

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

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5890
3/30/2012

Via e-mail: [REDACTED]@ky.gov

State of Kentucky
ATTN: Robert Francis
Dept for Environmental Protection
Environmental Response Branch
300 Fair Oaks Lane
Frankfort, KY 40601

Re: Claim Number: 912006-0001

Dear Mr. Francis:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 912006-0001 involving Terra Oil & Gas facility, upon reconsideration. For a further explanation, please see the enclosed Claim Summary/Determination Form.

Disposition of this reconsideration constitutes final agency action.

[REDACTED]

Chief, Claims Adjudication Division
U.S. Coast Guard

ENCL: Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 912006-0001
Claimant	: State of Kentucky
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Gina Strange
Amount Requested	: \$21,370.00

Facts:

1. **Oil Spill Incident:** On or about 24 May 2008, KYDEP Emergency Response Technician, David Leo, was notified of oil on the ground and in a creek. Rodney Maze, KYDEP Environmental Inspector of the Ashland Regional Office was contacted by Mr. Leo and responded to the incident on Simmons Loop and James Blevins Road along with Mr. Jim Skaggs, the Emergency Management Director for Elliott County. Investigation revealed a valve had been opened on an abandoned tank along the James Blevins Road resulting in a crude oil spill.

The crude oil spill is reported to have flowed from the valve down a drainage ditch through a 6" steel pipe under the roadway and down a grassy slope, leaching into an unnamed stream which intersected with an unnamed tributary to Grayson Lake Reservoir.

2. **Response Actions:** The spill was contained by emergency response personnel. No responsible party could be determined initially. KYDEP contracted with Koolau Environmental, LLC to handle the emergency response phase of the incident. Koolau began cleanup on May 24, 2008 and the emergency response phase was completed on May 25, 2008. A follow-up investigation was conducted by KYDEP on May 28, 2008. The tank had been emptied during the emergency response phase on May 25, 2008 and all visible contaminated soil was removed and staged on plastic. Small pools of oil were observed in the unnamed tributary during this follow-up investigation.

On June 6, 2008, another follow-up investigation was conducted by KYDEP. There was no visible product observed on the small stream along Johnny Blevins Road or in the unnamed tributary to Grayson Lake Reservoir along Simmons Loop. Used absorbent booms and pads were removed below and at the underflow dam location. One absorbent boom was left in place at the underflow dam location until oil removal occurs.

Claim & Claimant:

On 6 October 2011, the KYDEP (Claimant) presented a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$21,370.00 for the services provided on or about 24-25 May 2008.

In support of this claim, the Claimant provided the following supporting documentation:

1. Cover letter, undated presenting claim for \$21,370.00;
2. KYDEP Environmental Response Branch Report, signed and dated by USEPA on 9/28/11;

3. May 28, 2008 Claimant email documenting oil spill case opened;
4. May 28, 2008 Claimant email with NRC Report # 871947;
5. June 2, 2008 KYDEP Incident Investigation Report;
6. Koolau Environmental invoice in the amount of \$21,370.00;
7. Koolau Environmental summary of incident to KYDEP;
8. Koolau Environmental Health and Safety Plan for this incident;
9. County Mark Crude Oil MSDS;
10. Hand drawn picture of site location;
11. Copy of Google map of address location;
12. Copy of color map labeled with location and unnamed tributary;
13. Chain of Custody and Analytical Request of 3 samples dated May 27, 2008;
14. June 6, 2008 Sample Analysis Report;
15. Disposal Manifests;
16. Veolia Profile Sheets for disposal;
17. Quick Response, Inc. letter stating they vacuumed oily water from ditch and leaking oil tank for Koolau Environmental;
18. RP letter from KYDEP to Terra Oil and Gas Corp. dated June 6, 2008;
19. Ten color photos taken on site on May 24, 2008;
20. Eight color photos taken on site on May 28, 2008;
21. Five color photos taken on site on June 6, 2008;
22. June 6, 2008 KYDEP Investigation Follow-up Report;
23. Copies of certified mail receipts for billing sent to the Responsible Party;
24. June 6, 2008 Notice of Violation from KYDEP to Terra Oil & Gas Corp.
25. June 16, 2008 follow-up Notice of Violation from KYDEP to Terra Oil & Gas Corp.
26. KYDEP Enforcement Referral Form;
27. August 15, 2008 letter from KYDEP to Terra Oil & Gas advising the Notice of Violation has been referred to their Enforcement Division;
28. Copy of a Request for Legal Action from the KYDEP Enforcement Division to the KYDEP Office of Legal Services, Environmental Protection Legal Division.

The NPFC denied the claim originally on December 8, 2011 because the Claimant failed to demonstrate that the incident subject of this claim posed a substantial threat of discharge into a navigable waterway of the US.

Request for Reconsideration:

On 6 January 2012, the Claimant sent an e-mail to the NPFC stating that he was providing additional photo documentation of the spill location. The Claimant asserted that this documentation was the best they could do to try to show that the oil would have traveled into the river if actions had not been taken. On January 10, 2012, the NPFC sent an email to the Claimant confirming whether or not the email of January 6, 2012 with the photo documentation was in fact what the Claimant considered to be their request for reconsideration. The Claimant responded to the NPFC via email the same date and confirmed that he is requesting reconsideration and the photo documentation is intended to show the connections to the waterway and the Claimant stated they do not intend on submitting any other documentation.

On reconsideration, the Claimant presented the following:

1. One photograph "taken near the original tank location looking downstream";
2. One photograph taken of "6" pipe that allowed oil to enter UT along Johnny Blevins Road";

3. One photograph "taken from Simmons Loop Rd. looking upstream to the impacted UT along Johnny Blevins Road. Spill area shown in photo";
4. One photograph taken at the confluence of the UT along Johnny Blevins Road and the stream along Simmons Loop Road looking upstream to the spill site";
5. One photograph taken of "the unnamed stream along Simmons Loop road directly downstream of its confluence with the UT along Johnny Blevins Road";
6. One photograph "approximately 1 mile downstream of the spill site, the unnamed stream along Simmons Loop Road into the Little Sandy River near the backwaters of Grayson Lake"; and
7. One photograph taken of "Little Sandy River near the confluence of the unnamed stream along Simmons Loop Road."

The Claimant presents this evidence in an effort to make the argument that there was a discharge of oil and that discharge of oil posed a substantial threat of an UT (un-named tributary); that this un-named tributary lead to an un-named stream along Simmons Loop Road and leads to the Little Sandy River, approximately 1 (one) mile downstream and ultimately to Grayson Lake Reservoir. The Claimant makes the argument that the un-named tributaries are navigable waterways of the United States and that therefore the costs to remove oil from them are compensable under the provisions of OPA.

NPFC Determination on Reconsideration

The NPFC denies this claim upon reconsideration. The Claimant has failed to show that the un-named tributaries are in fact navigable waterways of the United States and that the discharge threatened or substantially threatened a navigable waterway of the United States.

In support of its claim for reconsideration, the Claimant submitted the above referenced seven (7) photographs in an effort to show the proximity of the site of the discharge to a navigable waterway. However, there are no navigable waterways shown in any of the photographs. The un-named streams did not appear to be real "streams" that were consistently present, but the kind that filled with water after it rained therefore more appropriately categorized as intermittent. The NPFC has determined that these streams were not navigable in fact.

Because the Claimant has failed to meet its burden under the Claims Regulations 33 CFR 136/105(a) and 33 CFR 136/105(b) C. 2701 (32), this claim is denied.

Claim Supervisor: 

Date of Supervisor's review: *3/30/12*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments: