

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 915056-0001
Claimant	: State of California Department of Fish and Wildlife Office of Spill Prevention and Response
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$31,914.68

**FACTS:**

1. ***Oil Spill Incident:*** On March 25, 2012, the State of California Department of Fish and Wildlife, Office of Spill Prevention and Response (OSPR) received a phone call from CALEMA regarding a 32' pleasure craft (P/C Arcadia) that sank in its berth at Moss Landing Harbor. Moss Landing Harbor drains into Monterey Bay, and then into the Pacific Ocean, all of which are navigable waterways of the US. At first no release was observed by OSPR personnel who had arrived on-scene; however, on March 28, 2012, when responding to a different spill, the OSPR Warden observed a consistent release and sheen of a gasoline-type product emitting from the vessel. Due to the vessel's proximity to the Monterey Bay National Marine Sanctuary and a resident sea otter colony, OSPR hired a local boat salvor to remedy the threat. In its spill report, OSPR states that 42 gallons of gasoline were released and dissipated, with only five gallons of product actually being recovered.

The owner of the vessel (and thus the Responsible Party (RP) for this incident) has been identified as Mr. [REDACTED] of Half Moon Bay, CA.

This incident was reported to and under the oversight of a representative from the State of California Department of Fish and Wildlife in its capacity as the State On Scene Corrdinator (SOSC). The incident was reported to the National Response Center (NRC) via report # 1006819.<sup>1</sup>

2. ***Description of removal actions performed:***

March 28, 2012 Monterey Bay Diving (MBD) was hired by the Claimant, OSPR, to raise the vessel, which sank in its slip 4 to 5 days earlier. MBD removed the batteries that were located in the engine room, removed all fuel cans, paint cans, lacquer thinner and plugged all vents to the fuel tanks. MBD then proceeded that afternoon and the following day to raise the vessel and once the gunnels were above the water line, MBD pumped the water out of the boat and patched any noticeable leaks with splash zone. Once all holes were patched and all water was out of the boat, MBD began removing the lift bags and monitored the vessel to ensure stability. After the vessel was determined to be stable, MBD put a 110v sump pump inside the engine room in case it rained and more water got inside the vessel. On Saturday, March 31, 2012, MBD retrieved their sump pump after the owner of the vessel placed his own pump inside.

<sup>1</sup> See NRC Report #1006819, opened 3/25/2012.

OSPR personnel remained on-scene during the duration of the removal and cleanup activities.

3. **The Claim:** On March 4, 2015, OSPR submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$31,914.68 for the services provided from March 25 through 29, 2012. 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.

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 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 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);
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)(1)
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, necessary, and performed in accordance with the National Contingency Plan (NCP).

OSPR claims a total of \$31,914.68 in uncompensated removal costs. However, as an initial matter, the submission documents indicate that the removal of hazardous substances occurred during response although without lab analysis and proof of proper disposal, the Claimant has not demonstrated that the product(s) removed were strictly oil or that disposal was performed in accordance with the NCP, based on the Claimant's contractor stating that it removed "fuel cans, paint cans [and] lacquer thinner." Additionally, OSPR did not (and, upon the NPFC's request, could not) provide disposal manifests, and thus it was unable to show that what was disposed of was oil as defined by OPA and not any other substances/chemicals. It is important to note that despite the fact that the NRC was contacted, no FOSC coordination has been provided for this incident.

Based on the preponderance of the evidence, this 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; (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; (3) the Claimant has failed to meet its burden to demonstrate that the incident involved strictly oil as defined by OPA; and (4) that the waste was properly disposed of in accordance with the NCP.

Should OSPR choose to request reconsideration of its claim, it would need to provide documentation that it obtained FOSC coordination and would also need to provide documentation to show the product was strictly oil and that it was disposed of in accordance with the NCP. Accordingly, this claim is denied.

***C. Determined Amount:***

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 915056-0001.

**AMOUNT: \$0.00**

Claim Supervisor: 

Date of Supervisor's review: *3/30/15*

Supervisor Action: *Denial approved*

Supervisor's Comments: