U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center

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5890
March 19, 2014

VIA EMAIL: [redacted]

Florida Dept of Environmental Protection
ATTN: Peggy Brown
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

RE: 914029-0001
2011-71-44732

Dear Ms. Brown:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 914029-0001 involving your response to oil drums and containers on Lillian Lee and Nora Tyson Road in St. Cloud, FL.

This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

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 914029-0001.

Mail reconsideration request to:
Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

[redacted]

Claims Manager
U.S. Coast Guard
By direction

Enclosures: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION

Claim Number:	914029-0001
Claimant:	Florida Dept of Environmental Protection
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	William Dodson
Amount Requested:	$5,298.34

FACTS:

Oil Spill Incident: On 1 Feb 2011, the Florida Bureau of Emergency Response (BER) responded to the report of an abandoned 55 gallon drum, 20 gallon drum and three 5 gallon containers on Lillian Lee & Nora Tyson Road in St Cloud, FL. Once on-scene, FL BER personnel observed heavy oil staining on the ground around the abandon drums and observed that the 55 gallon drum was nearly empty, the 20 gallon drum was empty and the three 5 gallon containers were full with what appeared to be used motor oil. The closest waterway to the spill site was Center Lake located approximately 1.5 miles to the northeast. [1] Center Lake is a tributary to the Kissimmee River, a navigable waterway of the United States. It was determined by FL DEP personnel on-scene that if the oil was left unmitigated, it would have spread toward Center Lake. On 18 Aug 2011, EPA FOSC Jordan Gerard attested by signature that FL DEP's response actions were properly taken and coordinated with the NCP.[2]

Description of Removal Activities for this Claimant: On 1 Feb 2011, Eagle-SWS, Inc. was hired by FL BER to respond to the abandon drums and containers. All of the containers were over packed and disposed of properly at Clark Environmental, Mulberry, FL. Sorbent pads were placed on the standing oil and disposed of with the over packed containers. On 24 Feb 2011, FL BER and SWS personnel returned to the spill site and remediated approximately 12 cu. yards of oil contaminated soil. The oil contaminated soil was properly disposed of at Clark Environmental, Mulberry, FL. [3]

The Claim: On 7 Mar 2014, FL DEP presented a removal cost claim to the CG National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the total amount of $5,298.34.[4]

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".

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[1] See Flowpath to Center Lake
[2] See Emergency Response Incident Report dated 22 Aug 2011
[3] See Emergency Response Incident Report dated 22 Aug 2011
[4] See Optional OSLTF Claim Form from FL DEP dated 7 Mar 2014

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].

NPFC 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 has determined that the incident did not pose a substantial threat of discharge into or upon navigable waters of the US. The drums were approximately 1.5 miles away from the nearest waterway and the Claimant reports that only approximately 15-20 gallons of product had actually spilled onto the roadside shoulder while all remaining product remained within the containers. There was no evidence that the product had traveled anywhere other than immediately beneath the drum and containers nor were any storm drains or ditches containing water impacted that could have served as the nexus to the navigable waterway.

Additionally it is important to note that the Claimant did not contact the United States Environmental Protection Agency (USEPA) notifying about the incident and subsequent response until over six months later on August 18, 2011.[5] Furthermore, the soil excavation activities that were undertaken by the Claimant's contractor, did not take place until some three weeks following the initial response to the containers which further confirms the amount of product that had spilled did not pose a threat to navigable waters.

SUMMARY

Based on the foregoing, the NPFC has determined that this incident and the actions undertaken by the Claimant are not OPA compensable because the Claimant has failed to demonstrate that a substantial threat of discharge into navigable waters existed.

AMOUNT: **$0.00**

Claim Supervisor: [redacted]

Date of Supervisor's review: ***3/19/2014***

Supervisor Action: ***Denial Approved***

[5] See, FL DEP Emergency Response Incident Report, page 2.