

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: P11005-0001
Claimant	: Eastern Environmental Management, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$57,395.98

### **FACTS:**

#### The Incident

On January 7, 2011, Sector North Carolina received a report from Beaufort County Sheriff's department of a fire at McCotter's Marina in Washington, NC located on Broad Creek/Pamlico River. The Marina fire resulted in approximately 26 recreational vessels being destroyed in the fire and sinking at the pier. Approximately 1,500 gallons of fuel products were released into Broad Creek, a navigable waterway of the US. Three different Fire Departments responded to the fire.<sup>1</sup> The MISLE Case Report Number is 534323.

#### The Removal Actions

The United States Coast Guard, Sector North Carolina (USCG) was the Federal On Scene Coordinator (FOSC) for this incident. In that capacity, they opened a Federal Project Number (FPN) and contracted with the Claimant, Eastern Environmental Management (EEM) to perform removal/response actions and clean up the spill.<sup>2</sup> Upon further investigation by the NPFCC, Coast Guard documentation shows that the Claimant was paid approximately \$107,000.00 for response and removal actions taken in response to this incident.<sup>3</sup>

On 14 January 2011, the FOSC deemed the incident and all actions associated with the incident complete via "POLREP Six & Final".<sup>4</sup> According to POLREP Six and Final, the Claimant, EEM, was to remove all remaining oiled debris, sorbent material and equipment from the scene."

After the FOSC issued the final POLREP, the Marina entered into a separate agreement with the Claimant whereby the Claimant would remain on scene with personnel, material and equipment to assist in the salvage of the vessels from the waters of the Marina. The Claimant allegedly incurred costs that totaled \$80,495.10. According to the evidence presented by the Claimant, the Claimant presented its costs to the Marina for payment. The Marina failed to pay the Claimant in full. To date, the Claimant has only been compensated in the amount of \$23,099.12. The Claimant now presents its claim to the Oil Spill Liability Trust Fund (OSLTF) via the National Pollution Funds Center (NPFCC) for uncompensated removal costs in the remaining amount of \$57,395.98.<sup>5</sup>

<sup>1</sup> Case Report 534323, POLREP One, 7 January 2011

<sup>2</sup> POLREP 1, dated 7 January 2011

<sup>3</sup> Coast Guard Authorization to Proceed

<sup>4</sup> SITREP, POL Six and Final, 14 January 2011.

<sup>5</sup> See, Cover Letter from EEM signed and dated 10 January 2012, by [REDACTED]

## The Claim and the Claimant

On 20 January 2012, The NPFC received the Claimant's submission seeking reimbursement for its alleged uncompensated removal costs in the amount of \$57,395.98.<sup>6</sup> The submission indicates that after 14 January 2011, they were hired by McCotter's Marina (Marina) and was no longer working under the FPN for the Coast Guard.

The submission explains that post 14 January 2011; the Claimant maintained a containment boom at the site from 14 January 2011 until 31 January 2011. During that time, the Claimant alleges that the Marina was working with the USCG to develop a plan for removing the vessels. On or about 31 January 2011, the Claimant asserts that a plan was agreed upon and the Claimant then provided personnel, materials and equipment to assist in the removal of the vessels.

According to the invoices presented, the Claimant maintained a presence at the Marina until 23 March 2011.

On or about 30 January 2012, the NPFC sent an acknowledgement letter and request for additional information letter to the Claimant. In that letter, questions were raised regarding the payments from the insurance companies and whether the Claimant had signed any release forms in accepting the reported payments.<sup>7</sup>

In subsequent phone conversations with [REDACTED] of EEM, the NPFC was informed that EEM was never directly in contact with either the boat owners or insurance companies regarding any payments made. Mr. [REDACTED] explained that the payments EEM received came from the Marina and EEM never signed any releases or similar paperwork in order to receive payments.<sup>8</sup>

Finally, the NPFC asked whether or not the actions taken by them were coordinated with the FOSC. The Claimant was not able to definitively answer this question. The Claimant stated that the Coast Guard was aware of their presence when the FPN was open, but could not attest to whether their actions of 14 January 2011 forward were sanctioned by the FOSC.<sup>9</sup>

Subsequent to that conversation, the NPFC sent an e-mail to the FOSC representative on or about 2 February 2012 requesting his position on the actions taken by the Claimant post 14 January 2011. No reply was received, therefore on 14 February 2012, a follow-up email was sent by the NPFC to the FOSC representative.<sup>10</sup>

As a result of this e-mail, a phone conference was held with the NPFC Claims Manager, NPFC claims supervisor, and the FOSC representative regarding all aspects of the incident. The NPFC expressed its concerns about the incident and Claimant actions after the USCG departed the scene.<sup>11</sup>

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<sup>6</sup> Cover Letter submitted by EEM signed and dated 10 January 2012 by [REDACTED]

<sup>7</sup> NPFC correspondence to EEM dated 30 January 2012

<sup>8</sup> Phone conference between NPFC and the claimant, EEM ([REDACTED]) on or about 8 February 2011

<sup>9</sup> Phone conference between NPFC and the claimant, EEM ([REDACTED]) on or about 8 February 2011

<sup>10</sup> Follow-up e-mail to FOSC ([REDACTED]) from 2 February 2012 e-mail from NPFC to FOSC re: actions taken by EEM.

<sup>11</sup> Phone conference of 14 February 2012 between NPFC personnel and FOSC, Sector North Carolina, MST1 [REDACTED]

## **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].

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. No FOSC Coordination has been provided by Sector North Carolina for the actions undertaken by the Claimant after 14 January 2011 33 CFR 136.203 & 205.
2. The incident involved the report of a discharge and a substantial threat of a discharge of “oil” was defined by OPA 90, 33 U.S.C. 2701 (23), to navigable waters;
3. Prior presentment of costs to the RPs was not made by the Claimant, prior to submission of the claim to the Fund. 33 U.S.C. 2701 (32), 33 CFR 136.103(a)
4. The claim was submitted within the six year period of limitations for removal costs claims to the Fund. 33 U.S.C. 2712 (h) (1)
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 thoroughly reviewed all documentation submitted with the claim as well as other information obtained during the course of the adjudication such as the POLREPS, the CASE REPORT in MISLE as well as the Case File assembled and kept by the NPFC Case Management Division of the NPFC and has determined this claim is denied for the reasons set forth below.

### **B. Analysis:**

The NPFC’s review of the claim focused on (1) whether the actions taken were compensable removal actions under OPA and the claims regulations at 33 CFR Part 136 (whether the actions were taken to prevent, minimize and mitigate the effects of the incident (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken are determined to be consistent with the National Contingency Plan (NCP) or directed by the FOSC; (4) whether the costs were adequately documented and reasonable, (5) whether the Claimant’s submitted costs were uncompensated; and finally, (6) the Claimant made proper presentment of costs to the RPs as required by the Oil Pollution Act of 1990 at 33 U.S.C. § 2713(a) and the claims regulations at 33 C.F.R. § 136.103(a), which state that all claims for removal costs and damages must be presented first to the Responsible Party or guarantor. If the claim is not settled by any person within 90 days, the Claimant may present the claim to the NPFC.

#### **1. Presentment**

As previously stated, there were twenty-six vessels that caught fire and sank at the Marina. No known source of the discharge was ever determined.<sup>12</sup> No source sample was available.<sup>13</sup> However, the record supports a finding that the Marina was not the source of the discharge and not the Responsible Party. To the contrary, a POLREP indicates that one of the vessels exploded and caught on fire and that fire spread to the other vessels that eventually sank at the dock.<sup>14</sup> The Marina could not determine which vessel was the source of the discharge, so it submitted its costs to each vessel owner and in turn received payments from the insurance companies of at least six (6) of the vessel owners.

Under the presentment requirement, the Claimant has failed to make proper presentment of costs to the twenty six RPs as required by the Oil Pollution Act of 1990 at 33 U.S.C. §

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<sup>12</sup> POLREP 6 & Final 14 January 2011

<sup>13</sup> SITREP-POL Five 13 January 2011

<sup>14</sup> POLREP 7 dated January 2011

2713(a) and the claims regulations at 33 C.F.R. § 136.103(a), which state that all claims for removal costs and damages must be presented first to the Responsible Party(s) or guarantor(s) as opposed to the Marina.

## 2. FOSC Coordination

In order for a Claimant to be reimbursed for its costs incurred in a removal action, the Claimant must show that the actions taken were “reasonable and necessary” to mitigate the effects of the incident and were “determined by the FOSC” to be “consistent with the National Contingency Plan”.<sup>15</sup> This claim is denied because the Claimant has failed to obtain FOSC coordination for the actions it undertook from January 14, 2011 forward pursuant to the governing claims regulations found at 33 CFR 136.203 & 205.

As previously stated, the Claimant was hired under an FPN by the FOSC to perform response/removal actions from 7 January until 14 January 2011. On or about 14 January 2011, the FOSC issued its final POLREP indicating that all removal actions were complete and that the site was “clean”.

The Claimant has not provided evidence that their actions taken post 14 January 2011 were removal costs as defined by the Claims Regulations, and were reasonable and necessary to as determined by the FOSC. In fact, the evidence supports a finding that the actions taken post January 14<sup>th</sup> were associated with salvage operations – removing the vessels from the water after the FOSC determined that no further discharge or threat of discharge existed<sup>16</sup>.

The NPFC contacted the FOSC representative in order to obtain clarification on why the USCG closed the Federal Project knowing that their contractor remained on scene. In that conversation with the FOSC representative, he failed to confirm that the actions taken by the Claimant post January 14, 2011 were in fact compensable removal actions. He could not or would not confirm whether he was aware that all of the fuel had been removed from the vessels. He was aware of the Claimant’s presence, but not all of the actions taken, personnel, materials or equipment that were involved or even how long the Claimant remained at the scene.<sup>17</sup>

The NPFC has reviewed the evidence submitted by the Claimant in support of its claim for removal costs. The invoices and dailies show that the Claimant was on scene from approximately 14 January 2011 – 23 March 2011. There are no detailed narratives for the work that was performed each day during this period of time, however looking at the invoices it appears that there were personnel, materials and equipment on scene that would be needed to support salvage operations.

The cover letter of 10 January 2012 that accompanied the Claimant’s submission to the Fund describes its actions as follows: “.....(after) January 31.....EEM was directed by the salvage company and Mr. Henley (owner of the Marina) as to what days we were to have personnel and equipment at the site for the removal process. When the boats were being raised EEM made access for the crane boat to get in and out of the containment area.....also pumped off the fuel tanks of the salvage boats as they were being brought to shore.”<sup>18</sup>

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<sup>15</sup> 33 CFR 136.203

<sup>16</sup> See POLREP Six and Final.

<sup>17</sup> Phone conference of 14 February 2012, NPFC personnel and FOSC, Sector North Carolina, MST1 [REDACTED]

[REDACTED] Claimant’s cover letter dated & signed 10 January 2012 by [REDACTED], included with claims submission to the Fund

All of the evidence described above does not support a finding that the actions taken by the Claimant were coordinated with the FOSC or were reasonable and necessary as determined by the FOSC. The NPFC has determined that That the Claimant has not demonstrated that their actions were requested and determined by the FOSC to be consistent with the NCP or necessary to mitigate a threat of oil since USCG POLREP Six and Final states no further oil or threat of oil existed.

The Claimant bears the burden of proving all elements of its claim to the Fund, 33 CFR 136.105(a). The Claimant has failed to provide sufficient evidence to support this claim as identified above, and thus failed to prove its entitlement to reimbursement of uncompensated removal costs in the amount of \$57,395.98. 33 CFR 136.105(e)(6),

Should the Claimant decide to request reconsideration, the Claimant will need to provide at a minimum, the following information which may result in the NPFC requesting supplemental information at a later time:

1. FOSC Coordination from Sector North Carolina indicating that the daily activities performed by the Claimant were necessary to include the removal of all sunken vessels at the Marina for the primary purpose of pollution prevention. The FOSC would also need to indicate why the removal of the vessels vice de-fueling of the tanks was necessary. As such, the FOSC would need to issue a supplemental POLREP changing its official position as stated in POLREP Six and Final;
2. The Claimant will need to identify all personnel and equipment that was used during the removal of each vessel on a daily basis and indicate why they were needed and what they were doing;
3. The Claimant will need to address why there was a need for personnel and equipment on scene at the Marina until the end of March 2011 and provide a detailed statement of the actions taken on each day personnel and equipment were on scene; and
4. The Claimant would need to make prior presentment to the twenty six Responsible Parties, as identified.

**Determined Amount:**

The NPFC hereby determines this claim is denied because (1) the Claimant failed to provide FOSC coordination pursuant to 33 CFR 136.203 & 205 and has failed to make prior presentment to the Responsible Parties as required by 33 CFR 103(a).

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *3/2/12*

Supervisor Action: *Denial approved*

Supervisor's Comments: