

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/26/2010
Claim Number	: 908101-001
Claimant	: Federal Mutual Insurance and Perry Oil
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Claim Manager	: ██████████
Amount Requested	: \$290,418.26

### **THE CLAIMANT**

The claimants are Perry Oil Company and Federated Mutual Insurance Company (Perry/Federated) The claim has been submitted by Concord Environmental Services, Concord, on behalf of Perry and Federated, its insurance company. <sup>1</sup> Concord Environmental has been authorized to submit the claim on via correspondence from ██████████ of Federated Mutual.<sup>2</sup>

### **THE CLAIM**

This claim was submitted to the Oil Spill Liability Trust Fund (OSLTF) to recover uncompensated removal costs in the amount of \$290,418.26 expended by Federated on behalf of Perry for costs incurred as the result of a traffic accident where a tanker truck owned by Perry Oil discharged oil into the navigable waters of the United States. The claimants Perry Oil/Federated are asserting a defense to liability pursuant to 33 U.S.C. 2703, asserting that the discharge of oil occurred as the result of the sole fault of a third party and therefore the claimants are not liable for the costs associated with the removal of the oil. The claim was received at the NPFC on or about 4 August 2008.

Although Perry Oil is the Responsible Party under the provisions of OPA, it is asserting that it is entitled to recover all costs associated with the removal aspects of this incident because the event that caused the oil pollution incident was caused solely by the actions of a third party. The claims regulations that govern this process provide that it is the claimant's burden to prove all elements of each claim by a preponderance of the evidence.<sup>3</sup> In order to prevail in its assertion of a defense to liability, the claimants here must prove by a preponderance of the evidence that the incident was solely caused by the actions of a third party; that it exercised due care with respect to the oil and that it took all reasonable steps to prevent all foreseeable acts to prevent the event from occurring.<sup>4</sup>

The underlying claim is for uncompensated removal cost claims in the amount of \$290,418.26. This memorandum will address both the defense to liability and the removal cost claim.

### **THE INCIDENT**

The incident that is the subject of this claim was a traffic accident that occurred on or about 30 March 2006 on the Hal Rodgers Parkway in London, Kentucky. The accident involved a tanker truck owned by Perry and driven by its employee, ██████████ and a personal vehicle, SUV operated by a private individual, Ms. ██████████. At the time of the accident, the tanker truck was traveling in the

<sup>1</sup> Claimant's submission letter of 31 July 2008 from Concord Environmental Services to National Pollution Funds Center

<sup>2</sup> Correspondence from ██████████ of Federated Mutual dated 16 September 2008

<sup>3</sup> 33 CFR 136.105

<sup>4</sup> 33 U.S.C 2703

eastbound lanes of the Parkway. The SUV was also traveling the eastbound lanes. The accident occurred when the tanker truck attempted to pass the SUV and the SUV made an abrupt left turn in front of the tanker truck. The tanker attempted to stop in order to avoid hitting the SUV but could not do so, and collided with it. As a result of the accident, the tanker truck was ruptured and spilled approximately 7,000 gallons of high sulfur, off-road, No. 2 fuel oil. The fuel flowed approximately 75 feet from the point of the accident and into a flume that conveyed the fuel approximately 300 feet into Sally's Branch, into Lick Creek, to Little Laurel River, to Laurel River, and ultimately to Cumberland River a navigable waterway of the United States.<sup>5</sup> The FOOSC was EPA Region 4 who responded to the incident. Some of the product was removed with tank trucks, some was removed from the soil and the rest evaporated from the water. The incident was reported to the NRC and assigned NRC Number 792471. According to the evidence submitted by the claimant, the third party, driver of the SUV was cited by the police for the traffic accident, specifically for failure to control a vehicle. The driver of the tanker trucker owned by Perry Oil was not issued a citation for violation of any traffic regulation.<sup>6</sup>

### **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).

#### 2703. Defenses to liability

##### (a) Complete defenses

A responsible party is not liable for removal costs or damages under section [2702](#) of this title 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 whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement 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)

"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 NPFCA, 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>5</sup> Executive Summary, page 1 (Claimant's Submission) & Appendix G

<sup>6</sup> Kentucky Uniform Police Traffic Collision Report

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].

### **ANALYSIS: ENTITLEMENT TO DEFENSE TO LIABILITY**

As previously stated, the provisions of OPA generally provide that a Responsible Party is liable for all costs and damages associated with an oil pollution incident. An exception to that is if a Responsible Party can establish by a preponderance of the evidence that the incident was caused solely by the actions of a third party. 33 U.S.C. 2703

Perry Oil is the Responsible Party because the oil discharged from its tank truck into the waters of Sally’s Branch, a tributary of the Cumberland River a navigable water of the United States. However, in this claim, the claimant asserts that because the discharge occurred as the result of a traffic accident that was caused by a third party, [REDACTED], therefore, it should not be liable for the costs incurred and damages that resulted from the incident.

The NPFC has reviewed and analyzed the evidence submitted by the claimant and has determined that the evidence supports a decision that claimant is entitled to a defense to liability.

#### *Claimant Exercised Due Care*

The evidence submitted supports a finding that the claimant exercised due care with respect to the oil. Claimant submitted a traffic report as part of the evidence to support its assertion of a defense to liability. This report indicates that the traffic accident was caused by the actions of a Ms. [REDACTED], the driver

of a personal SUV. According to the traffic accident report the driver of the SUV was charged with the following offenses: failure to yield the right of way, inattention and failure to maintain proper control.<sup>7</sup>

Claimant's submission includes a list of witnesses to the accident: [REDACTED] and [REDACTED]. Only Mr. [REDACTED] statement is included in the submission because according to the submission, Ms. [REDACTED] did not return calls for an interview.

Mr. [REDACTED] statement was in-line with the police accident report that the SUV driven by Ms. [REDACTED] was at-fault in the accident. Specifically, he stated that following: that he was traveling in an eastbound direction directly behind the tanker on the Hal Rodgers Parkway; that the weather was clear and the road conditions were dry; he was behind the tanker truck immediately before the accident; he estimates the speed at 55 mph; there were no vehicles approaching from the other direction; he could not see around the tanker to see if other vehicles were approaching from the other direction. At the time of the accident the tanker truck had its left turn signal on to enter the westbound lane. It was at that time that Mr. [REDACTED] noticed the S10 Blazer traveling eastbound. The tanker completely entered the westbound lane as it was attempting to pass the Blazer. As it was parallel with the Blazer, the Blazer began to make a left turn. The tanker applied its brakes but was unable to avoid striking the Blazer midway on the driver's side. He describes the Blazer's actions as an "abrupt left turn" as the tanker was attempting to pass. Mr. [REDACTED] stated that he was unclear as to where the Blazer was attempting to turn as there were no drives or roads on the left side of the roadway. Finally, he states that when the impact occurred the tanker overturned onto the driver's side and came to a final rest on the shoulder of westbound traffic. The Blazer was on its wheels at its final rest. Mr. [REDACTED] stated that in his opinion the driver of the Blazer was at fault for the accident.<sup>8</sup>

49 CFR 396.3 Requires "that every motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control."<sup>9</sup> The claimant submitted records for repair and maintenance records for the truck for the years 2000, 2001, 2002, 2003, 2004, 2005 & 2006. Claimant submitted the same type of records for the tanker for the years 1999, 2000, 2001, 2002, 2003, 2004, 2005 & 2006. Claimant submitted tank truck inspection reports for the following: May 1997, May 1998, May 2001, April 2002, January 2003, April 2003, April 2004, January 2005, April 2005, March 2006, May 2007 and December 2007. The NPFC has determined that the claimant complied with the requirement of the Federal Regulations.

Mr. [REDACTED] [REDACTED] was the driver of the tanker truck was an employee of Perry Oil and was licensed to operate a tanker truck<sup>10</sup> According to the information provided by the claimant in support of this claim, [REDACTED] [REDACTED] was licensed to operate this kind of vehicle per a CDL issued by the State of Kentucky, at the time of the accident.<sup>11</sup> Mr. Joseph was born on 13 July 1959. He was an employee of Perry Oil from October 2003 through May 2006. According to his employment records, Mr. [REDACTED] has over twenty (20) years of experience operating tanker and tanker trailers, specifically hauling coal. Over his career he had completed training modules to include the following: Driving Tankers, Preventing Rollovers, Hazards of Tailgating, Traffic Violations & CDL Disqualifications, Drugs and Alcohol in the Workplace, The Alert Driver – Guide to Sleep – Fatigue & Rest, Hours of Service, Truck Driver and Cargo Security, and Homeland Security & Hazmat 126F.

According to the Kentucky State Police (KSP), Mr. [REDACTED] driving record includes no suspensions and was in good standing. Finally, there was no evidence presented that Mr. [REDACTED] had any contractual relationship with the driver of the SUV, Ms. [REDACTED] [REDACTED]

#### *The Claimant took Precautions against Foreseeable Acts*

<sup>7</sup> Kentucky Uniform Police Traffic Collision Report #70304312

<sup>8</sup> Statement of [REDACTED] [REDACTED]

<sup>9</sup> 49 CFR 396.3

<sup>10</sup> Copy of [REDACTED] [REDACTED] driving record No. J95029331

The evidence submitted including police reports and witness statements show that the driver of the tanker truck was licensed and was driving within the established speed limits. The evidence listed above with regards to the maintenance, repair and inspection records supports a finding that the claimant took all reasonable precautions to prevent foreseeable acts. The vehicle was in good repair and maintained properly and in accordance with Federal and industry standards. The driver, Mr. [REDACTED] was licensed at the time of the incident. Although no drug or alcohol tests were administered, there was no evidence of drug or alcohol use on the part of Mr. [REDACTED]. The evidence shows that the vehicle was being properly operated based on the conditions at the time of the accident.

There is nothing in the claims submission or any other evidence to indicate that the driver of the SUV/Blazer was an employee of or in any contractual relationship with the claimants, Perry Oil/Federated Mutual. Nothing in either the witness statements or the accident reports indicate that the Ms. [REDACTED] had any type of relationship with the claimants.

### **Pending Litigation:**

On or about 26 March 2007 the claimant initiated litigation against the [REDACTED] [REDACTED] for damages to the tanker truck, to the trailer, for loss of fuel, for the recovery of workmen's compensation costs and for payments of deductibles made pursuant to the insurance policy in the amount of \$85,566.49. (Perry Oil Company, Inc.(Plaintiffs) and Federated Mutual Insurance Company v. [REDACTED] [REDACTED] (Defendant), Case No. 07-CI-00405, Laurel Circuit Court, Division II, Twenty-Seventh Judicial Circuit, Commonwealth of Kentucky)<sup>12</sup> The NPFC is in possession of this complaint and other relevant pleadings in this litigation. A review of the complaint has determined that the costs that are the subject of that lawsuit are not the OPA costs that are the subject of the underlying claim to this defense to liability claim.

The current status of the litigation is as follows: On or about 14 January 2009 an Agreed Order of Dismissal With Prejudice was entered on behalf of the intervening plaintiff, [REDACTED] [REDACTED] because he settled his claim against the defendant, [REDACTED] [REDACTED]. On or about 4 February 2009 an Agreed Order of Partial Dismissal With Prejudice was entered on behalf of Perry Oil/Federated Mutual because they settled their claims for reimbursement of workmen's compensation claim on behalf of [REDACTED] [REDACTED] against the defendant, [REDACTED] [REDACTED].<sup>13</sup>

The NPFC also obtained copies of the underlying settlement agreement entered into by Perry Oil/Federated Mutual and [REDACTED] [REDACTED]. This agreement releases [REDACTED] [REDACTED] from only workmen's compensation benefits and specifically excludes claims against property or environmental clean-up expenses. This settlement release preserves the NPFC's rights to pursue [REDACTED] [REDACTED] for OPA costs.<sup>14</sup>

The records submitted indicate that the status of this current litigation is not a bar to the NPFC reviewing this claim or making a determination on either the assertion of an affirmative defense or on the underlying removal cost claim.

### **CONCLUSION:**

The NPFC has reviewed all of the documentation submitted in support of this claim and has determined that the claimant has met its burden of proof to have its request for defense to liability granted. The claimant has provided evidence to support that it exercised due care with respect to the oil and took precautions against all foreseeable acts. There is no evidence that the driver of the tanker truck, [REDACTED] [REDACTED] contributed in any way to the incident, nor was he cited for any traffic violations. Finally, there is no evidence that he was in a contractual relationship with the other driver, [REDACTED] [REDACTED].

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<sup>12</sup> Complaint & Jury Demand, Case no. 07-CI-00405

<sup>13</sup> Orders dated 14 January 2009 & 4 February 2009 in Civil Action 07-CI-00405

<sup>14</sup> Partial Release and Settlement Agreement signed 30 October 2008

The NPFC therefore recommends granting claimant's request for its defense to liability, as requested. Having granted this defense, the underlying claim for removal costs will be reviewed and adjudicated in the next section of this memorandum.

## **CLAIM FOR UNCOMPENSATED REMOVAL COSTS**

### **A. Analysis:**

Claimant in its claims submission asserted it incurred costs totaling \$290,418.86. Invoices for these costs were provided in support of these costs. 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.

In the course of adjudicating this claim two issues were raised as areas of concern: 1. whether removal of all of the oil from all compartments of the truck was necessary and 2.) whether the landfill where the contaminated soil was disposed was licensed to accept this solid waste. Both issues will be addressed.

During response actions the oil was removed from the all compartments of the truck. The tanker truck was a four compartment vehicle, with a capacity of 8,750 gallons. At the time of the accident 7007 gallons of No. 2 fuel oil were on board. There were areas where the tanker skin was punctured as follows: the front driver's side, the top side near the rear man-way, and the rear driver's side corner. Based on the description of the tanker and of the damage to it was necessary for all of the fuel to be removed. The removal was necessary in order to avoid additional discharge of oil and to ensure the safe movement of the badly damaged tanker.<sup>15</sup>

The landfill where the soil was disposed was properly licensed by the State of Kentucky to accept contaminated soil as solid waste.<sup>16</sup>

During the adjudication process, the Claims Manager worked with the claimant and the EPA FOSC in order to discuss the actions performed since the EPA FOSC actually went to the spill location. The EPA FOSC spoke with [REDACTED] [REDACTED] of the NPFC Claims Division on a couple of occasions and advised that he concurs that the scope of the response actions associated with the oil spill, was in fact necessary to mitigate the ongoing spill and substantial threat of contamination and discharge to the nearby waterway.

The Claims Manager and the EPA FOSC have determined that the response actions were reasonable and necessary to continue mitigating the substantial threat. The Claimant has substantiated the need for the ongoing response action by way of sample analysis which demonstrates the continuing presence of oil at an actionable level.

On the basis stated above, the Claims Manager hereby determines that the claimant did in fact incur \$274,384.20 of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim number 908101-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of 30 March 2006 – 15

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<sup>15</sup> E-mails dated 16 April 2009 and 17 April 2009 between [REDACTED] [REDACTED] National Pollution Funds Center and [REDACTED] [REDACTED] Concord Environmental

<sup>16</sup> Correspondence from Kentucky Department for Environmental Protection, dated 31 July 2008 and enclosed permit of the same date

October 2006. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

**B. Determined Amount:**

The NPFC hereby determines that the OSLTF will pay \$ 274,384.20 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim number 908101-001. Although the claimant's submission indicates a sum certain of \$290,418.26, after a review of the documentation the NPFC determined that documentation had been submitted to support only \$274,384.20. 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. Of those costs presented, the NPFC has determined that claimant is entitled to compensation in the amount of \$274,384.20.

**AMOUNT:** \$274,384.20

**RECOMMENDATION:** I recommend making the claimant a settlement offer in the amount of \$274,384.20.

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: