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
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Arlington, VA 20598-7100
Staff Symbol: (CA)
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5890
July 30, 2013

VIA EMAIL: [redacted]@michigan.gov

State of Michigan
ATTN: Michael Worm
Department of Environmental Quality
350 Ottawa Avenue, N.W.
Grand Rapids, Michigan 49503-2341

RE: E12504-0001

Dear Mr. Worm:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number E12504-0001 involving the oil discharge into Fenner's Ditch from a suspected leak of the abandoned Dolly M. Dam #4 exploration well at 681 West Wedgewood Drive, Muskegon, Michigan. 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 E12504-0001.

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	: E12504-0001
Claimant	: State of Michigan
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Galen Wetzel
Amount Requested	: $7,035.89

FACTS:

Oil Spill Incident: Crude oil is slowly but continuously leaking from a suspected former exploration well (Dolly M. Dam #4) adjacent to Fenner's Ditch, a navigable waterway which flows into Bear Lake a tributary to Lake Michigan. The site is located on a residential lot at 681 West Wedgewood Drive, Muskegon, Michigan.

The exploration well was abandoned in or around 1929 by dropping a steel ball down a hole and removing the top several hundred feet of well casing. It is suspected that the oil is migrating up through the old borehole in the clay and then filtering up through the upper sand layer (40 to 70 feet thick).

Since 2009, the Michigan Department of Environmental Quality (DEQ) has been applying and maintaining sorbent material to manage the release. The lack of casing has made the task of closing/abandoning the well difficult. DEQ requested U.S. Environmental Protection Agency (EPA) for assistance to pinpoint the location of the old borehole and allow the capping to commence.

June 18-22, 2012, EPA mobilized and conducted a geophysical assessment of the area of Fenner's Ditch. Findings were published on July 20, 2012. No further remediation actions or response activities have been provided after this date.

Responsible Party: EPA has stated that the current property owners were unaware a well was located on the land until after it began leaking after they purchased the home. EPA decided not to issue a Notice of Federal Interest (NOFI) to the property owners. EPA continues to review background records to determine if there are any companies still in existence that may be tied back to the exploration well. The NPFC has not identified a responsible party at this time and has determined that the current property owners are not responsible for the spill under the Innocent Landowner Provision.

Description of Removal Activities for this Claimant: DEQ has provided documentation to show that they have been supplying sorbent material for the collection of discharged oil since December 2009 and that DEQ personnel have been responding to the spill site on a near monthly basis since April 2010. Contaminated sorbent material was disposed of via private landowner collection at no additional cost to DEQ.

The Claim: On June 28, 2013, The State of Michigan, Department of Environmental Quality (DEQ), presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of $7,035.89.

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".

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 (NCP) 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 was provided by U.S. EPA Region 10 (Jeffrey Kimble) 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 are 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 has failed to provide substantiation that the contaminated absorbent material generated from this spill was disposed of in accordance with the NCP. The Claimant provided the following description of how the waste was disposed of:

> *Absorbent booms and pads were gathered and disposed of via private landowner collection, resulting in disposal at a licensed municipal landfill, at no additional cost.*

Chapter 40 of the Code of Federal Regulations Section 300.310(c) states that disposal shall be performed in the following manner:

> *Oil and contaminated materials recovered in cleanup operations shall be disposed of in accordance with the Regional Contingency Plan (RCP), Area Contingency Plan (ACP), and any applicable laws, regulations, or requirements. Regional Response Team (RRT) and Area Committee guidelines may identify the disposal options available during an oil spill response and may describe what disposal requirements are mandatory or may not be waived by the On Scene Commander (OSC).*

The Claimants description that contaminated waste was simply placed out for residential collection is not consistent with disposal methods normally seen during a removal response. Disposal of petroleum contaminated waste is typically identified on a disposal manifest and documented accordingly to demonstrate disposal was performed in accordance with the NCP.

C. Determined Amount:

Based upon the foregoing, the NPFC denies this claim because the contaminated waste product associated with this incident has not been shown to have been properly disposed of in accordance with the NCP.

AMOUNT: **$0.00** [redacted]

Claim Supervisor: [redacted]

Date of Supervisor's Review: *7/29/13*

Supervisor Action: ***Denial approved***

Supervisor's Comments: