

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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6/27/2011

VIA EMAIL: [REDACTED]@ospr.dfg.ca.gov

State of California
ATTN: Ms. Kelly Abe
Department of Fish and Game
P.O. Box 944209
Sacramento, CA 94233-2090

RE: Claim Number: 911073-0001

Dear Ms. Kelly Abe:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on claim number 911073-0001. Please see the attached Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.

Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number 911073-0001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely, [REDACTED]

Mark Erbe
Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 911073-0001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Mark Erbe
Amount Requested	: \$3,554.20

FACTS:

Incident:

On May 14, 2007, Lt. Arnold of the California Department of Fish & Game (DFG), Office of Oil Spill Prevention and Response (OSPR) reported that he was driving along Route 1 in Santa Cruz County when he noticed a sailboat grounded within the intertidal zone of Waddell Creek. At the scene he was informed by a State Park Ranger that the sailboat was abandoned. Using his binoculars, Lt. Arnold observed that the sailboat had a couple of red fuel cans and one oil can onboard and an outboard "kicker" engine. Lt. Arnold then reported that he obtained authorization from DFG-OSPR HQ to hire Pacific Salvage Inc. to take the vessel off the rocks and tow it to Santa Cruz.

By the time that the salvage company arrived on-scene, the sailboat was lying on its side. The salvage company determined that the vessel's hull was slightly breached just above the waterline but, they decided to take vessel off the rocks and tow it to Santa Cruz. The salvage crew was able to tow the sailboat. However, sea swells frayed the towline and the vessel broke free and sank before the salvage crew could attach another tow line. Lt. Arnold reported that the two fuel cans and one oil can broke free and floated to shore. His report read: "the pollution threat was off the vessel before it went down."¹

In his narrative report, Lt. Arnold stated State Park Rangers told him that three days before the incident, DFG Wardens boarded the sailboat and it was abandoned at that time. It is important to note that the Wardens had no authority to take the sailboat into custody while it was at anchor.

Claimant:

The claimant is the California Department of Fish and Game (DFG), Office of Oil Spill Prevention and Response (OSPR). OSPR has primary authority to direct removal, abatement, response, containment and cleanup efforts for any spill in State waters.

Claim:

The Claimant seeks compensation from the Oil Spill Liability Trust Fund (OSLTF) for uncompensated response and removal costs associated with the abandoned sailboat in the amount of \$3,554.20. The response costs included costs for personnel time for Lt. Brian Arnold (OSPR) who logged 7 hours at \$59.48 per hour (7 x \$59.48 = \$416.36) and \$552.28 for DFG Administrative Costs. In addition, the Claimant submitted Pacific Salvage Inc.'s invoice of \$2,585.56.²

¹ See DFG-OSPR Narrative Report May 14, 2007 lines 17,18 & 19

² See DFG-OSPR Incident Billing 5/14/2011 Operating Expenses and Pacific Salvage Inc.'s invoice

Responsible Party:

No responsible party was designated.³ The sailboat was last registered to John Sherwood of Alameda. The RP related to the Alameda Police Department that he sold the boat to Rolf O. Stribolt of Oregon. Mr. Stribolt could not be contacted. Lt. Arnold was informed by a DF&G Special Agent that Sean Clark of Half Moon Bay, CA sailed the vessel to Waddell Creek and abandoned it.

Description of Removal Actions Performed:

On the NPFC Standard Claim the claimant checked Removal Costs and Monitor Clean Up.⁴ Form the DFG-OSPR's Narrative on the Waddell Creek incident removal actions consist of observing two gas cans and one oil can and a small outboard engine were on the sailboat.

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".

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;

³ See DFG-OSPR Narrative Report May 14, 2007 lines 7, 8, 25 & 26

⁴ See NPFC's Standard Claim form, Page 1, #3 and Page 2, #11, #12

(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:

Under OPA and its governing regulations, the Claimant bears the burden to prove its removal actions were reasonable in response to the scope of the incident. The Claims Manager finds that the Claimant has not proven that its actions were a reasonable response considering the magnitude of the incident.

Under OPA and its governing regulations the Claimant must establish that its actions were necessary to prevent, minimize or mitigate the effects of an incident. The Claims Manager finds that the administrative record lacks evidence that the Claimant’s actions were necessary to prevent, minimize or mitigate the effects of an incident. Specifically, the Claimant has not shown that hiring a salvage company was a necessary removal action.

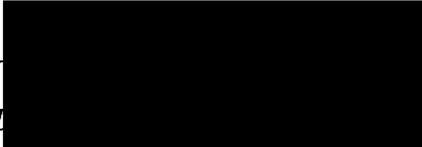
Additionally, the Claims Manager finds that the Claimant has failed to establish that its actions were determined to be consistent with the National Contingency Plan or directed by the FOSC pursuant to 33 CFR 136.203 & 205.

The administrative record lacks documentation demonstrating that the sailboat posed a substantial threat of a discharge. Under OPA, the NPFC has the fiduciary responsibility to perform a reasonableness determination and ensure all actions were performed in accordance with the National Contingency Plan (NCP). In this case, the Claims Manager finds that the Claimant failed to prove there was a substantial threat of discharge oil into the waterway. The mere presence of two gas cans and one oil can does not prove a substantial threat of discharge.

Furthermore, the Claimant has failed to demonstrate why the salvage effort was an appropriate response action and that it was in fact ordered by the Federal On Scene Coordinator (FOSC) pursuant to 33 CFR 136.203 & 205.

DETERMINATION:

The NPFC hereby denies the claim as the Claimant failed to demonstrate (1) a substantial threat of discharge of oil existed, (2) that the actions taken were determined by the FOSC to be consistent with the NCP, and (3) that the salvage of the vessel was reasonable and necessary.

Claim Supervisor: 

Date of Supervisor’s Review: 6/27/11

Supervisor Action: *Denial approved*