

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100
Staff Symbol: (CA)
Phone: 202-493-6694
E-mail: [REDACTED]@uscg.mil
Fax: 202-493-6937

5890
4/9/2012

Sent Via E-mail: [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: 912044-0001

Dear Ms. Abe:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 912044-0001 involving Brusco Tug & Barge. See the attached Claim Summary / Determination Form for details regarding 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. If, however, 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 the reconsideration 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 912044-0001.

Mail reconsideration requests to:

DIRECTOR
NATIONAL POLLUTION FUNDS CENTER
US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100

[REDACTED]
Claims Manager
U.S. Coast Guard

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 912044-0001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Felita Jackson
Amount Requested	: \$599.85

FACTS:

- 1. Oil Spill Incident:** On March 30, 2006, Brusco Tug and Barge (Brusco Tug) reported to the National Response Center (NRC) that oil was released from their tug boat, *Bo Brusco*, from a hole in the hull while fueling at the dock at their IMTT facility in Richmond, California.¹ It was determined that an estimated 50 gallons of red dye diesel fuel discharged into the San Francisco Bay. San Francisco Bay is a navigable waterway of the United States. Brusco Tug, as the responsible party (RP), also reported that they were trying to stop the discharge, that clean-up was underway, and that they had hired contractor MSRC for the response. According to the claim submission, the Claimant sent a Staff Environmental Scientist to the incident site to assess natural resource damages.
- 2. Description of Removal Actions:** The Claimant provided a Supplemental Report entitled "Biological Injury Report for Brusco Tug & Barge at IMTT Facility Richmond, Contra Costa County on Thursday, March 30, 2006."² In summary the report states it is to provide a basic understanding of the environment at risk and a description of environmental impacts related to the spill. Under the "IMPACTS TO THE ENVIRONMENT" section of this report and under subcategory B, it states the OES report indicated the release occurred at 10:00 on 7/13/03 during an incoming tide, approximately four hours before high tide. Additionally, under the "DOCUMENTATION" section of this same report, it states digital photos were taken by OSPR biologist in order to document the extent of oiling and potential impacts to resources on 7/14/03 and that a final site monitoring was conducted by OSPR on 9/11/03, approximately two months after the release. The photos provided in this claim submission are also from 2003.
- 3. The Claim:** On March 7, 2012, the Claimant presented a removal cost claim in the amount of \$599.85 to the National Pollution Funds Center (NPFC) for reimbursement for their uncompensated personnel costs. The claim consists of a billing summary, State investigation report, personnel time record for the Scientist, and a supplemental Biological Injury Report for Brusco Tug & Barge IMTT Facility.

Pursuant to the governing claims regulations found at 33 CFR § 136.103(b)(3), the Claimant has not first presented their costs to the RP.

¹ See NRC Report #792488.

² See, Supplemental Report dated March 30, 2006.

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].

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. FOSC coordination has not been provided for the Claimant.
2. The incident involved the discharge of “Oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. 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.
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1).
5. 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 and that the costs for these actions were not reasonable and allowable under OPA and 33 CFR§ 136.205 as set forth below.

B. Analysis:

The NPFC Claims Manager has reviewed the actual cost invoice and personnel time record 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, and (4) whether the costs were adequately documented and reasonable.

The Claimant seeks reimbursement for uncompensated costs associated with the personnel hours for an Environment Scientist to perform an NRD Assessment. Upon review of the facts presented by the Claimant and supplemental information obtained by the NPFC, the Claims Manager hereby determines that the staff environmental scientist may worked at the incident site to assess natural resource damages caused by the discharged oil based on their OSLTF Claim Form although the Supplemental Report allegedly generated by the Scientist for this incident actually has details and photos associated with an oil spill incident from 2003 vice this incident from 2006. The NPFC requested clarifying information from the Claimant via email on March 8, 2012 due to the disparity of the information provided. The Claimant responded on March 27, 2012 stating what was presented was all they had. The NPFC questioned why there were no costs associated with response by a Warden of OSPR which is typical of claims received by OSPR. Additionally, the NPFC usually receives an investigation report from the Warden articulating the facts regarding the response actions. The Claimant responded saying the Warden did not code time for this incident nor did the Warden generate a report.

Based on the foregoing, it is not clear to the NPFC that the Environmental Scientist costs are in fact for this incident since the Supplemental Report is specific to a 2003 incident. Additionally, NRD Assessment in and of itself is not an OPA compensable removal cost. Finally, the Claimant has not received FOSC coordination from Sector San Francisco as the Federal On Scene Coordinator (FOSC) for this incident and as such, the Claimant has failed to meet their burden pursuant to the governing claims regulations found at 33 CFR §§136.203 & 205 to demonstrate that any actions undertaken by them were determined by the FOSC to be reasonable, necessary and consistent with the National Contingency Plan (NCP).

Based on the foregoing, this claim is denied.

AMOUNT: \$00.00

Claim Supervisor

Date of Supervisor's review: 4/9/12

Supervisor Action: *Denial approved*

Supervisor's Comments: