U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
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5890
5/3/2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 9792

Phoenix Pollution Control & Environmental Services, Inc
ATTN: Nelson Fetgatter
7111 Decker Drive
Baytown, TX 77520

RE: Claim Number: 911082-0001

Dear Mr. Fetgatter:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 911082-0001 involving Green Hunter Bio-fuels, Inc. on 9/14/08 associated with Hurricane Ike. Please see the attached Claim Summary / Determination Form for the details associated with this denial.

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 911082-0001.

Mail reconsideration requests to:

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

[redacted]
Donna Hellberg
Claims Manager
U.S. Coast Guard

Enclosure: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 911082-0001
Claimant	: Phoenix Pollution Control & Environmental Services, Inc
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: Donna Hellberg
Amount Requested	: $145,360.06

FACTS:

On or about September 14, 2008, the Claimant asserts it was called out to Green Hunter Bio Fuels Inc. in order to respond to what the states as "Hurricane Ike – 2008 Recovery."[1] The Claimant provided no other details, explanations, or information.

CLAIM and CLAIMANT:

On June 2, 2011, the Claimant, Phoenix Pollution Control & Environmental Services, Inc. presented a claim to the National Pollution Funds Center (NPFC) for its alleged uncompensated removal costs in the amount of $2,650.41. The Claimant provided a cover letter and OSLTF Optional Claim Form that contained minimal information associated with the incident for which these costs originated.

The claim consists of: a cover letter dated April 25, 2011, an OSLTF Claim Form dated May 27, 2011, various Phoenix invoices, various subcontractor invoices, miscellaneous dailies, manifests, and rental invoices.

The Claimant has presented the subject invoices to Green Hunter Bio-Fuels, Inc., the responsible party (RP) for the incident. The Claimant indicated to the NPFC that they were in litigation with this RP. On February 28, 2012, the NPFC sent an email to Claimant Counsel and the Claimant advising that they have until March 28, 2012 to produce all litigation documents between the Claimant and Green Hunter or the NPFC would move forward to adjudicate the claim and would not continuing holding the claim in abeyance. To date, no response to the request for document production has been received therefore the NPFC will not hold the claim in abeyance any longer.

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

[1] *See,* OSLTF Claim Form, page 1, number 2.

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. No FOSC coordination has been provided for the Claimant responding to an OPA event.
2. The Claimant has not demonstrated that the incident involved the report of a discharge and substantial threat of 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)(1)
4. A Responsible Party was determined for this incident. 33 U.S.C. § 2701(32).
5. In accordance with 33 CFR § 136.105(e)(12), the claimant has stated they filed litigation but has failed to produce requested documentation..
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the removal costs presented were not for actions in accordance with the NCP, or whether the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

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 NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

Upon review of the claim submission, the NPFC performed independent research associated with the neutralization and disposal of a sulfuric acid spill. The Claimant has not demonstrated that the claim is for response to OPA oil. An OPA 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 product that the Claimant responded to was sulfuric acid which is not oil as defined under OPA. As such, this claim is denied.

Furthermore, had the Claimant been able to demonstrate this was an oil response, the Claimant has not demonstrated that the actions undertaken were determined by Federal On Scene Coordinator (FOSC) to be consistent with the National Contingency Plan (NCP) or were directed by the FOSC. The FOSC would be a designated representative from either the United States Coast Guard (USCG) or the United States Environmental Protection Agency (USEPA).

Should the Claimant decide to request reconsideration of this denial, the Claimant will need to obtain a written statement from the FOSC which states the response was to an oil as defined under OPA, that the actions undertaken by the Claimant were reasonable and necessary to prevent, minimize, and mitigate the effects of the incident. The Claimant will also need to demonstrate that the oil product in which it responded either discharged or substantially threatened to discharge into a navigable waterway.

Additionally, upon further review of the claim submission, the Claimant has failed to provide the following documentation needed in order to make a proper adjudication of this claim:

1- The Claimant has failed to provide evidence that the incident was reported to the National Response Center (NRC) in accordance with the National Contingency Plan (NCP);
2- The Claimant has failed to provide any details as to who called Phoenix to the site to perform response actions, was an agreement executed or was Phoenix identified as the cleanup contractor under a facility response plan and if so, the Claimant has not provided any of the contracts/agreements etc associated with that contractual relationship;
3- The Claimant has not provided its rate schedule that governs the rates it charged to Green Hunter for its own personnel/materials/equipment nor has the Claimant provide any agreements/ rate schedules or contracts it has with its affiliated subcontractor that also responded on this incident;
4- The Claimant has not provided proof of payment for the costs billed to Phoenix by its subcontractor that demonstrates Phoenix has the subrogable rights to submit their costs to the NPFC;
5- The Claimant has not demonstrated that the actions they undertook were determined by the Federal On Scene Coordinator (FOSC) to be consistent with the NCP pursuant to the governing claims regulations. The FOSC in this case would be either the United States Coast Guard (USCG) or the United States Environmental Protection Agency (USEPA);
6- The Claimant did not provide sample analysis to evidence that the product spilled was an OPA oil.

Based on the information provided by the Claimant, the NPFC has determined this claim is denied because (1) the Claimant failed to demonstrate the incident was reported to the National Response Center (NRC) pursuant to the National Contingency Plan (NCP), (2) the Claimant has failed to provide sufficient details and information regarding the incident and ensuing response, (3) the Claimant has failed to demonstrate that the product was an OPA oil, (4) the Claimant has failed to provide sufficient supporting documentation for this claim as identified above, (5) the Claimant has failed to provide proof of payment to its subcontractor, (6) the Claimant has failed to demonstrate that the actions undertaken were directed by the FOSC and determined to be consistent with the NCP, and (7) the Claimant has failed to demonstrate that the incident posed a substantial threat of discharge into a navigable waterway.

Should the Claimant decide to request reconsideration of this claim, the Claimant will need to provide documentary evidence from the FOSC that the actions undertaken by the Claimant were in response to an oil pollution event that actually substantially threatened or discharged into a navigable waterway of the US and the Claimant will need to address each of the identified deficiencies noted above. The Claimant will also need to provide the requested documentation as stated in the NPFC email of February 28, 2012.

Based on the foregoing, this claim is denied.

Claim Supervisor [redacted]

Date of Supervisor's review: ***5/3/12***

Supervisor Action: ***Denial approved***

Supervisor's Comments: