U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center

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5890
October 16, 2013

VIA EMAIL: [redacted]

Florida Department of Environmental Protection
ATTN: [redacted]
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

RE: 913061-0001

Dear Ms. [redacted]:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on claim number 913061-0001 involving FL Facility 2011-3I- 45530 oil spill.

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.

Disposition of this reconsideration constitutes final agency action.

Sincerely,

[redacted]

Chief, Claims Adjudication Division
U.S. Coast Guard
By direction

Enclosures: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION

Claim Number:	913061-0001
Claimant:	Florida Department of Environmental Protection
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	[redacted]
Amount Requested:	$89,421.26

FACTS:

1. ***Oil Spill Incident:*** On July 10, 2011, Florida Bureau of Emergency Response (FL BER), received an email from the SWP concerning a structural fire with cooking oil and cleaning chemicals that discharged at Stan's Coffee located at 5614 2nd Street West in Lehigh Acres. FL BER contacted the fire department at 1717 hrs and Chief [redacted] stated they were currently fighting a fire at a 33,000 square foot warehouse that contained coffee, cooking oil, and cleaning chemicals. Due to fire fighting activity, there was runoff coming from the building but it was contained on-site in the stormwater system. The incident was reported to the National Response Center (NRC) via report #982379. It is important to note that the Florida Emergency Response Incident Report states the following pollutants were involved in this spill: ammonia derivatives, caustic scrubber, phosphoric acid, food oils, and isopropyl alcohol.

2. ***Decsription of removal actions:*** FL BER personnel arrived on scene at about 1445 on July 11, 2011 and met with fire and police. The fire department advised that they had applied over 1.5 million gallons of water on the fire. FL BER noted substantial flooding with floating oil throughout the property, leading off site through the stormwater ditches to the nearby canal system which empties into the Orange River, a navigable waterway of the US.

   FL BER took pH readings at various locations which were all neutral, and it is believed that the fire fighting foam neutralized the cleaning chemicals. East County Water Control Distirct (ECWCD) deployed hard boom at two canal locations downstream from the site. The Responsible Party (RP) hired SWS to handle cleanup. FL BER called and reported the incident to the National Response Center (NRC) and called the United States Coast Guard (USCG) Station Fort Myers.

   On July 12, 2011, FL BER monitored SWS remediation of the stormwater system and ECWCD reported that due to heavy rains, the water control structures downstream had all overflowed. FL BER and USCG monitored the Orange River in several locations but did not observe a sheen. At the end of the day, the cleanup reverted to FL BER due to insufficient insurance coverage by the RP.

   On July 13, 2011 and July 14, 2011, FL BER oversaw soil excavation and vacuuming activities by SWS who was retained by FL BER to continue response efforts. Lee County DOT agreed to scrape the stormwater ditches along 2nd Street and the

contaminated soil was taken to the Lee/Hendry Landfill for disposal. The USCG referred the incident to the United States Environmental Protection Agency (USEPA) as the Federal On Scene Coordinator (FOSC).

On July 15, 2011 and July 16, 2011, FL BER supervised SWS remediation of the contaminated soil and stormwater system. On July 18, 2011 and July 19, 2011, FL BER oversaw contaminated soil and petroleum contaminated water removal. The stormwater system was scraped including the west, south and east sides of the building along with the stormwater pond on the north side.

Over 664 tons of contaminated soil and vegetation were hauled to the Okeechobee Landfill for disposal and 31, 000 gallons of petroleum contaminated water were transported to Aqua Clean Environmental for disposal. The loading bay water level was also pumped down to keep floating oil and debris contained during rainstorms.

On August 10, 2011, FL BER met with SWS to empty and decon the frac tanks of the residual cooking oil which was transported to Clark Environmental for solidification. The loading bay was pumped down again to ensure the berm was not breached during future rainstorms. On August 11, 2011, SWS hauled the last load of cooking oil to Clark Environmental which totaled over 60,000 pounds for solidification. On August 12, 2011, SWS hauled five drums of contaminated absorbents to Clark Environmental for disposal. FL BER stated remedication complete on August 12, 2011.

3. ***The Claim:*** On May 14, 2013, the Claimant presented this claim to the National Pullution Funds Center (NPFC) for compensation of it's uncompensated removal costs in the amount of $89,421.26. FL BER is claiming $68.085 in FL BER vehicle costs, $137.00 in work and nitrile gloves, $.80 in pH paper, $2,575.55 in FL BER personnel costs, $22.00 in clerical charges, and $86,617.82 in response costs invoiced by SWS as the response contractor on this incident.

   The claim was denied on May 21, 2013 on the grounds that the Claimant failed to provide substantiation that the oil was oil as defined by OPA and did not contain ANY hazardous materials such as Polychlorinated Biphenyls (PCBs). 33 USC 2701(23). "Oil" must be discharged to impose liability under the Oil Pollution Act (OPA). The facts as presented in the documentation from the Claimant indicates the contamination included Phosphoric Acid, which is listed as "hazardous substances" under CERCLA and as a result, excluded from the definition of oil under OPA.

   The claim package included the FL BER Emergency Response Incident Report dated July 11, 2011, which indicated one of the pollutants involved was Phosphoric Acid regardless of the amount present. Therefore the substance involved in this incident does not meet the definition of oil under OPA but rather is considered a "mixed spill" and not compensable by the OSLTF.

REQUEST FOR RECONSIDERATION:

On July 19, 2013, the Claimant sent a request for reconsideration to the NPFC via email stating they would like the NPFC to reconsider the claim. The Claimant provided no new information to support the request other than written arguments which are as follows:

1. Although FDEP-OER was notified that hazardous substances were located on site, and that notification was included in our report, there was no visual, physical, or anecdotal evidence of hazardous substances being mixed with the oil. The lack of hazardous substances being mixed with the oil is supported by the actions of our responder as denoted in the response report, the excerpts of such can be found below.

   a. Our responder, the State OSC, utilizing the PH paper to test the oil/water mixture and finding no elevated readings negates the presence of hazardous substances in the product being recovered.

   b. The SOSC visually noted "oil floating on water" and she did not visually note the other products.

   c. Her testing of the oil/water for PH and it coming back normal indicates no presence of other items to make a mixture.

2. The State OSC observed oil floating on the water, which had the potential to impact a navigable waterway. This observation alone dictated that an NCP response be enacted.

NPFC Determination on Reconsideration

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. The NPFC considered all the documentation submitted by the Claimant. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a ***de novo*** review of the entire claim submission upon reconsideration.

Following receipt of the request for reconsideration on July 19, 2013 via email from Ms. [redacted], the NPFC sent an email to Ms. [redacted] requesting a copy of any lab analysis that had been performed which would demonstrate whether or not the product was strictly oil. On July 29, 2013, the NPFC called and spoke with Ms. [redacted] about the evidence needed to substantiate the product was oil. Ms. [redacted]

advised that no lab analysis was performed and that while the Claimant's report listed phosphoric acid as being present, she said that it in fact was not but that they reported what was told to them.

The NPFC advised that without a lab analysis, the Claimant would not be able to demonstrate the product was strictly oil and as such, the Claimant would not prevail in meeting their burden. The NPFC asked the Claimant if she wanted to withdraw the request for reconsideration or if she wanted the NPFC to move forward with a denial based on the fact that the Claimant was unable to demonstrate the product was oil. Ms. [redacted] informed the NPFC that she would speak with others and let the NPFC know her intent.

On September 18, 2013, Mr. [redacted] of the United States Environmental Protection Agency (USEPA) met with [redacted] of the NPFC to dicuss the details of the incident. While Mr. [redacted] was only able to say that the Claimant did not have a lab analysis but believed the product was strictly oil based on a visual inspection only and a field ph test, the NPFC explained that the burden is on the Claimant to demonstrate the product was an oil as defined under OPA. Mr. [redacted] understood that without a lab analysis and with a facility that is known to have hazardous waste products on site, the NPFC is not able to make a different determination based on the preponderance of the evidence.

Based on the foregoing, this claim is again denied on reconsideration as the Claimant has failed to provide substantiation that the oil was oil as defined by OPA and did not contain ANY hazardous materials such as Polychlorinated Biphenyls (PCBs). 33 USC 2701(23). "Oil" must be discharged to impose liability under the Oil Pollution Act (OPA).

The facts as presented in the documentation from the Claimant indicates the contamination consisted of Phosphoric Acid, which is listed as "hazardous substances" under CERCLA and are thus excluded from the definition of oil under OPA. This claim is denied.

Claim Supervisor: [redacted]

Date of Supervisor's review: ***10/16/13***

Supervisor Action: ***Denial on reconsideration approved***

Supervisor's Comments: