

## CLAIM SUMMARY / DETERMINATION FORM

Date : 10/4/2010  
Claim Number : 910065-001  
Claimant : State of Wisconsin  
Type of Claimant : State  
Type of Claim : Removal Costs  
Claim Manager : [REDACTED]  
Amount Requested : \$55,945.99

### **FACTS:**

- 1. Oil Spill Incident:** On June 29, 2009, an estimated 180 gallons of #1 fuel oil was discharged at 3444 South County Road E, Parkland, Wisconsin, the residence of [REDACTED]. The discharge occurred when the 265 gallon above ground storage tank (AST) tipped over due to unstable foundation footing. The discharge spilled the oil into the sump pump in the crawl space under the residence, discharging it into the ditch that leads to a surface water tributary of Lake Superior. Lake Superior is a navigable waterway of the United States. Initially, the Wisconsin Department of Natural Resources (WDNR) had received an anonymous complaint on June 23, 2009 informing that a discharge had been observed in the ditch in front of the residence. The WDNR inspected the area on June 24, 2009, and performed a second inspection of the area on July 1, 2009 before determining that the discharge resulted from the AST spill. The State On-Scene Coordinator (SOSC), [REDACTED] of the WDNR, contacted Federal On-Scene Coordinator (FOSC), [REDACTED] of the United States Environmental Protection Agency Region 5, to discuss the incident and the response plan. The FOSC gave support for the response plan. Environmental Troubleshooters, Incorporated (ET) were contacted for emergency response clean-up.
- 2. Description of Removal Activities for this Claimant:** ET was hired and began their cleanup efforts on July 6, 2009 by assessing the spill and performed an on-site utility review with the Douglas County Highway Department to obtain a permit to excavate the area. ET removed the AST for excavation of impacted soil behind the residence and surrounding areas. Upon completion of the excavation, the impacted soils (topsoil, sand and clay) were transported to Lamb's LLC in Schroeder, Minnesota for bio-pile compost treatment. This portion of the clean-up occurred from July 7, 2009 to July 10, 2009. The clean-up efforts resumed on July 13, 2009 with the preparation for the ditch excavation and continued through July 14, 2009. On the night of July 14, 2009, 1.7 inches of rain fell and a significant sheen was observed on the ditch water the next day. OSI Environmental Incorporated (OSI) of Eveleth, Minnesota, was hired to pump and treat 2,600 gallons of water from the ditch. On July 16, 2009 and July 17, 2009, ET backfilled the ditch and the area behind the residence. Site restoration was performed from July 22, 2009 to August 11, 2009. During that period, OSI pumped 100 gallons of fuel impacted water from the ditch.
- 3. The Claim:** On January 27, 2010, the Claimant submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$55,945.99. WDNR is claiming expenses of \$55,945.99 for the services provided by ET. The claim consists of the WDNR spill report, area maps, ET invoice, invoices from subcontractors, incident report, dailies, a rate schedule and a

Federal On-Scene Coordinator memorandum. Per the Claimant, the responsible party (RP), Mr. [REDACTED] has been contacted. However, the Claimant noted that the RP is hospitalized with Alzheimer's disease and is not capable of understanding the spill event. [REDACTED], the RP's son, is documented in the claim submission as his point of contact.

#### **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. The FOSC coordination was provided by Ms. [REDACTED] of the United States Environmental Protection Agency- Region 5 on 12/30/09.
2. The incident involved a 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 on time.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the removal costs presented were for actions in accordance with the NCP and that costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 as set forth below.

#### **B. Analysis:**

The NPFC Claims Manager has 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, and (4) whether the costs were adequately documented and reasonable.

Based on that review, the Claims Manager hereby determines that there are discrepancies with regards to the reimbursement requested and the cost documentation provided by the claimant. There were many billing inconsistencies between the ET daily worksheets and the ET invoice.<sup>1</sup>

For services performed by ET on July 6, 2009, the Claimant requested to be reimbursed \$495.30. The ET invoice billed for 2.75 hours of work performed by Scott Peterson as the Project Manager, at the pay rate of \$100.00 per hour for a total of \$275.00. However,

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<sup>1</sup> See attached spreadsheet.

according to the daily worksheet, Mr. [REDACTED] was the Emergency Response Supervisor, listed on the rate schedule at the \$90.00 per hour billing rate. The Claimant will be reimbursed at the \$90.00 per hour rate, for a total of \$247.50. Per Diem was not documented on the daily worksheet, but was listed on the invoice as "per diem 4 crew" for \$44.65. Mr. [REDACTED] is the only ET personnel documented as working at the incident site for that day, and per diem is not listed on the ET rate schedule provided by the Claimant. The reimbursement for \$44.65 for per diem is denied. Therefore, the NPFC has adjusted the amount payable for July 6, 2009 to \$423.15, for a total denied amount of \$72.15.

The Claimant requested to be reimbursed \$1,050.75 for services performed by ET on July 7, 2009. The ET invoice billed for 2.5 hours for the "utility meet" only by [REDACTED] at the Project Manager rate of \$100.00 per hour, for a total of \$250.00. However, the daily worksheet billed for 3.0 hours for Mr. [REDACTED] as the Emergency Response Supervisor for the "utility meet/permit" for that day. The Emergency Response Supervisor rate is \$90.00 per hour. The Claimant will be reimbursed for the 2.5 hours noted on the invoice at the \$90.00 per hour rate, for a total of \$225.00. Per Diem was documented on the daily worksheet as "per diem - 4 people - 1 day" without a specified dollar amount. This was not on the invoice for July 7, 2006. Mr. [REDACTED] and Mr. [REDACTED] were the only two ET personnel documented as working at the incident site for that day, on both the invoice and the daily worksheet. Per Diem is not listed on the ET rate schedule provided by the Claimant. The request for reimbursement of \$30.00 for one Douglas County Highway Department permit is denied for lack of cost documentation. Therefore, the NPFC has adjusted the amount payable for July 7, 2009 to \$995.75, for a total denied amount of \$55.00.

For services performed by ET on July 8, 2009, the Claimant requested to be reimbursed \$2,833.77. The ET invoice billed for 3.0 hours for "Project Mgmt. & Admin." only by [REDACTED] at the Project Manager rate of \$100.00 per hour for a total of \$300.00. However, the daily worksheet billed 8.0 hours for Mr. [REDACTED] as the Emergency Response Supervisor for the "Project Management, Mob Equipment" for that day. The latter task was not on the invoice. The Emergency Response Supervisor rate is \$90.00 per hour. The Claimant will be reimbursed for the 3.0 hours noted on the invoice at the \$90.00 per hour rate, for a total of \$270.00. The "mobilization of backhoe" for \$400.00 was documented on the invoice, but not on the rate schedule and therefore, the \$400.00 will not be reimbursed. Per Diem was documented on the invoice as "per diem 4 crew" for \$33.42, and on the daily worksheet as "per diem - 4 people - 1 day" without a specified dollar amount. However, Mr. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] were the only three ET personnel documented as working at the incident site for that day on both the invoice and the daily worksheet. Per Diem is not listed on the ET rate schedule provided by the Claimant. The reimbursement of \$33.42 is denied. Therefore, the NPFC has adjusted the amount payable for July 8, 2009 to \$2,370.35, for a total denied amount of \$463.42.

The Claimant requested to be reimbursed \$3,135.65 for services performed by ET on July 9, 2009. The ET invoice billed for 3.0 hours for "Project Mgmt. & Admin." by [REDACTED] at the Project Manager rate of \$100.00 per hour, for a total of \$300.00. However, the daily worksheet billed for 3.0 hours for Mr. [REDACTED] as the Emergency Response Supervisor for that same task. The Emergency Response Supervisor rate is \$90.00 per hour. The Claimant will be reimbursed for the 3.0 hours noted on the invoice at the \$90.00 per hour rate, for a total of \$270.00. [REDACTED] soil disposal task was billed on the invoice at the Equipment Operator rate of \$70.00 per hour for 11.5 hours,

for a total of \$805.00, but the daily worksheet documented 11.0 hours for the task. Therefore, the Claimant will be reimbursed for 11.0 hours of work at the \$70.00 per rate, for a total of \$770.00. Therefore, the NPFC has adjusted the amount payable for July 9, 2009 to \$3,070.65, for a total denied amount of \$65.00.

For the work done by ET on July 13, 2009, the Claimant requested to be reimbursed \$6,323.87. The reimbursement for the skid steer mobilization fee of \$250.00 is denied, as it was not on the rate schedule. And reimbursement for the subcontracted work of transporting soils by three trucks for 25.5 hours to Lambs, LLC for \$2,295.00 is denied, due to lack of cost documentation. The per diem for Joe Fye in the amount of \$8.97 is again denied because it is not listed on the ET rate schedule provided by the Claimant. Therefore, the NPFC has adjusted the amount payable for July 13, 2009 to \$3,769.90, for a total denied amount of \$2,554.07.

The Claimant requested to be reimbursed \$6,510.35 for services performed by ET on July 14, 2009. The ET invoice billed for 2.5 hours for "Access Agreements" for Craig Wilson at the rate of \$120.00 per hour, for a total of \$300.00. However, the daily worksheet billed him for 2.5 hours as "Project Management" for that same task. The Project Manager rate is \$100.00 per hour. The Claimant will be reimbursed for the 2.5 hours noted on the invoice at the \$100.00 per hour rate, for a total of \$250.00. Jess Mohr's directing traffic task was billed on the invoice at the rate of \$75.00 per hour for 5.0 hours, for a total of \$375.00. However, the daily worksheet documented the 5.0 hours for the task as an ER Tech. The ER Tech rate is \$60.00 per hour. Therefore, the Claimant will be reimbursed for the 5.0 hours of work at the \$60.00 an hour rate, for a total of \$300.00. Reimbursement for the subcontracted work of transporting soils by three trucks for 25.5 hours to Lambs, LLC for \$2,565.00 is denied due to lack of cost documentation. Therefore, the NPFC has adjusted the amount payable for July 14, 2009 to \$3,820.15, for a total denied amount of \$2,690.15.

Reimbursement in the amount of \$5,929.51 for services performed by ET on July 15, 2009 was requested by the Claimant. The ET invoice billed \$3,267.00 for subcontractor OSI to pump and treat 2,600 gallons of impacted ditch water. However, OSI invoice #602923 billed ET \$2,853.75 for the job. There was no additional explanation provided for the cost mark-up, nor was there any justification provided in the rate schedule. Therefore, the reimbursement will be for the amount documented on the OSI invoice for \$2,853.75. The reimbursement for the sample analytical costs of \$208.00 is denied, due to lack of cost documentation. The "per diem 3 crew" in the amount of \$29.81 is again denied because per diem is not listed on the ET rate schedule. Therefore, the NPFC has adjusted the amount payable for July 15, 2009 to \$5,278.45, for a total denied amount of \$651.06.

The Claimant requested reimbursement of \$3,506.80 for services performed by ET on July 16, 2009. [REDACTED] directing traffic and excavation restoration tasks were billed on the invoice at the rate of \$75.00 per hour for 8.0 hours, for a total of \$600.00. The daily worksheet documented the 8.0 hours for his tasks as a Field Scientist. That rate is \$75.00 per hour rate. However, Mr. [REDACTED] was performing the same task on July 14, 2009 as an ER Tech. Therefore, the Claimant will be reimbursed at the ER Tech rate of \$60.00 per hour for 8.0 hours for a total of \$480.00. The "per diem 1 crew" in the amount of \$4.40 is again denied because per diem is not listed on the ET rate schedule. Therefore, the NPFC has adjusted the amount payable for July 16, 2009 to \$3,382.40, for a total denied amount of \$124.40.

The Claimant requested reimbursement in the amount of \$545.22 for services performed by ET on July 20, 2009. The "per diem 1 crew" in the amount of \$7.72 is again denied because per diem is not listed on the ET rate schedule. Therefore, the NPFC has adjusted the amount payable for July 20, 2009 to \$537.50, for a total denied amount of \$7.72.

The Claimant requested to be reimbursed \$1,164.40 for services performed by ET on July 22, 2009. [REDACTED] project management for ditch replacement task was billed on the invoice at the rate of \$125.00 per hour for 1.25 hours, for a total of \$150.00. The daily worksheet documented the 1.25 hours for his task as "Project Management." That rate is \$100.00 per hour. Therefore, the Claimant will be reimbursed at the Project Manager rate of \$100.00 per hour for 1.25 hours, for a total of \$125.00. The "erosion straw mat/staples" was invoiced for \$337.00, and was noted on the daily worksheet (without cost information). However, this equipment item was not on the rate schedule, nor was cost documentation provided. Reimbursement for this item at \$337.00 is denied. Therefore, the NPFC has adjusted the amount payable for July 22, 2009 to \$802.40, for a total denied amount of \$362.00.

The Claimant requested reimbursement in the amount of \$318.00 for PVOC/DRO analytical costs incurred on July 27, 2009. Cost documentation was not provided for the analysis. The reimbursement of \$318.00 is denied. Therefore, the NPFC has adjusted the amount payable for July 27, 2009 to \$0.00, for a total denied amount of \$318.00.

The Claimant requested to be reimbursed \$2,874.45 for services performed by ET and it's subcontractor on July 28, 2009. OSI was subcontracted to pump and treat the impacted drain and ditch water. The job was invoiced for \$488.00. However, per invoice #602955, the cost was \$445.00. Claimant did not provide justification for the cost mark-up, nor was there a provision in the rate schedule. Therefore, Claimant will be reimbursed \$445.00 for the work of OSI. The "per diem 3 crew" in the amount of \$41.90 is also denied because per diem is not listed on the ET rate schedule. Therefore, the NPFC has adjusted the amount payable for July 28, 2009 to \$2,789.55, for a total denied amount of \$84.90.

For services performed by ET on July 29, 2009, the Claimant requested reimbursement in the amount of \$2,082.40. The task "demob backhoe" was invoiced for \$350.00, but was not documented on the daily worksheet, nor listed on the rate schedule. The reimbursement of \$350.00 is denied. Therefore, the NPFC has adjusted the amount payable for July 29, 2009 to \$1,732.40, for a total denied amount of \$350.00.

For materials purchased by ET on July 31, 2009, the Claimant requested to be reimbursed in the amount of \$2,652.72. The sixty pound bag of grass seed was invoiced for \$146.47, and was documented on the daily worksheet. However, it was not on the rate schedule, nor was there cost documentation for the bag of grass seed. Therefore, reimbursement of \$146.47 is denied. The reimbursement of Class 5 backfill invoiced at \$1,736.00 and top soil at \$375.25, delivered by Udeen, are also denied for lack of cost documentation. Therefore, the NPFC has adjusted the amount payable for July 31, 2009 to \$395.00, for a total denied amount of \$2,257.72.

The Claimant requested to be reimbursed \$432.40 for services performed by ET on August 3, 2009. [REDACTED] was billed on the invoice for "report preparation/analytical results" at the rate of \$70.00 per hour for 3.0 hours, for a total of \$210.00. The daily worksheet documented the 3.0 hours for his tasks as an ER Tech.

That rate is \$60.00 per hour. The Claimant will be reimbursed at the ER Tech rate of \$60.00 per hour for 3.0 hours for a total of \$180.00. Therefore, the NPFC has adjusted the amount payable for August 3, 2009 to \$402.40 for a total denied amount of \$30.00.

For services performed by ET on August 4, 2009, the Claimant requested to be reimbursed \$70.00. Michael Taylor was billed on the invoice for "Picture Download and Printing" at the rate of \$70.00 per hour for 1.0 hour, for a total of \$70.00. The daily worksheet was not provided for this date, and therefore, his employee title was not provided. As documented on the rate schedule, \$45.00 per hour rate is the rate for clerical tasks. The Claimant will be reimbursed at the clerical rate of \$45.00 per hour for 1.0 hour for a total of \$45.00. Therefore, the NPFC has adjusted the amount payable for August 4, 2009 to \$45.00 for a total denied amount of \$25.00.

The Claimant requested to be reimbursed \$2,204.96 for subcontracted materials and services performed by ET on August 5, 2009. Road signs were subcontracted and invoiced for \$484.64 by the Claimant. However, the Claimant did not provide cost documentation. That reimbursement of \$484.64 is denied. The two invoiced entries for "per diem 2 crew" in the amounts of \$14.25 and \$23.67, for a total of \$37.92, are also denied because per diem is not listed on the ET rate schedule. Therefore, the NPFC has adjusted the amount payable for August 5, 2009 to \$1,382.40, for a total denied amount of \$822.56.

The Claimant requested to be reimbursed \$610.00 for services performed by ET on August 6, 2009. [REDACTED] was billed on the invoice for "Project Mgmt. & Admin. - douglas cty hwy dept report" at the rate of \$100.00 per hour for 1.0 hour, for a total of \$100.00. The daily worksheet documented Mr. [REDACTED] employee title as "ER Sup." The Emergency Response Supervisor on the rate schedule is \$90.00 per hour. The Claimant will be reimbursed at the \$90.00 per hour rate for 1.0 hour for a total of \$90.00. Therefore, the NPFC has adjusted the amount payable for August 6, 2009 to \$600.00 for a total denied amount of \$10.00.

The Claimant requested to be reimbursed \$946.74 for equipment and services performed by ET on August 10, 2009. The bag of front yard grass seed material was invoiced for \$25.99, and was documented on the daily worksheet without cost information. However, it was not on the rate schedule, nor was there cost documentation for the bag of grass seed. The reimbursement for \$25.99 is denied. The two cubic yards of top soil restoration invoiced at \$43.40, and documented on the daily worksheet, did not have cost documentation. The reimbursement of \$43.40 for the restoration is denied. Therefore, the NPFC has adjusted the amount payable for August 10, 2009 to \$877.35, for a total denied amount of \$69.39.

For the work performed by ET on August 11, 2009, the Claimant requested reimbursement of \$440.00. Scott Peterson was billed on the invoice for "Project Mgmt. report preparation" at the rate of \$100.00 per hour for 2.0 hours, for a total of \$200.00. The daily worksheet documented Mr. [REDACTED] employee title as "ER Sup." The hourly rate of an Emergency Response Supervisor on the rate schedule is \$90.00 per hour. The Claimant will be reimbursed at the \$90.00 per hour rate for 2.0 hours for a total of \$180.00. Therefore, the NPFC has adjusted the amount payable for August 11, 2009 to \$420.00 for a total denied amount of \$20.00.

The Claimant requested to be reimbursed \$400.00 for report preparation performed by ET on August 12, 2009. [REDACTED] was billed on the invoice for "Emergency

Response Spill Report Preparation” at the rate of \$100.00 per hour for 4.0 hours, for a total of \$400.00. The daily worksheet was not provided for this date to provide his employee title. Therefore, as documented on the rate schedule, \$45.00 per hour is the rate for clerical tasks. The Claimant will be reimbursed at the clerical rate of \$45.00 per hour for 4.0 hours for a total of \$180.00. Therefore, the NPFC has adjusted the amount payable for August 12, 2009 to \$180.00 for a total denied amount of \$220.00.

The Claimant requested to be reimbursed \$200.00 for report preparation performed by ET on August 13, 2009. Scott Peterson was billed on the invoice for “Report Preparation/review” at the rate of \$100.00 per hour for 1.0 hour, for a total of \$100.00. [REDACTED] was billed on the invoice for “Final Report” at the rate of \$100.00 per hour for 1.0 hour, for a total of \$100.00. The daily worksheet was not provided for this date to provide employee title information. Therefore, as documented on the rate schedule, \$45.00 per hour is the rate for clerical tasks. The Claimant will be reimbursed at the clerical rate of \$45.00 per hour for 2.0 hours for a total of \$90.00 for the work of Mr. [REDACTED] and Mr. [REDACTED]. Therefore, the NPFC has adjusted the amount payable for August 13, 2009 to \$90.00 for a total denied amount of \$110.00.

Based on the NPFC’s denial of \$11,362.29, the NPFC determines that the OSLTF will pay \$ 44,583.70 as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #910065-001.

**C. *Determined Amount:***

The NPFC determines that the OSLTF will pay \$44,583.70 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 910065-001. 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 Claimant.

**AMOUNT: \$44,583.70**

Claim Supervisor: [REDACTED]

Date of Supervisor’s review: *10/5/10*

Supervisor Action: *Approved*

Supervisor’s Comments: