U.S. Department of Homeland Security
United States Coast Guard

Director
National Pollution Funds Center

4200 Wilson Blvd Stop 7100
Arlington VA 20598-7100
Staff Symbol: Ca
Toll-Free: 1-800-280-7118
Fax: 703-872-6113
Email: ARL-PF-NPFCCLAIMSINFO@uscg.mil

5890
May 23, 2014

Sent Via Email:
gmc@chaloslaw.com

Snyder Brothers, Inc., et al.
One Glade Park East
Kittanning, PA 16201

RE: E08314-0001

Dear Mr. Chalos:

The National Pollution Funds Center (NPFC), in accordance with the 33 U.S.C. § 2708(a)(1) and 33 CFR Part 136, determines that Snyer Brothers, Inc. has not established by preponderance of the evidence that it is entitled to a defense to liability under 33 U.S.C. § 2703(a)(3); therefore, the claim is denied for the reasons stated in the enclosed Claim Summary / Determination Form.

This determination is based on an analysis of the information submitted and information independently gathered by the NPFC. Please see the attached determination for further details regarding the rationale for this decision.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,

[redacted]

THOMAS S. MORRISON
Chief, Claims Adjudication Division
National Pollution Funds Center

Enclosures: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION

Claim Number: E08314-0001
Claimant: Snyder Brothers, Inc., et al.
Type of Claimant: Corporate (US)
Type of Claim: Affirmative Defense
Claim Manager: Dawn Unglesbee
Amount Requested: $578,188.47

I. Facts

A. Oil Spill Incident

In the early morning hours of August 17, 2008, a Snyder Brothers employee discovered that crude oil had discharged from above-ground storage tanks at six Snyder Brothers, Inc. (SBI) oil production facilities[1] in McKean County, Pennsylvania. Approximately 410 barrels of crude oil discharged from tanks at three facilities entered creeks and streams that drain into Indian Run, North Fork Chapel, Chapel Bay, and ultimately into the Allegheny River, a navigable water of the United States. [2] Another 675 barrels of crude oil discharged from tanks at three other facilities but there is no evidence in the record that this oil discharged to, or posed a substantial threat of discharge to, a creek or stream or other navigable water.[3] The seventh facility, Victor, was vandalized but there is no evidence in the record that oil discharged from its tanks.

The facilities, each located approximately one to two miles from the others, are located within the Allegheny National Forest, which is managed by the U.S. Department of Agriculture, U.S. Forest Service. SBI leases the land underlying its facilities from private in-holdings within the National Forest System Surface Ownership Program. Pennsylvania Department of Environmental Protection (PA DEP) permits each of the facilities. SBI owns and operates the tanks and is the Oil Pollution Act (OPA) responsible party (RP) for the three facilities that discharged oil to the creeks and streams, tributaries and to the Allegheny River.

B. Claim History

1. Original Claim

Claimants, SBI and its insurer, St. Paul Fire & Marine Insurance Company, presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in August 2010, asserting that the discharges were caused by the sole fault of a third party, that they established entitlement to a complete defense and thus were entitled to reimbursement of SBI's removal costs in the amount

---

[1] The SBI facilities are: 2 West, 2 East, 7 West, 7 East, 3, Venture and Victor. Each facility includes a tank battery, several producing oil wells and between two and five ASTs. According to SBI the total average monthly throughput of crude oil produced and shipped from the facilities for the seven months prior to the incident was approximately 12,229 barrels or 379,000 gallons.

[2] The oil discharged to navigable waters was from 2West, 2 East and 7 West.

[3] Claimants argue on reconsideration that the oil discharged from the Venture facility posed a substantial threat of discharge to Crary Run Creek but there is no evidence in the administrative record to support this allegation.

of $578,188.47.[4] Specifically, they argue that the discharges were caused solely by Christopher and Andrew Horton, two former SBI employees who gained unauthorized access to the facilities. Christopher Horton intentionally damaged SBI equipment, discarded locks and opened valves on 20 above-ground storage tanks (ASTs), thereby releasing the oil in the tanks.[5]

Claimants argued that they took precautions against foreseeable acts or omissions of third parties because SBI had numerous security measures in place to prevent tampering with the ASTs at the facilities. According to the Claimants, each AST had double-valve segregation between the product in storage and the sales line; combination or key-type locks on all tank valves required keys or a combination to open; tank valve handles were removed and required a special wrench to open the valves. Well tenders were provided access and keys or combinations and tools to open the ASTs only at their assigned facility. Claimants argued that some of the facilities were fenced with lighting; some were controlled by locked gates. They argued further that Andrew and Christopher Horton voluntarily left SBI several months prior to the incident; therefore, their acts of vandalism were unforeseen and unforeseeable.

They also argued that they exercised due care with respect to the oil concerned because SBI had Spill Prevention, Control, and Countermeasure (SPCC) plans in place and that "appropriately-sized containment dikes were installed at each facility, which were properly maintained by SBI and periodically inspected by DEP." [6] Finally, Claimants relied on Gatlin Oil Co. v. USA, 169 F. 3d 207 (4th Cir. 1999) whereby the court noted that Gatlin Oil was entitled to a third party defense because an unknown vandal caused the oil spill.

2. *Initial Denial*

The NPFC denied the claim on April 11, 2013 on the grounds that Claimants did not demonstrate entitlement to a third party defense because it did not establish by a preponderance of the evidence that the incident was caused solely by a third party. Specifically, it determined that Claimants did not establish that they exhibited due care with respect to the oil because the berms[7] were inadequate to contain the capacity of the tanks and that SPCC Plans for the facilities, which required appropriate containment or diversionary structures to prevent a discharge or substantial threat of a discharge of oil to navigable waters, were not executed until several months after the incident. Nor did Claimants establish by a preponderance of the evidence that they took precautions against foreseeable acts or omissions because it was unclear from the administrative record what security measures were in place. Claimants provided no photographs or specific information about the facilities' conditions at the time of the incident and did not provide a company policy or information about security measures in place when employees departed SBI employment.

---

[4] The NPFC made no determination as to whether the $578,188.47 in claimed removal costs is for only the three facilities or the six facilities.

[5] Both Christopher and Andrew Horton plead guilty to environmental crimes under Pennsylvania law and were incarcerated and fined.

[6] See George Chalos letter attached to the Claim Form.

[7] In this claim berms are sometimes referred to as secondary containment systems or dikes.

3. *Reconsideration Request*

Claimants timely sought reconsideration on August 7, 2013, again asserting that they were entitled to a sole fault third party defense. The reconsideration request was supported by a Supplemental Declaration of Thomas Defibaugh, a project engineer and supervisor at SBI at the time of the incident and an SBI employee for 18 years.
He reiterated that SBI had adequate security measures in place and that the containment dikes installed at each facility were appropriately sized to contain the capacity of the largest tank in the event of a discharge. He stated that the Pennsylvania Preparedness, Prevention and Contingency (PPC) Plans were in place at the time of the incident for Lots 2, 7, and Venture. He also stated that although the SBI SPCC plans were not memorialized in writing at the time of the incident, the plans depicted the secondary containment systems that were in place at the time of the incident.

Attached to his Declaration are Exhibits (A) – (J): (A) photo of a ball locking valve; (B) a CD with pictures of the SBI facilities taken on August 20, 2008 (three days after the incident); (C) a CD with photos taken at facilities 2 East, 2 West and 7 West on September 11, 2008 (three weeks after the incident); (D), (E) and (F) the PPC Plans in place at the time of the incident for Lots 2, 7 and Venture; and (G), (H, (I) and (J) site maps and Emergency Containment Calculations as set forth in SBI's SPCC plans for 2 West, 2 East, 7 West and Venture.

II. <u>Applicable Law</u>

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 of the United States is liable for removal costs or damages that result from such incident. 33 U.S.C. § 2702(a).

"Facility" means "any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil." 33 U.S.C. §2701(9).

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund. 33 U.S.C. § 2713(e). The Claims Regulations are found at 33 CFR Part 136.

The Oil Spill Liability Trust Fund, which is administered by the National Pollution Funds Center, shall be available to the President for –...

> (4) the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. § 2712(a)(4).

A responsible party is not liable for removal costs or damages under section 2702 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by --...

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party who act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual relationship arises in connection with carriage by a common carrier by rail) if the responsible party establishes by a preponderance of the evidence that the responsible party

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or

(4) any combination of paragraphs (1), (2) and (3).

33 U.S.C. § 2703(a)(3)(A) and (B).

The responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title only if the responsible party demonstrates that –

(1) the responsible party is entitled to a defense to liability under section 2703 of this title; or

(2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

33 U.S.C. § 2708(a)(1).

The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a).

The Director, NPFC, upon written request of the claimant or person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of denial by the claimant, whichever date is earlier. 33 CFR 136.115(d).

III. NPFC Analysis on Reconsideration

The NPFC, upon reconsideration, reviews the claim *de novo;* the initial determination dated April 11, 2013 is incorporated into this determination on reconsideration. While SBI has seven facilities in this area of the Allegheny National Forest, only three (2 East, 2 West and 7 West) discharged oil to navigable waters and are addressed in this claim. As noted above, Claimants on reconsideration argue that the discharge from tanks at the Venture facility posed a substantial threat of discharge of oil to Crary Run Creek but there is no evidence in the record to support this allegation.

Claimants maintain that SBI is not liable for the removal costs associated with the incident because they established by a preponderance of the evidence that they established entitlement to a sole fault third party, i.e., the incident was caused solely by Andrew and Christopher Horton;

they exercised due care with respect to the oil concerned and took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions. For the reasons set forth below, Claimants have not established entitlement to a sole fault third party defense.

Claimants' argument that they took precautions against foreseeable acts or omissions of a third party fails for several reasons. First, they assert that the discharge was caused solely by Andrew and Christopher Horton because they had security measures in place to prevent the unauthorized tampering with tanks at their facilities. They argue that the valves on their tanks could only be opened with a key or a combination and tank handles were removed and could only be opened with a special tool. Christopher Horton, in testimony at his Guilty Plea dated May 4, 2009, stated that at least one valve at one well was unlocked as he began opening valves at each facility. The administrative record evidences that Christopher Horton opened the valves on all 20 tanks at the six facilities that discharged oil. There is no evidence in the record as to whether the valves were locked, unlocked or broken at the time of the incident; therefore, the NPFC cannot determine if the locks provided security against unauthorized tampering or vandalism.

Additionally, Christopher Horton was able to open the valves even though the tank handles had been removed and supposedly required a "special tool" to open the valves. Mr. Defibaugh, in his Supplemental Declaration, concedes that the "special tool" needed to turn the handles and open the valves is a 15-inch wrench found in hardware stores but asserts that such a wrench would not typically be used by a "layperson." Christopher Horton, as a former employee at SBI, was not a typical "layperson" but a person familiar with this type of wrench needed to turn the valve. Thus the special tool is not a security measure that would necessarily prevent a former employee from opening the valves.

Second, Claimants assert that the security at some of their facilities, including fencing, lighting and locked gates, were precautionary measures taken against foreseeable acts or omissions of third parties, in this case, against vandals. The NPFC initially denied the claim because there was no evidence in the administrative record that the facilities were fenced or had lighting. Despite Claimants' allegation that the facilities were fenced, the PPC Plans for 2 East, 2 West and 7 West state that "[T]he facilities are in fairly isolated areas so they are not fenced…"[8] Further, Claimants state in the SPCC Plans that lighting was not required because all oil transferred to trucks was conducted during daylight hours. The PPC and SPCC Plans are convincing evidence that the facilities did not provide fencing or lighting as security measures.

Third, Claimants seem to argue that the remoteness of the facilities within the Allegheny National Forest makes them secure from vandals. However, in the case of employees or former employees who know the location of the facilities, remoteness as its own security is not convincing. Further, although the facilities are in the Allegheny National Forest, they are not particularly remote. Although Mr. Chalos asserts that the facilities are located far from roads within the Forest, maps, pictures and descriptions reflect that the three facilities are located at, or merely feet from, the roadside. For instance, 2 West is located roadside at the intersection of Forest Roads (FR) 267 and FR 267C; 2 East is located on the east side of State Road (SR) 321

[8] Claimants argue that they exercised due care by having the PPC Plans in place at the time of the incident. The PPC Plans, which require information about hazardous chemicals located on the facility and are required as part of the NPDES permitting process, do not require the implementation of security measures.

approximately two miles south of the intersection of SR 321 and SR 59; 7 West is located on the west side of SR 321, approximately 1.5 miles north of 2 East.[9]

Finally, Bryan Snyder, vice president of Snyder Brothers, Inc., stated in his Declaration dated August 18, 2010, that the incident was "completely unforeseen and unforeseeable" and that there were never any threats or conduct by either Andrew or Christopher that would reasonably lead him or anyone to believe they would vandalize the facilities. This is refuted by other evidence in the record. In an Affidavit of Probable Cause dated August 18, 2008 Bryan Snyder advised Trooper Craig Erickson that "recently (within the last year) and Andy Horton had left his job at Snyder's. He indicted (sic) that Horton was unhappy with the company and left over a job disagreement issue. He said that Andy Horton sent him numerous "strange" e-mails. Further he believed that Andy Horton had reported him to OSHA and had indicated that Snyder hadn't heard the last from him." [10] Thus, evidence in the record refutes Claimants' assertion that there had never been questionable conduct by the Hortons and that the Horton vandalism was completely unforeseen and unforeseeable.

Based on the evidence in the administrative record Claimants have not established by a preponderance of the evidence that they took precautions against foreseeable acts or omissions of such third parties.

The second requirement for establishing entitlement to a third party defense is establishing by a preponderance of the evidence that the responsible party exercised due care with respect to the oil concerned and in light of all relevant facts and circumstances. In this case Claimants have not provided evidence that they have done so. The SBI facilities are in the Allegheny National Forest; they are located in heavily forested areas with wetlands and near streams and creeks. The discharged oil migrated from the tanks and impacted six miles of streams, which are high quality streams with naturally-producing trout populations.

The NPFC initially denied the claim in part because Claimants did not establish that the facilities had adequate berms[11]to hold the capacity of the tanks.[12] While Claimants argued that "adequately-sized containment dikes were installed at each facility, Mr. Vince Zenone, the Federal On Scene Coordinator (FOSC) for the incident, visited the facilities on August 18, 2008 (one day after the incident) and noted that there was no berm at 2 East and the berms at 2 West and 7 West were degraded. Thus, oil that discharged from the tanks at these three facilities did not have adequate berms that may have prevented the oil from reaching the creeks and ultimately the Allegheny River.

---

[9] While these roads are inside the Allegheny National Forest they are public roads and are not restricted.
[10] SNYDER 004778

11Berms or secondary containment systems are put in place to prevent oil that may discharge from a tank or facility from migrating toward or into navigable waters.
12. The Claimants argue that the NPFC cited the wrong standard for the capacity of berms, i.e., a berm must be capable of containing the contents of the largest tank at the facility, rather than the contents of the tanks. The NPFC acknowledges that this statement was inartfully worded; however, that statement does not affect the determination to deny the claim because the administrative record evidences that the berms were either nonexistent (at 2 East) or severely degraded (2 West and 7 West) and were apparently incapable of holding the contents of the largest tank.

On reconsideration Mr. Defibaugh concedes that the SPCC plans were not memorialized in writing at the time of the incident but that the SPCC plans prepared in 2008 "depicted the secondary systems that were **already** in place at the time the spill occurred." [13] This statement conflicts with other evidence he provided. His Supplemental Declaration included attachments (G, H, and I), which are maps and emergency containment calculations that state the "Proposed Total Dike Capacity" for 2 West, 2 East and 7 West. However, other evidence provided by Mr. Defibaugh refutes that adequate secondary systems were in fact in place at the time of the incident. He submitted photographs of the three facilities taken on August 20, 2008, three days after the incident.[14] [15] There appear to be remnants of containment berms at 2 West and 7 West; they may have been constructed at some time in the past but they were not maintained and certainly appeared to be inadequate on August 17, 2008 to hold the oil discharged from the tanks at 2 West[16], 2 East and 7 West. Importantly, Attachment B to Mr. Defibaugh's Supplemental Declaration is a CD containing photographs taken on September 11, 2008 (three weeks after the incident)[17] reflecting new and larger containment dikes under construction at 2 East and 7West. At this time there is no evidence of a containment dike at 2 West.[18] [19]

Claimants submitted the SPCC plans, which reflect that they were executed by Bryan Snyder on February 13, 2009 and by Michael Filmyer on February 6, 2009, months after the incident.[20] With or without SPCC plans in effect at the time of the incident, there is no evidence in the record that berms in place on August 17, 2008 would have contained the discharged oil and prevented it from entering the creeks and ultimately the Allegheny River.

Finally, Claimants argue that they may rely on Gatlin Oil v. USA to establish entitlement to a third party defense because the Fourth Circuit noted in that case that Gatlin Oil was entitled to a complete defense because an unknown vandal caused the spill. Claimants note that the Fourth Circuit did not address any precautions taken in its opinion. The facts surrounding the security precautions taken by Gatlin Oil were discussed in the United States (Appellee) Brief to the Fourth Circuit. 1998 WL 34097532 (C.A. 4). "To enter the facility and jimmy the tank valves, the perpetrator, according to police, has to be an individual in good physical condition in order to scale the fence that surrounds the facility....Gatlin also showed that it had heightened security measures at the time of the incident to thwart individuals from entering the facility. Gatlin's security measures met Federal regulatory requirements and industry standards ... Gatlin was able to show that it had exercised due care in light of all the circumstances of the case." Id. at *8. [21]

---

[13] Defibaugh Supplemental Declaration, paragraph 11.

[14] Exhibit B to the Defibaugh Supplemental Declaration; some of the same photographs were provided by Mr. Zenone.

[15] He stated in his Declaration that SBI was unable to locate photographs of the facilities taken prior to the incident.

[16] According to Mr. Zenone's observation and review of the photographs, oil had discharged from the tanks at 2 West prior to the August 17, 2008 incident.

[17] Exhibit C to the Defibaugh Supplemental Declaration.

[18] Exhibits (G), (H) and (I) are Emergency Containment Calculations for 2 West, 2 East and 7 West respectively; however they do not establish that the containment dikes were in place because they only calculate the dike capacity and freeboard based on the average length, width and height of the area of the dike.

[19] Curiously, Claimants admit that the oil discharged from Venture did not reach navigable waters because there was effective secondary containment around the tanks at that facility.

[20] Binder 2 of 2 Claimant's Supplemental Submission, January 7, 2011.

[21] The Gatlin Oil facility was a fuel storage facility containing two 5,000-gallon tanks of gasoline and distillate products and two 5,000-gallon tanks of motor oil.

Claimants' reliance on Gatlin Oil is inapposite because the Gatlin Oil facility was equipped with high fences and lighting and met federal standards for security. As discussed above SBI had insufficient security measures in place against vandals.

The claim is denied on reconsideration.

Claim Supervisor: ***Thomas Morrison*** [redacted]

Date of Supervisor's review: 5/23/2014

Supervisor Action: Denial Approved.

Supervisor's Comments: