & L Energy bankruptcy proceedings and waiving its right to raise any objection to the transfer of the claim and its right to receive notice pursuant to Fed.R. Bankr. Pro.3001(e).

C. Determined Amount: \$1,790,649.59


Claim Supervisor: 
Date of Supervisor's Review: <i>10/29/15</i>
Supervisor Action: <i>Approved</i>
Supervisor's Comments: