

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)
Phone: 800-280-7118
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5890
10/18/2012

VIA MAIL: [REDACTED]@gmail.com

ATTN: Janer Vazquez, General Manager
1500 Harbor Boulevard
Weehawken, NJ 07086

RE: Claim Number: 912068-0001

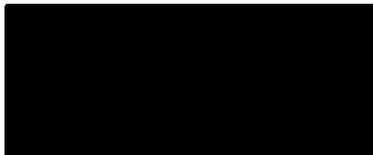
Dear Mr. Vazquez:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 912068-0001. Please see the attached Claim Summary / Determination Form for the rationale regarding this 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 912068-0001.

Mail reconsideration requests to:

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



Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	912068-0001
Claimant	Lincoln Harbor Yacht Club
Type of Claimant	Individual
Type of Claim	Removal Costs
Claim Manager	Cynthia E Oliver
Amount Requested:	\$6,600.00

FACTS

On May 23, 2012, the motor vessel MISTRIAL II was discovered to have sunk at its mooring in slip C34 of the Lincoln Harbor Yacht Club in Weehawken, NJ.¹ The owner of the vessel and RP was discovered to be Mohammed Elgahnem of 1432 East 71st Street, Brooklyn, NY. The vessel took on water during a heavy rain the night before and sunk at the pier side, causing sheen to appear around the vessel.²

DESCRIPTION OF REMOVAL ACTIONS

On May 23, 2012, Janer Vazquez, General Manager for the Lincoln Harbor Yacht Club placed two pumps in the vessel in an attempt to raise it. Due to the failure of one of those pumps, the raising of the vessel was postponed until the next day.³ At that time, Mr. Vazquez contacted the Yacht Club's designated "oil spill response team," Ken's Marine Service, who placed boom around the vessel.⁴ Mr. Vazquez also contracted the services of Bob's Diving Service, who used pumps and a diver to raise the vessel. The MISTRIAL II was then removed from the boat slip via Roberto's Boat Repair and destroyed as an abandoned vessel.

THE CLAIM

On May 25, 2012 the Lincoln Harbor Yacht Club submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$6,600.00.

The Lincoln Harbor Yacht Club is claiming response costs in the amount of \$6,600.00, which is for monies paid to Ken's Marine Service, and Bob's Diving Service. Ken's Marine Service is the Lincoln Harbor Yacht Club's designated "oil spill response team", and Bob's Diving Service performed the vessel raising services.

The original claim submission consists of the OSLTF Claim Form, Pollution Witness Statement, and a copy of the Federal On Scene Coordinator Representative's (FOSCR) (MST3 Michael Warhurst) business card.

Additional supporting documents include a copy of the invoice from Bob's Diving Service, correspondence to the RP, correspondence to the Claimant, FOSCR Pollution Investigator Statement, and NRC Report 1011709.

¹ See, OSLTF Claim Form, dated May 25, 2012.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages resulting from that incident. 33 U.S.C. § 2702(b). A responsible party's liability includes "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 "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil" 33 USC § 2701(23).

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."

Pursuant to 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].

Pursuant to 33 USC § 2713(d), "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."

Pursuant to 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.

Pursuant to 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."

Pursuant to 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."

DETERMINATION OF LOSS

Overview

1. FOSC coordination was provided by USCG Sector New York FOSCR MST3 Michael Warhurst.
2. The incident involved a discharge of "oil" as defined in OPA 90, 33 USC § 2701 (23), that presented a substantial threat 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)(2);

Analysis

The review of the actual cost invoicing and dailies 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 consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented.

This claim is denied. Under 33 C.F.R. § 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. The NPFC considered all documentation presented by the Claimant.

On June 1, 2012, the NPFC contacted the Claimant via email requesting evidence of presentation of removal costs incurred for the pier side sinking of the MISTRIAL II to the owner and Responsible Party, Mr. Mohammed Elghanem. This email also requested additional removal cost information in the form of contractor labor and materials rates, as well as waste manifests for oily waste removed from the site. On June 11, 2012, the NPFC sent a follow-up email to the Claimant advising they would need to provide a dated copy of the letter with cost documentation to Mr. Elghanem which would evidence the commencement of the 90-day waiting period for the RP to accept, reject, or ignore the Claimant's demand for payment of services. This follow-up email also clarified that the additional information would be due no later than June 14, 2012. On June 14, 2012, the NPFC contacted the Claimant via email and requested the RP's address, and clarified that if the RP denied the claim within the 90-day period, the NPFC could commence adjudication of the claim, otherwise the entire 90-day period would have to lapse prior to NPFC's ability to adjudicate the claim.

On June 19, 2012, the Claimant contacted NPFC via email and provided a copy of the invoice from Bob's Diving Service as well as a copy of a second letter sent by the Claimant to the RP requesting reimbursement for oil removal costs incurred as a result of the vessel sinking.

On June 20, 2012, the NPFC sent a Certified Mail Return Receipt letter to the RP which notified the RP of his responsibilities under the Oil Pollution Act of 1990. The letter was returned "undeliverable" on July 24, 2012. The RP made no other contact with the NPFC nor the Claimant. As such, on September 11, 2012, the NPFC proceeded to adjudicate the claim.

The Claimant's sum certain was presented in the amount of \$6,600.00. However, only \$1,800.00 of the claimed costs were supported with documentation, in the form of an invoice for Bob's Diving Service. Because a standard rate schedule for this vendor was not received, the NPFC must deny this claimed amount of \$1,800.00.

On September 18, 2012, the NPFC emailed the Claimant a second request for additional information which requested documentation of the Non-Hazardous/RCRA materials disposal, chain of custody, and

invoices for the same. This letter also requested the standard rate schedule for Bob's Diving Service, Ken's Marine Service, and equipment rented by the Claimant for the response and removal of oily waste at the site. As of October 15, 2012, no response has been received from the Claimant. No other requested required documentation has been received from the Claimant, and as such, the remaining unsupported claimed amount in the amount of \$4,800.00 is also denied.

Based on the foregoing, this claim is denied because the Claimant has failed to provide to the NPFC all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim as required under 33 C.F.R. § 136.105(a) and 136.105(e)(6).

Claim Supervisor:



Date of Supervisor's review: *10/18/12*

Supervisor Action: *Denial approved*

Supervisor's Comments: