

CLAIM SUMMARY / DETERMINATION FORM

Date : 4/12/2011
Claim Number : 911045-0001
Claimant : Wisconsin Department of Natural Resources
Type of Claimant : State
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$15,845.15

FACTS:

- 1. Oil Spill Incident:** The United States Environmental Protection Agency (US EPA) Region V,¹ reports that on April 14, 2010, a mystery diesel sheen was reported along a channel of Lake Winnebago, a navigable waterway of the US, in the City of Oshkosh, WI. Staining was found along the shoreline, about six inches above the water line. Representatives from the City of Oshkosh ("city") and the Wisconsin Department of Natural Resources (WDNR) began looking for a potential Responsible Party (RP). The affected area was subsequently boomed. Manholes in the surrounding area were inspected, as well as an investigation as to whether or not any suspicious activities were observed by residents of the area; however, an RP was never identified. The incident was reported to the National Response Center at 1026 local time on April 27, 2010, via report # 938307.²

WDNR contracted out Veolia Environmental Services (Veolia) for spill cleanup and removal activities in the affected area.

Description of removal actions performed: The claimant, WDNR, along with the City of Oshkosh and Veolia, mobilized to clean and decontaminate the areas affected by the oil spill.

WDNR actions included: WDNR employees assisted the city's representatives in searching for a possible source for the diesel sheen by looking at both manholes and sewers in the vicinity of the spill and its Spill Database for recently reported spills to see if there was any possible connection between this spill and another.³

City of Oshkosh actions included: After removing debris from the water, the sheen could be seen emanating from the shoreline into the water. The city's HAZMAT team deployed boom in the water to keep the sheen from traveling further down the channel.⁴

Veolia actions included: Veolia was hired by the WDNR after the city asked it for help with cleanup. Veolia replaced the boom and absorbents originally put in place by the city, maintaining and replacing it as needed throughout the duration of the response. It also skimmed the oily debris from the channel, as well as the oil collected by the boom. Veolia also collected samples of the oil from the bottom of the channel. Other actions included placing hard boom across the channel, utilizing the city's jet truck to flush the

¹ See letter from Ms. [REDACTED] FOSC, US EPA, to the NPFC, dated 3/23/2011 and submitted with the claim on 3/30/2011.

² See NRC Report # 938307.

³ See WDNR SERTS Report # 20100414NE71-2, submitted with the claim on 3/30/2011.

⁴ See Joint WDNR-City of Oshkosh-EPA Region V Spill Status Report, submitted with the claim on 3/30/2011.

storm sewers, dragging the bottom of the channel with a magnet to try and locate the spill-source, skimming the rest of the channel and, ultimately, removing the boom from the channel when clean-up and removal operations were complete. Sixteen drums of diesel contaminated sorbents and pads were disposed.⁵

- 3. *The Claim:*** On March 30, 2011, Wisconsin Department of Natural Resources (WDNR) submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$15,845.15 for the services provided from April 14 through May 24, 2010. This claim is for removal costs based on the rate schedules in place at the time services were provided. A copy of the vendor rate schedules are provided in the claim submission.

This claim consists of copies of the invoicing and associated dailies; a copy of the WDNR Spill Report dated 4/14/2010; a copy of the WDNR SERTS Report # 20100414NE71-2; a copy of the WDNR Spill Response Write-up; a copy of NRC Report # 938307; a copy of the joint WDNR-City of Oshkosh-EPA Region V Spill Status Report; a copy of the Veolia Contractor Report # 4901570.10.047; copies of the disposal manifests; a copy of the US EPA Region V FOSC Letter; internal email correspondence and copies of maps and pictures.

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".

⁵ See WDNR SERTS Report # 20100414NE71-2, dated 1/14/2011 and submitted with the claim on 3/30/2011.

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 136.103(b)(3), claims for removal costs or damages may be presented first to the Fund only By the Governor of a State for removal costs incurred by that State.

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 initial FOSC coordination has been established via US EPA Region V.⁶ 33 U.S.C. § 1321(d)(2)(K).
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. A Responsible Party could not be determined. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(2)
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

⁶ See letter from Ms. [REDACTED] FOSC, US EPA, to the NPFC, dated 3/23/2011 and submitted with the claim on 3/30/2011.

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 were reasonable, necessary and performed in accordance with the National Contingency Plan (NCP).

Due to the preponderance of the evidence, the NPFC has found that, of the \$15,845.15 claimed, only \$14,866.30 is compensable. The breakdown of costs approved and costs denied are as follows:

Salary:

Total Salary Costs Claimed: \$1624.62
Total Salary Costs Approved: \$1360.59

Reasoning: The WDNR provided the NPFC with a breakdown of personnel costs attributed to this spill.⁷ Of the \$1,624.62 claimed, \$264.03 comes from allocable labor costs. While the WDNR did provide the NPFC with a breakdown of money allotted for “Labor” and “Allocable Labor” costs for this project, this alone does not give credence as to how all of the totals were derived. The claims manager was able to reference the claimed labor costs with a personnel spreadsheet provided by the WDNR; however, there is no documentation as to what the allocable costs were and how they were calculated. Therefore, due to the lack of evidence to support its claim, all WDNR allocable costs have been denied. Based on the hours and rates provided to the NPFC by WDNR, the amount of compensable personnel costs totals \$1,360.59.

Fringe:

Total Fringe Costs Claimed: \$343.69
Total Fringe Costs Approved: \$0.00

Reasoning: The WDNR did provide the NPFC with a breakdown of money allotted to fringe for this project during fiscal year 2010; however, the WDNR did not provide documentation as to how the totals were derived.⁸ Therefore, due to the lack of evidence to support its claim, all WDNR fringe costs have been denied.

Contracts:

Total Contract Costs Claimed: \$13,505.71

⁷ See Activity Analysis Report for Activity RRIg, submitted with the claim on 3/30/2011.

⁸ Ibid.

Total Contract Costs Approved: \$13,505.71

Reasoning: The WDNR submitted both dailies and invoicing from its contractor, Veolia. After cross-checking and verifying contractor costs, the claims manager found that the actual amount invoiced should have been \$13,505.73; however, as WDNR only paid \$13,505.71 as shown in its Activity Analysis Report, the NPFC considers \$13,505.71 as compensable costs.

Supplies:

Total Supply Costs Claimed: \$87.50

Total Supply Costs Approved: \$0.00

Reasoning: The invoices provided for supply costs calculate a total of \$87.50. Again, the WDNR did provide the NPFC with a breakdown of money allotted to supplies for this project during fiscal year 2010; however, it did not provide documentation as to how the totals were derived.⁹ Therefore, due to the lack of evidence to support its claim, all WDNR supply costs have been denied.

Indirect Charges:


Total Indirect Charges Claimed: \$283.63

Total Indirect Charges Approved: \$0.00

Reasoning: As there is no explanation of costs for the claimed "Indirect Costs," the claims manager did request clarification from WDNR, but to date has received no response.¹⁰ In previous submissions, the WDNR has described Indirect Charges as "DNR administrative costs, depreciation of administrative facilities, central services cost allocation plan and Single Audit costs . . . negotiated with, and approved by, the US Department of Interior." This Indirect Rate "applies to all Grants (including contracts, cooperative agreements, etc.) which come to the DNR from federal and other outside funding sources. At their request, [the WDNR has] one rate for all grants." While it is true that A-87 guidelines show these types of charges apply to grant programs, the OSLTF is not a grant program. Therefore, this does not apply. Ultimately, however, WDNR has not supplied documentation to support its claim, and all costs "Indirect Charges" are subsequently denied.

C. *Determined Amount:*

The NPFC hereby determines that the OSLTF will pay **\$14,866.30** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #911045-0001. 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.

AMOUNT: \$14,866.30 

Claim Supervisor: 

Date of Supervisor's review:

⁹ See Activity Analysis Report for Activity RRIg, submitted with the claim on 3/30/2011.

¹⁰ See email from Ms. Alyssa Lombardi, NPFC, to Mr. Larry Fox, WDNR, dated 4/05/2011.

Supervisor Action:

Supervisor's Comments: