

CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/27/2011
Claim Number	: 911050-0001
Claimant	: Mr. Frank DiGregorio
Type of Claimant	: Private (US)
Type of Claim	: Affirmative Defense
Claim Manager	: [REDACTED]
Amount Requested	: \$16,170.50

**FACTS:**

On 23 September 2009, Northstar Marine, Inc., which had been hired by Mr. [REDACTED] (property owner), to remove two 275-gallon #2 oil above-ground fuel oil tanks (ASTs), arrived at [REDACTED] Sea Isle City, Cape May County, NJ, and smelled oil in the vicinity. Upon further inspection, Northstar discovered that two AST fuel lines were cut and crimped at the bottom of the ASTs, and both tanks had oil spilling from the fuel lines. Northstar did turn off the valves to prevent further oiling to the property. Visual analysis showed that oil had spilled; Photo-Ionization Detector (PID) of the soil showed, at the center of the spill, an approximate depth of four feet below ground surface, where the groundwater table was encountered. This property is located at [REDACTED], off an inlet to Ludlam Bay, which flows into Strathmere Bay and eventually into the Atlantic Ocean, all navigable waterways of the US.

While the New Jersey Department of Environmental Protection (NJ DEP) was notified (Incident # 09-09-0801-27), there was no State or Federal coordination by means of an On-Scene Coordinator.

**THE CLAIM:**

On 08 April 2011, Mr. [REDACTED] (Claimant) submitted a claim to the National Pollution Funds Center (NPFC) asserting a third party defense to liability and entitlement to the underlying removal costs incurred to conduct removal activities associated with the discharge of oil from two above-ground storage tanks. Claimant's costs resulted from soil remediation activities, lab testing/analytical results, backfill of soils and disposal manifests.

**APPLICABLE LAW:**

The Oil Pollution Act of 1990, 33 USC §2701 *et seq.* (OPA or the Act) provides the liability and compensation provisions governing the adjudication of this claim.

In the case of an offshore facility, the responsible party means the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law...for the area in which the facility is located. 33 USC §2701(32)(C).

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 USC §2701(9).

Notwithstanding any other provision or rule of law...each responsible party for a vessel or facility from which oil is discharged or which poses a threat of discharge of oil into or upon the

navigable waters is liable for the removal costs and damages that result from such incident. 33 USC §2702(a).

The Oil Spill Liability Trust Fund is available...for...the payment of claims in accordance with section 2713 for uncompensated removal costs...or uncompensated damages. 33 USC §2712(a)(4).

The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that –

- (1) the responsible party is entitled to a defense to liability under section 1003; or
- (2) The responsible party is entitled to a limitation of liability under section 1004. 33 U.S.C. §2708(a).

Claims for removal costs may be first submitted to the Fund by a responsible party who may assert a claim under section 2708 of this title. 33 USC §2713(b)(1)(B).

A responsible party is not liable for removal costs or damages 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...

- (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..., 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, ... 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. 33 USC §2703(a)(3)(A) and (B)

Claims may be presented first to the Fund by a responsible party who may assert a claim under section 2708. 33 USC §2713(b)(1)(B).

The applicable claims regulations are:

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

Each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. 33 CFR 136.105(b)

The claimant bears the burden to prove that the removal actions taken were necessary to prevent, minimize, or mitigate the effects of the incident; that the removal costs were incurred as a result of these actions; and that the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. 33 CFR 136.203.

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. 33 CFR 136.205.

**DETERMINATION OF LOSS:**

**A. Overview:**

1. There was no Federal On Scene Coordination (FOSC) for this incident. 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); however, it has not been proven to pose a substantial threat of discharge to navigable waters.
3. The Responsible Party is seeking compensation for removal costs as a third-party defense to liability. 33 USC §2703(a)(3)(A-B).
4. 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.

**B. Documentation:**

Claimant has submitted the following documents to support his claim:

1. A cover letter and a copy of the Optional OSLTF Claim Form, dated 3/26/2011.
2. Copies of the Northstar Marine, Inc. Invoices # 5126, 5085 and 5063 for this incident.
3. A copy of the NJ DEP No Further Action Determination, dated 12/28/2009.
4. A copy of the Unregulated Heating Oil Tank (UHOT) Program Certification signed and dated 11/18/2009 and 11/22/2009.
5. A copy of the Northstar cover letter to Mr. [REDACTED] re: Remedial Action Report (RAR), dated 11/30/2009.
6. Proof of payment (check # 29995) to the State of NJ UHOT Program by NES.
7. Copies of email correspondence between Claimant and EPA Region II and USCG Sector Delaware Bay.
8. A copy of the UHOT Program Questionnaire.
9. A copy of the RAR prepared by NES, dated 11/2009.

**C. Analysis:**

Pursuant to OPA 90, the Claimant is the Responsible Party (RP) for the discharge of oil because it was his oil on his property. (33 USC §2701(32)(C).) As the RP, the Claimant is liable for the resulting removal costs and damages. (33 USC §2702(a).) The Claimant asserted that he is entitled to a third-party defense to liability because the discharge of oil and resulting injury to the environment was caused solely by vandalism on his property and is, therefore, exonerated from liability.

OPA provides that an RP is not liable for removal costs or damages under Section 2702 if the RP establishes, by a preponderance of the evidence, that the discharge of oil and the resulting damages or removal costs were caused solely by an act or omission of a third party. At the same time, the RP must also establish, by a preponderance of the evidence, that it exercised due care with respect to the oil concerned taking into consideration the characteristics of the oil in light of all relevant facts and circumstances and took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions. (33 USC §2703(a)(3).

Neither the Claimant nor his contractor obtained coordination for this incident to document that vandals did, in fact, cause the oil spill on his property. There is no local police report, no call in to the National Response Center and/or no State (NJ DEP) or Federal coordination (US EPA or USCG), corroborating the Claimant's assertion that vandals caused the release of oil from the ASTs on his property, thus releasing him from his liability. Put simply, the Claimant has not proven, by a preponderance of the evidence, that he exercised due care with respect to the oil concerned in light of all relevant facts and circumstances or took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions. Because the Claimant has failed to meet his burden to demonstrate he is entitled to a third party defense, the underlying costs have not been reviewed by the NPFC.

**DETERMINATION:**

Based on the discussion above, the claim submitted by Mr. Frank DiGregorio, in the amount of \$16,170.50, is denied.

Claim Supervisor

Date of Supervisor's review: *5/11/11*

Supervisor Action: *Denial approved*

Supervisor's Comments: