

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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5890
4/18/2012

Via e-mail: Ms. Kelly Abe: [REDACTED]@ospr.dfg.ca.gov
State of California
ATTN: Kelly Abe
Dept of Fish and Game
Office of Spill Prevention and Response
P.O. Box 944209
Sacramento, CA 94233-2090

Re: Claim Number: 912021-0001

Dear Ms. Abe

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 912021-0001 involving Hays Brothers Petroleum incident. For a more detailed explanation of this decision please see the enclosed Claim Summary/Determination.

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 912021-0001.

Mail reconsideration requests to:

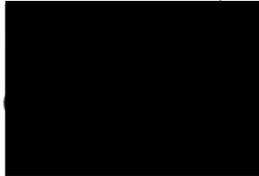
Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,

[REDACTED]
Claims Manager
U.S. Coast Guard

CLAIM SUMMARY / DETERMINATION FORM

Date : 4/18/2012
Claim Number : 912021-0001
Claimant : State of California
Type of Claimant : State
Type of Claim : Removal Costs
Claim Manager : Gina Strange
Amount Requested : \$11,511.94



Facts of the Incident

In April 2008 complaints were received by the Claimant, the State of California, alleging that there was pollution in the area of the Hayes Equipment located at 4638 Pacific Heights Road, Butte County, California and that there were numerous containers of oil and diesel that were being dumped into the ground on the Hays property.

The Claimant responded to the complaints and alleges that it incurred costs in the amount of \$11,511.94 for the costs of personnel of staff environmental scientists, an incident commander, travel costs, equipment costs, such as pollution action kits, laboratory costs, fees for equipment, facilities and supplies and administration.

The Claim

The Claimant has now submitted a claim alleging that it incurred uncompensated removal costs to the Oil Spill Liability Trust Fund (OSLTF) via the National Pollution Funds Center (NPFC) on or about 19 December 2011 to recover the costs it incurred in responding to the incident, in the amount of \$11,511.94.

Description of Actions

According to one investigation report, there was a pollution complaint against Hays Equipment Rentals on or about 7 April 2008 located at 4638 Pacific Heights Road in Butte County. Another complaint had been received alleging the there were numerous containers of oil and diesel that were being dumped directly into the ground on the Hays property. The piles of ash were believed to be hazardous. Also seen, were open pits dug in the ground that appeared to be an illegal land fill for refuse materials that were being buried under dirt fill on the property. There were also dismantled vehicles leaking materials into the ground and the person making the report was concerned it could affect the water supply as the river is right next to this property.

The investigator saw enormous amount of dirt fill that was used to extend the property to the west. Sticking out of the ash the investigator could see ash, pieces of metal, asphalt, auto glass, rebar and other trash. A significant amount of ash had been buried in the fill. Petroleum product was openly dumped onto the ground as evident from soil staining, according to the report filed by the claimant's investigator. The report alleges that Lab tests confirmed the petroleum products as well as heavy metals from the piles. Finally, the report states that motor vehicle parts and other trash and garbage were scattered and buried in fill on the property.

After reviewing the submission, it does not appear that the Claimant either performed any removal actions on their own, or hired a contractor to remove the discharge or potential threat of

a discharge. The only costs associated with this claim appear to be cost of personnel to travel to the site and costs for laboratory analysis, but none of them connected to removal actions associated with this claim.

There were motor vehicles parts and other trash and garbage scattered and buried in fill on the property. According to the investigator, these products had the direct ability to affect Waters of the State and the fish and wildlife that inhabit them. According to the Investigation Report, the California Department of Fish & Game made a request that the Butte County District Attorney's office file a formal complaint against Jerry Robert Hays for a violation of the state law. There is no evidence regarding whether these charges were ever filed.

The investigators had a conversation with Mr. Hays regarding the condition of the property. According to the investigators the property is approximately 1600 feet away from the flowing Feather River across the land surface and the water table is approximately 6 – 1- feet below the ground surface based on the river level.

There was also a large pit close to 8 feet deep and 8 – 10 feet across. In the bottom of the pit and on the sides the investigator could see the earth was wet, indicating the water table was close.

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:

Overview:

1. Claimant has not provided evidence of FOSC coordination as required by 33 CFR 136.203 and 205.
2. In accordance with 33 CFR 136.105 (e)(12), the claimant has failed to certify that there is not a suit filed in court for the claimed uncompensated removal costs.
3. The claim was submitted on time.
4. The NPFC claims manager has thoroughly reviewed all documentation submitted with the claim and determined that the costs presented were not for actions presented in accordance with the NCP.
5. The Claimant has failed to provide evidence as to whether there was an actual or substantial threat of a discharge of oil into a navigable waterway of the United States as required under the provisions of OPA.
6. The claimant has failed to meet its burden as required under the regulations. 33 CFR 136.105.

Analysis.

The NPFC CA reviewed all of the costs submitted by the claimant to confirm that (1) the actions taken were compensable “removal costs” under OPA and the claims regulations at 33 CFR (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 reviewed all the documentation presented in support of this claim. The claimant has not provided any information requested in the NPFC's request for additional information dated 21 December 2011.

The NPFC hereby determines this claim is denied because the claimant failed to provide:

- a. FOSC coordination as required by 33 CFR136.203 & 205;
- b. evidence that no suit is currently filed in court as required by 33 CFR 136.105 (e)(12);
- c. additional information requested by the NPFC as required by 33 CFR 136.105; and
- d. evidence that a substantial threat to a navigable waterway existed.

AMOUNT: 0.00

Claim Supervisor:

Date of Supervisor's review: 4/18/12

Supervisor Action: Denied,

Supervisor's Comments: