

CLAIM SUMMARY / DETERMINATION FORM

Date : 2/28/2011
Claim Number : E10516-0001
Claimant : Grand Trunk Western Railroad
Type of Claimant : Corporate (US)
Type of Claim : Removal Costs
Claim Manager : XXXXXXXXXX
Amount Requested : \$66,533.75

Facts

On March 30, 2010, the United States Environmental Protection Agency (USEPA) and the Michigan Department of Natural Resources & Environmental (MDNRE) contacted the Claimant, Grand Trunk Western Railroad (GTWR) to inform them that petroleum oil was identified on their property near the southeast corner of Eureka and Huron Street in Taylor, Michigan. The petroleum was found in the west right-of-way (ROW) drainage ditch, at approximately milepost 5.1-5.2 in the Dearborn Subdivision. The oil was moving toward the Frank & Poet Drain which is a nexus to Gibraltar Bay, a navigable waterway of the United States.

The site consists of a small surface water drainage ditch that runs north/south between the addresses of 20401 Gladwin Avenue, 15200 and 15801 Huron Street and a Canadian National railroad track. Approximately 800 feet of ditch line was affected. The ditch contained open water for approximately 200 feet; then transitioned to a covered drain tile pipe for the remainder of the ditch run until converging with the Frank and Poet Drain upstream of a railroad bridge¹.

Claimant contracted with Arcadis as their Spill Management Team (SMT) and Marine Pollution Control (MPC) for removal of the petroleum product from the drainage ditch.

Responsible Party

It was determined by the USEPA on March 30, 2010 that GTWR was neither the source nor the cause of the release into the drainage ditch and therefore was not liable for the petroleum material. However, GTWR accepted responsibility to clean up the petroleum material that was identified within its drainage ditch and acted as a Good Samaritan in performing response actions to mitigate the spill.

The Removal Actions

March 31, 2010, a site walk was conducted with GTWR and Arcadis along Huron Street and the drainage ditch on the west side of the railroad tracks in order to assess the ditch and surrounding areas for potential sources of the petroleum material. The site walk extended from the north side of Quanta containers to the Frank & Poet Drain. A petroleum material was identified within the drainage ditch directly behind K&S Services.

MPC installed absorbent materials and hay bales within the drainage ditch to prevent migration of product downstream and removed contaminated vegetation and soil. The contaminated debris

¹ POLREP #1 and POLREP #2

was then containerized in heavy duty plastic bags and disposed of by MPC at Disposal and Recycling Technologies in Detroit, Michigan. During the site visit, the origin of the petroleum product within the drainage could not be determined. MPC removed water and petroleum product using a vacuum truck.

April 8, 2010, more petroleum product was removed using a vacuum truck. A concrete drain line was identified on the west side of the drainage ditch. This drain line was observed to be directly discharging a petroleum product into the ditch. The City of Taylor sent an engineer to determine where the drainage line led. After investigation, it was found that the City was not in possession of records that contained information regarding the drainage and that the drain was not owned or maintained by the City; therefore it was considered an illegal connection.

MPC continued to vacuum the petroleum contaminated water and removed contaminated vegetation. Samples were sent to Midwest Analytical Services. Removal and disposal activities continued.

April 27, 2010, Arcadis contracted with Fibertec to complete an electromagnetic (EM) and ground penetrating radar (GPR) survey on the drainage pipe to determine the extent of the drain pipe. The pipe extended southwest for 100 feet then could no longer be detected. The drain was determined to be on the Quanta Containers property at 15801 Huron Street in Taylor, Michigan, and south of K&S Services.

Removal and disposal activities continued using sorbent boom and sorbent pads.

May 5, 2010, Claimant and Arcadis met with MDNRE to discuss the site activities and decided at this point to conduct an aesthetic cleanup within the drainage ditch, continue to monitor and contain the petroleum product within the drainage ditch prior to excavation activities, and Wayne County performed a smoke/dye test of the surrounding properties.

Removal and disposal activities continued using sorbent boom and sorbent pads.

June 3, 2010, Quanta Containers, with the oversight of the USEPA, conducted excavation activities of the drainage pipe located on its property. This activity was conducted in order to determine where the pipe was potentially leading. During the excavation, it was determined that the pipe ended where the previous EM and GPR survey had indicated. The exploratory excavation determined no indication of any additional piping in the immediate area. The concrete pipe was removed, and according to information presented to GTWR and Arcadis, no visible impacts were identified outside the concrete structure (e.g., soil). Based on this information, the origin of the product within the drainage ditch could not be determined.

June 16, 2010, MISSDIG and Terra Probe conducted a private utility evaluation. No underground utilities were present in the area therefore excavation could begin.

June 17-18, 2010, Arcadis personnel and MPC, under contract with the Claimant, initiated limited excavation activities at the site. Prior to conducting excavation activities, MPC used a vacuum truck to dewater the drainage ditch. Approximately 2,045 gallons of liquid were removed from the ditch and disposed at Enviro Solids, Inc. in Dearborn, Michigan. Waste characterization and profiling activities were conducted by MPC prior to initiating field activities. Representatives from GTWR, the MDNRE, and the USEPA were on site during excavation activities.

Upon removal of the liquid from the drainage ditch, the excavation activities that took place on the southern end of the ditch proceeded toward the southern end of the culvert. Petroleum product was removed from the drainage ditch and loaded directly into trucks for off-site disposal. During excavation activities, a photoionization detector (PID) was used to monitor the ambient air.

The excavation area was approximately 263 feet in length, 12 feet in width, and 1.5 feet in depth. Approximately 162.18 tons of petroleum impacted soil were removed from the site and disposed at Riverview Land Preserve in Riverview, Michigan. Waste characterization and profiling activities were conducted by MPC prior to initiating field activities.

Removal, monitoring, remediation, and disposal activities continued until September 23, 2010. Approximately 495-gallons of liquid/petroleum product was recovered during response activities by MPC with the vacuum truck. This material was disposed by MPC at Disposal and Recycling Technologies in Detroit, Michigan².

Approximately 2,540-gallons of petroleum impacted liquids were removed from the drainage ditch and disposed at Enviro Solids, Inc. located in Dearborn, Michigan.

Upon completion of the soil removal, the excavated area was visually assessed to verify that all petroleum contaminated product was removed. All parties present included; GTWR, Arcadis, MDNRE, and USEPA. It was indicated that visibly impacted material had been successfully removed from the drainage ditch³.

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].

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.

² See Claimant's Appendix A, Disposal Manifests.

³ See Claimant's Appendix B.

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 removal actions were coordinated with the USEPA as evidenced by POLREP #1 and POLREP #2.
2. The incident involved the discharge and continuing substantial threat of 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 certified that it has filed no suit in court for the claimed uncompensated removal costs.
4. The claim was submitted within six years after the date of completion of all removal actions for this incident as determined by the Federal On Scene Coordinator (FOSC).
5. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that the majority of all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205 with the exception of denied costs.

B. Analysis

The NPFC finds that the evidence presented by the Claimant demonstrated that the Claimant is not the Responsible party and assumed the responsibility of immediate action to mitigate the oil from flowing into the navigable waterways.

Grand Trunk Western Railroad stated in its claim, that all costs claimed are for uncompensated removal costs incurred for this incident for the time period of March 30, 2010-September 23, 2010. The Claimant represented that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

The NPFC Claims Manager reviewed the Claimant's actual cost invoices and dailies to confirm that the Claimant had incurred all costs claimed, that the costs were uncompensated, and that the

costs were adequately documented and reasonable. Claimant provided proof of payment for the Arcadis and Marine Pollution Control invoices.⁴

The Claims Manager also confirmed that the removal costs were: (1) compensable "removal actions" under OPA and the claims regulations at 33 CFR Part 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) incurred as a result of these actions; (3) incurred for removal actions that were determined by the FOSC to be consistent with NCP or directed by the FOSC.

NPFC denied the following costs from the Arcadis Invoices:

Invoice #0321941—Reimb Employee Mileage	\$ 75.90	Not in rate schedule
Invoice #0325583—Reimb Employee Mileage	\$151.26	Not in rate schedule
Invoice #0329846—Reimb Employee Mileage	\$142.65	Not in rate schedule
Invoice #0329846—Reproduction	\$ 20.74	Not in rate schedule
Invoice #0340199—Reimb Employee Mileage	\$ 9.50	Not in rate schedule
Total denied on the Arcadis Invoices	\$400.05	

NPFC denied the following costs from the Marine Pollution Control Invoices:

Invoice #31678—Finance Charge	\$ 9.47	Not OPA compensable
Invoice #31657—Finance Charge	\$143.72	Not OPA compensable
Invoice #31678-1 Finance Charge	\$ 34.39	Not OPA compensable
Invoice #31678-2 Finance Charge	\$ 24.80	Not OPA compensable
Invoice #31795—Finance Charge	\$ 27.55	Not OPA compensable
Invoice #31795-1 Finance Charge	\$ 54.73	Not OPA compensable
Invoice #31842—Finance Charge	\$419.12	Not OPA compensable
Invoice #31795-2 Finance Charge	\$ 3.89	Not OPA compensable
Invoice #31795-3 Finance Charge	\$ 13.73	Not OPA compensable
Invoice #31842-1 Finance Charge	\$ 7.45	Not OPA compensable
Invoice #31795-4 Finance Charge	\$ 13.25	Not OPA compensable
Total denied on the MPC Invoices	\$752.10	

Determined Amount:

The NPFC Claims Manager hereby determines that the Claimant incurred \$65,381.61 of uncompensated OPA compensable removal costs that are supported by the evidence. This amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and adjudicated by the NPFC under claim# E10516-001.

AMOUNT: \$65,381.61

Claim Supervisor: 

Date of Supervisor's review: 3/2/11

Supervisor Action: *Approved*

⁴ Proof of payment.