

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890
4/12/2011

Via email: [REDACTED]@imsenv.com

IMS Environmental Services
c/o Mr. May
1301 Marsh Street

RE: Claim Number: 911020-0001

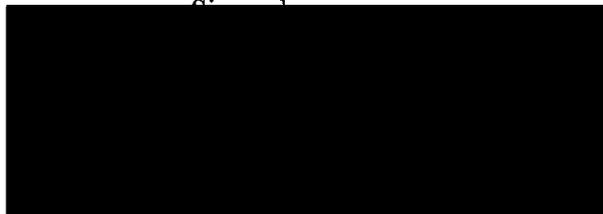
Dear Mr. May:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 911020-0001 involving the Hampton Roads Transit spill. Please see the claim analysis for further details.

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 911020-0001.

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

Date	: 4/11/2011
Claim Number	: 911020-0001
Claimant	: IMS Environmental Services, Inc.
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$50,563.40

FACTS:

1. Oil Spill Incident:

On April 19, 2010, contractors (A&M Services Plus, LLC (A&M)) were excavating near an underground storage tank located at Hampton Roads Transit (HRT), in Hampton, VA. While working, A&M punctured a tank on-site, discharging approximately 1200-1500 gallons of gasoline into the soil.¹ HRT did not have immediate knowledge of the incident, and therefore, did not report the incident to the National Response Center (NRC) or the Commonwealth of Virginia Department of Environmental Quality (VA DEQ) until April 27, 2010.

2. Description of removal actions performed:

The claimant, IMS Environmental Services, Inc. (IMS) contracted with A&M for removal and cleanup of the oiled soil, and any waterways possibly affected by the discharge. IMS transferred the remaining fuel and water from the affected tank and vacuumed the existing tank field monitoring wells MW-1, MW-2, MW-3 and MW-8. It also gauged monitoring wells MW-4, MW-5, MW-6 and MW-7.²

IMS also cleaned the oil/water separators (OWS), pits and catch drains, conducted vapor monitoring of the sanitary sewer lines and recovered liquid and vapor from the tank field monitoring wells. IMS also washed the OWS affected by gasoline, flushing the line that led to a sewer manhole located on the property and monitored it for oil and vapors.³

Two tons of soils were removed and disposed of from the tank farm well installation, as well as 27,600 gallons of water and 1329 gallons of oil from the damaged tank.⁴

3. The Claim: On February 4, 2011, IMS submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$50,563.40 for the services provided from May 5 through July 30, 2010. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim submission.

¹ See NRC Report # 938383, dated 4/27/2010.

² See IMS Initial Abatement Measures Report, dated 6/07/2010, and submitted to the NPFC with the claim on 2/04/2011.

³ *Ibid.*

⁴ *Id.*

This claim consists of copies of the invoicing and associated dailies; a copy of NRC Report # 938383; copies of proofs of payment to third parties; a copy of the contract between IMS and A&M Services Plus, LLC; copies of the disposal manifests; a copy of the VA DEQ Request for Site Characterization Report, dated 5/06/2010; copies of the cover letter and finalized copy of the Initial Abatement Measures Report submitted to the VA DEQ by IMS; copies of letters between IMS to A&M, dated 1/06/2011 and 1/26/2011; photographs and internal email correspondence.

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 FOOSC, and (4) whether the costs were adequately documented.

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 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 NPFCA, 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].

DETERMINATION OF LOSS:

A. Overview:

1. There was no FOSC coordination for this incident. 33 U.S.C. § 1321(d)(2)(K).
2. The incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23); however, it did not pose a substantial threat to navigable waters.
3. A Responsible Party was determined and subsequently notified by the NPFC. However, no response has been received from the RP to date. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(2)
5. 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.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm whether or not 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 Claims Manager was unable to validate that the costs incurred were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

IMS claims a total of \$50,563.40 in uncompensated removal costs. However, there are problems with its claim. First, while it could be argued that there was a discharge of oil, it is not clear that this discharge posed a SUBSTANTIAL threat to a navigable waterway. While the RP did notify the VA DEQ, no FOSC coordination has been provided by either Coast Guard or USEPA for this spill. Furthermore, as the NRC report states that this spill affected land-soil, the claims manager sought to address how the 1198 gallons of gasoline⁵ threatened a body of water that was approximately 4500 feet⁶ from the site of the incident. While IMS told the claims manager that the “subsurface release coincided with a significant rain event in the Hampton Roads area” and “[e]vidence of gasoline was discovered in several subsurface vaults and conduits across the HRT property and ultimately the storm drain running along Algonquin Road which leads directly to the Elizabeth River,”⁷ the initial Abatement Report (submitted to VA DEQ by IMS) states that the gasoline was found in the oil/water separator (OWS) and not in the sewer system.⁸

VA DEQ’s understanding of the incident was that, based on the reports submitted for this incident (and its discussion with Scott Demharter, the Director of Energy Management and Sustainability for HRT), most of the fuel released was intercepted by the OWS, with the possibility of an unknown quantity making its way to the groundwater. Additionally, while it is also possible that an unknown amount made its way to the Hampton Roads Sanitation District (HRSD) sanitary sewer, the release was unknown to the facility for 8 days (and therefore not contained) from its initial onset on April 19, 2010 until IMS determined that the OWS was discharging to the sanitary sewer system on April 27, 2010 (On this same date, IMS used a photo-ionization detector meter to check for the presence of gasoline vapor in the first HRSD connecting manhole and detected gasoline vapors in concentrations up to 60 ppm).⁹ Had the discharge been a substantial threat, a larger quantity would have been found in the OWS, as well as in the sanitary sewer. Furthermore, according to VA DEQ, there were no additional reports of gasoline vapors in the sanitary sewer after the first day IMS was onsite and there has never been any impact (free product or vapor) reported in any area of the storm drain system or in any waterway (the Elizabeth River or Hampton Roads) that have been attributed to this release.¹⁰

Based on the preponderance of the evidence, the claim is denied because (1) the response has not been coordinated with a Federal On Scene Coordinator (FOSC) in accordance with 33 CFR 136.203 and (2) no FOSC has determined that the actions undertaken by the Claimant were deemed consistent with the National Contingency Plan in accordance with 33 CFR 136.205 nor were the actions by the Claimant directed by the FOSC and (3) the Claimant has failed to meet its burden to demonstrate that a substantial threat of discharge oil into or upon a navigable waterway existed. Should IMS choose to request reconsideration of its claim, it would need to coordinate its response efforts and receive a written statement from the FOSC of the affected EPA region/USCG district. Accordingly, this claim is denied.

C. Determined Amount:

⁵ See IMS Initial Abatement Measures Report, dated 6/07/2010, and submitted to the NPFC with the claim on 2/04/2011.

⁶ See email from Mr. Bryan Genzler, IMS, to Ms. Alyssa Lombardi, NPFC, dated 3/31/2011.

⁷ See IMS Initial Abatement Measures Report, dated 6/07/2010, and submitted to the NPFC with the claim on 2/04/2011.

⁸ See email from Ms. Rebecca Gehring, VA DEQ, to Ms. Alyssa Lombardi, NPFC, dated 4/08/2011.

⁹ See email from Ms. Rebecca Gehring, VA DEQ, to Ms. Alyssa Lombardi, NPFC, dated 4/08/2011.

¹⁰ *Ibid.*

The NPFC hereby determines that the OSLTF will pay \$0.00 as full compensation for the claimed removal costs incurred by the Claimant and submitted to the NPFC under claim 911020-0001.

AMOUNT: \$0.00

Claim Supervisor:  *Donna Heltberg*

Date of Supervisor's review: *4/12/11*

Supervisor Action: *Denial approved*

Supervisor's Comments: