U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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5890
January 16, 2013

VIA EMAIL: [redacted]@durhamnc.gov

City of Durham
Office of the City Manager
ATTN: Mr. Thomas Bonfield
101 City Hall Plaza
Durham, NC 27701

RE: 913014-0001

Dear Mr. Bonfield:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 913014-0001 involving the discharge of heating oil from the private residence located at 2813 Shenandoah Drive, Durham, NC 27704, owned by a Ms. Elizabeth Finch, into an unnamed tributary to Ellerbe Creek on December 30, 2010. Please see the attached Claim Summary / Determination Form for an explanation 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. 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 913014-0001.

Mail reconsideration requests to:

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

Sincerely,

[redacted]

Galen Wetzel
Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 913014-0001
Claimant	: City of Durham, NC
Type of Claimant	: Local Municipality
Type of Claim	: Removal Costs
Claim Manager	: Galen Wetzel
Amount Requested	: $17,970.00

FACTS:

Oil Spill Incident: On December 30, 2010, two public works employees for the City of Durham, NC were investigating a petroleum odor emanating from a storm drain near 2903 Elgin Street. The investigation lead to an unnamed stream, a tributary to the Ellerbe Creek, where multiple pools of a reddish-orange oil product was discovered between Farthing and Elgin Streets.

The source of the oil remained a mystery until January 14, 2011, when a private residence located at 2813 Shenandoah Drive, owned by a Ms. Elizabeth Finch, was inspected. There it was found that a fuel line in the basement, leading from the above ground oil storage tank to the home's furnace, was cut and an unknown quantity of home heating fuel was discharged into the basement. The oil flowed into a floor drain that discharged to the unnamed stream. Ms. Finch was advised by the City that she was the responsible party and was responsible for the mitigation and clean-up of the oil.

It is noted that the City of Durham Water Quality Complaint / Inspection Record (WQI)[1] indicates that the house appeared to be abandoned and that the home was burglarized at some point prior to December 30, 2010. The cutting of the copper fuel lines is believed to be caused by vandals.

Description of Removal Activities for this Claimant: On December 30, 2010, the City of Durham contracted Resource Reformers, LLC dba[2] Clean Green to perform emergency spill containment and clean up. The contractor utilized a vacuum truck to remove all the oil in contaminated pools, absorbent booms and pads along with constructing earthen berms. Cleanup was completed the same day.

The City of Durham continued to make checks of the stream and directed Clean Green to perform additional response activities on January 3, 6, 10, 12-13, 18, 24, February 11, 25, and March 8, 2011.[3]

On April 7, 2011, the Responsible Party contracted Zebra Environmental to complete soil remediation. All work was completed on this date.

The Claim: On November 15, 2012, The City of Durham, NC presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of $17,970.00.

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

[1] WQI File number 10WQ213, ADC number 0873-G06.
[2] dba is thought to stand for, "doing business as".
[3] As documented in the WQI File number 10WQ213.

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 Federal on Scene Coordinator (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. No FOSC coordination has been provided by the United States Environmental Protection Agency (USEPA) in accordance with CFR § 136.203.
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 U.S.C. §2701 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 for removal costs.
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 allowable under OPA and 33 CFR § 136.205.

B. 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.

The Claimant did not obtain FOSC coordination for this incident[4] and as such, the Claimant has failed to meet their burden pursuant to the governing claims regulations found at 33 CFR 136.203 and 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).

The Claimant failed to show how the invoiced rates were determined and any comparison of the rates. This is normally provided via a rate schedule from the contracted Oil Spill Response Organization (OSRO), Clean Green. In order to assist the Claimant, the NPFC Claims Manager (CM) offered and then communicated[5] directly with the OSRO in an attempt to gather the required documentation.

The OSRO told the CM that their business does not have a published rate schedule because each response is different and one cost document is impractical. Therefore the NPFC is unable to verify any of the labor and equipment rates used for this incident and cannot make a reasonableness determination of costs with the records provided.

The Claimant failed to show how the personnel and equipment were utilized in accordance with the invoice. This is normally provided from a daily type log that was maintained at the incident site. Daily records typically show each person's participation by capturing their respective role and associated time expended by signing in & out and listing all the equipment utilized. Again the NPFC CM assisted the Claimant by reaching out to the OSRO who said no such log was maintained and that Clean Green uses a punch clock to account for their personnel hours. This method represents the total time an employee worked for that day and does not show the actual time spent on this incident or account for any of the equipment used. Therefore the NPFC is unable to verify any of the invoiced line items used for this incident and cannot calculate OPA compensable costs with the records provided.

Note: due to the lack of documentation from the OSRO, the CM attempted to justify the OSRO invoice by using the WQI. However due to inconsistencies (examples below) found between the invoice and WQI, the CM was unable to do this.

- The OSRO either billed for personnel time and equipment that was not included in the WQI. Specifically the WQI does not include any response activities for December 31, 2010; January 4 and 25, 2011, despite the OSRO stating they performed work on these dates.

[4] Claimant representative, Mr. Jonathan Baker, stated this fact in email to NPFC on December 19, 2012.
[5] On December 21, 2012 a telephone conversation with Andrew Wilkinson of Clean Green was conducted.

- The OSRO billed for equipment that was not included in the WQI. Specifically the OSRO claimed that on January 6, 2011, three absorbent booms were used but the WQI only states that absorbent pads were used.
- WQI does not constantly contain enough details of the daily response activities. Specifically on January 12, 2011, OSRO claimed to use absorbent boom but the WQI only states the OSRO searched for an underground storage tank. On January 18, 2011, the OSRO claimed to use 70 absorbent pads but the WQI only states oil sheen was removed with absorbent pads.

Finally, the Claimant has failed to show that the disposal cost claimed was in fact incurred by the OSRO. This is normally provided by a billing invoice (with proof of payment) and a signed waste manifest from the receiving facility, in this case GARCO, Inc. The only proof of waste disposal was a Certificate of Disposal from GARCO. This documentation does not show any financial obligation of the OSRO. Therefore the disposal cost of $2,750.00 for 1100 gallons of heating oil is denied.

C. Determined Amount:

Based upon the foregoing, the NPFC denies this claim because the Claimant has failed to provide adequate documentation to demonstrate that the costs incurred are based on fair and reasonable rates, invoiced line items were incurred, disposal costs were incurred, and no FOSC coordination was obtained from the FOSC to ensure the response was conducted in accordance with the NCP.

AMOUNT: **$0.00** [redacted]

Claim Supervisor: ***Donna Heilberg***

Date of Supervisor's Review: ***1/16/13***

Supervisor Action: ***Denial approved***

Supervisor's Comments: