

CLAIM SUMMARY / DETERMINATION FORM

Claim Number : E09706-0001  
Claimant : Missouri Department of Natural Resources  
Environmental Emergency Response  
Type of Claimant : State  
Type of Claim : Removal Costs  
Claim Manager : [REDACTED]  
Amount Requested : \$20,441.00

**FACTS:**

- 1. Oil Spill Incident:** The United States Environmental Protection Agency (US EPA) Region VII as the Federal On Scene Coordinator (FOSC) reports that on May 29, 2011, the Cape Girardeau Fire Department Fire department responded to a petroleum spill in Painted Spring Creek, a tributary of the Mississippi River, a navigable waterway of the United States.<sup>1</sup>

The Missouri Department of Natural Resources (MDNR) sent out the State On-Scene Coordinator (SOSC) to evaluate the incident. After inspection of the area, no Responsible Party (RP) or source could be identified. EPA Region VII was dispatched, as the Federal On-Scene Coordinator (FOSC) responding to the spill site. He could also not determine the RP or a source. As both the FOSC and the SOSC agreed removal was necessary, the MDNR acted as the lead agency to direct clean-up activities. A Pollution Removal Funding Authorization (PRFA) was issued to MDNR in the amount of \$10,000.00.<sup>2</sup>

- 2. Description of removal actions performed:** The Claimant, the MDNR Environmental Emergency Response (EER), contracted out Environmental Restoration, LLC, for clean-up and removal activities. Absorbent boom, a vacuum truck, a double-barrel skimmer and leaf blowers were utilized. Approximately 3,000 gallons of an oil-water mixture was collected and approximately ten cubic yards of solid waste were placed in a roll-off box.<sup>3</sup>

The Claimant as SOSC continued to monitor the spill site. Over the next week, boom was collected as needed, and the waste was sent for proper disposal.<sup>4</sup>

- 3. The Claim:** On July 8, 2011, MDNR EER submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$20,441.00 for the services provided from May 21 through May 28, 2009. This claim is for removal costs based on the rate schedule in place at the time services were provided.

This claim consists of copies of: the Optional OSLTF Claim Form; US EPA Region VII OSC Profile for this event; US EPA Region VII POLREPS ONE and TWO for this incident; NRC Report # 960221; MDNR Environmental Emergency Response Report # 090521-0110-EJS; Environmental Restoration, LLC Response Invoices/Dailies; MDNR Cost Summary Spreadsheet for Job Code NJ09ERMH; Letter from Mr. [REDACTED] US

<sup>1</sup> See US EPA Region VII POLREP ONE, dated 5/21/2009.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.*

<sup>4</sup> See US EPA Region VII POLREP TWO, dated 6/05/2009.

EPA Region VII, to Mr. [REDACTED] USCG NPFC, regarding the PRFA for this incident; USCG PRFA Authorization Letter, dated 10/06/2011; MDNR Incident Report for Job Code NJ09ERMH; and internal email correspondence.

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 FOOSC, and (4) whether the costs were adequately documented.

**APPLICABLE LAW:**

"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 has been established via US EPA Region VII.<sup>5</sup> 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. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(2)
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.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined what removal costs presented were for actions in accordance with the NCP, and if the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.
6. No RP could be identified. 33 U.S.C. § 2701(32).

#### **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 National Contingency Plan (NCP) or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The total amount of costs incurred by the MDNR EER for this incident amounted to \$30,441.00; however, a PRFA was issued on May 21, 2009 in the amount of \$10,000.00, thus bringing the total amount claimed to \$20,441.00. Although the NPFC is uncertain as to what costs were paid under this PRFA, it does know that both the Fringe and Indirect Costs were incurred at the onset of the response and determined to be part of the costs covered under the PRFA. These costs, which would normally be denied under the claims program, would definitely have fallen under the PRFA pursuant to the contract provisions. All other costs are, based on the preponderance of the evidence, are found to be OPA compensable.


<sup>5</sup> See US EPA Region VII POLREP ONE, dated 5/21/2009.

The Claims Manager hereby determines that the claimant did in fact incur \$20,441.00 of uncompensated removal costs and that that amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #E09706-0001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident from May 21 through May 28, 2009.

**C. Determined Amount:**

The NPFC hereby determines that the OSLTF will pay \$20,441.00 as full compensation for the reimbursable removal costs incurred by the MDNR EER and submitted to the NPFC under claim #E09706-0001. 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: \$20,441.00**

<p>Claim Supervisor: </p> <p>Date of Supervisor's review: <i>12/1/11</i></p> <p>Supervisor Action: <i>Approved</i></p> <p>Supervisor's Comments:</p>
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