U.S. Department of Homeland Security
United States Coast Guard

Director
National Pollution Funds Center

4200 Wilson Blvd Stop 7100
Arlington VA 20598-7100
Staff Symbol: Ca
Toll-Free: 1-800-280-7118
Fax: 703-872-6113
Email: ARL-PF-NPFCCLAIMSINFO@uscg.mil

5890
October 6, 2015

VIA EMAIL: [redacted]

State of Washington Department of Ecology
ATTN: [redacted]
P.O. Box 47775
Olympia, WA 98504-7775

RE: 915009-0001

Dear [redacted]:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on claim number 915009-0001 involving your response to the Tug NORTHERN RETRIEVER.

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.

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. All correspondence should include claim number 915009-0001.

The NPFC is in the process of moving during the fall of 2015 and into the winter of 2016. Because of the timeliness requirement for reconsideration requests, you may email an advanced copy of your reconsideration request directly to the claims manager handling your claim or to ARL-PF-NPFCClaimsInfo@uscg.mil email address. You may also alert us that a reconsideration request is in the mail by calling 1-800-280-7118

In order to satisfy OPA claims regulations, you must also mail any reconsideration request to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

Sincerely,

[redacted]

Claims Manager
U.S. Coast Guard
By direction

Enclosures: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 915009-0001
Claimant	: State of Washington Department of Ecology
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [redacted]
Amount Requested:	$95,823.92

THE CLAIMANT AND THE CLAIM:

On October 23, 2014, the State of Washington Department of Ecology (WA DOE or Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) seeking $95,823.92 for removal costs associated with removing oil from the tug NORTHERN RETRIEVER.

BACKGROUND:

The NORTHERN RETRIEVER has a long history with the Washington Department of Natural Resources (DNR), the State of Washington's administrative agency responsible for protecting the environment and natural resources, and responsible for the state's Derelict Vessel Removal Program. For 15 years beginning in 1993, [redacted], owner of the tugboat, NORTHERN RETRIEVER, illegally anchored the vessel over state-owned aquatic lands in Grays Harbor, near the mouth of the Chehalis River, a navigable water of the United States. In 2004, the DNR notified [redacted] that the vessel was trespassing over state-owned aquatic lands and needed to be moved.[1] On May 16, 2008, the City of Hoquiam, WA, declared the Tug NORTHERN RETRIEVER abandoned[2] and on June 16, 2008, it took custody of the vessel.[3] On August, 28, 2008, the City of Hoquiam transferred custody of the NORTHERN RETRIEVER to DNR.

On January 21, 2009, DNR requested pollution removal assistance from the WA DOE. The WA DOE, under state law, enforces state and federal environmental laws and responds to oil and hazardous material spills. On January 22, 2009, the WA DOE determined that the NORTHERN RETRIEVER was a risk of sinking and discharging oil and hazardous materials into Grays Harbor.[4] On February 3, 2009, Global Diving & Salvage removed approximately 60,000 gallons of oil and oily water from the tanks and bilges of the Tug.[5] The vessel was later scrapped in accordance with the state's Derelict Vessel Removal Program.

ANALYSIS:

As a fact finder during the adjudication of a claim, the NPFC considers all relevant evidence, whether provided by the Claimant or obtained independently by the NPFC, and weighs its

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[1] [redacted] v. City of Hoquiam, 170 Wash.App. 811, 287 P.3d 619 (2012)
[2] See Revised Code of Washington (RCW) 79.100.010 for the definition of abandoned.
[3] See State of Washington Grays Harbor Superior Court Summary Judgment [redacted] vs. the City of Hoquiam and WA DNR" dated November 16, 2009, submitted by WA DOE at the request of the NPFC dated January 15, 2015.
[4] See State of WA Order for Reimbursement of Expenses, No. 7118 dated September 16, 2009, submitted by WA DOE at the request of the NPFC dated January 15, 2015.
[5] See NPFC Optional OSLTF Form submitted by WA DOE dated October 14, 2014.

probative value when determining the facts of the claim. If there is conflicting evidence the NPFC will make a determination as to what evidence is more credible or deserves greater weight.

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,[6] the costs to prevent, minimize, or mitigate oil pollution from an incident". 33 USC § 2701(31). The Oil Pollution Act of 1990 and its implementing regulations contain specific requirements that must be satisfied before the OSLTF is available to pay a removal cost claim. First, an incident as defined by OPA must have occurred. An incident is defined as "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil." 33 U.S.C. §2701(14). Second, the Federal On-Scene Coordinator (FOSC) must either direct the response or determine that the removal actions taken were consistent with the National Contingency Plan. 33 C.F.R. §§136.203 and 136.205.

In this claim, the record contains conflicting evidence with regard to whether the vessel posed a substantial threat of discharging oil. FOSCs, not state agencies, have been delegated the authority to determine whether a substantial threat of a discharge exists and requires a pollution response.[7] On June 27, 2008, at the request of the City of Hoquiam[8] and the DNR,[9] USCG Sector Portland personnel boarded the NORTHERN RETRIEVER to inspect it and determine the risk of pollution from the vessel. The Coast Guard Federal On-Scene Coordinator's Representative (FOSCR) and another CG member inspected the vessel and determined that it was not discharging oil and did not pose a substantial threat of discharging oil into the navigable waterway; thus, no oil pollution cleanup was necessary.[10] Via a June 30, 2008 email from MSTC [redacted] to the City of Hoquiam and DNR, MSTC [redacted] informed them that the vessel was determined not to be a substantial threat to the environment and CG Sector Portland would not be initiating a pollution cleanup at that time.

DNR then commissioned two surveys of the vessel several months after the FOSCR made his determination. On September 16, 2008, DNR contracted Ms. [redacted], AMS, of Michel & Christen Marine Surveyors, Inc., to conduct a survey of the NORTHERN RETRIEVER. In her survey, she reported water leaking through the hull plating near and along the turn of the bilge and in the engine room near the starboard sea chest. Her opinion was that the vessel presented a significant danger to the environment, surrounding infrastructure and to herself and should be removed from the water as soon as possible.[11] Then, on January 6, 2009, DNR contracted

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[6] The NPFC has defined a substantial threat of a discharge to include "situations in which most likely oil will spill unless someone tries to stop it." http://www.uscg.mil/npfc/glossary.asp

[7] 40 C.F.R. §§300.100, 300.120 and 300.130. See also, NPFC Technical Operating Procedures Chapter 2 – Roles and Responsibilities in Determining Removal.

[8] See June 27, 2008 email from [redacted] (City of Hoquiam Police Chief) to DNR found within email exchange ending on June 30, 2008, and including MSTC [redacted], CG Sector Portland.

[9] See email from [redacted], WA DNR to MST3 [redacted], USCG Sector Portland dated June 24, 2008.

[10] See emails from MST1 [redacted] to NPFC dated May 14, 2015 and from MSTC [redacted], CG Sector Portland to the City of Hoquiam and WA DNR dated June 30, 2008. In his email, MST1 [redacted], who boarded the vessel as the Pollution Investigator and Federal On-Scene Coordinator's Representative (FOSCR) recalled that the vessel had no appreciable list or taking on of water, no pollution was observed, and there was nothing to lead him to deem the vessel an immediate pollution threat.

[11] See Michel & Christen Marine Surveyors, Inc, Report of Survey dated September 24, 2008, p.11.

Ballard Diving & Salvage to conduct an underwater hull survey of the tug. In their hull survey, they reported that the vessel had a 10" long fracture in the hull plating at the keel near the stern of the vessel and a 4 – 5-foot long by 5- 6 inch-wide crack traveling transversely across the keel. Ballard Diving & Salvage recommended that all hull fractures be repaired with temporary steel patches before attempting to move the vessel.[12]

It appears that DNR made the decision to request WA DOE to "conduct an immediate pollution removal operation" after the September 16, 2008, marine survey performed by Michel & Christen Marine Surveyors, Inc., and the January 6, 2009, Ballard Marine dive survey which revealed ruptures in the vessel's hull.[13] Despite these surveys, the evidence does not show that the oil on board was actually discharging or posed a substantial threat of discharging oil outside the vessel. The marine survey and dive survey commissioned by DNR were performed about three months and six months after the CG inspection, respectively, but still showed no discharge of oil or oil at immediate risk of discharging. The record shows that water was slowly entering the hull, but nothing was leaking out and there is no indication that oil was sheening from the vessel.[14] As Claimant stated, WA DOE "hired Global Diving & Salvage to install temporary patches on the hull and conduct a thorough pollution removal operation to eliminate the threat of a major oil spill should the vessel sink before DNR could have the vessel demolished."[15] Thus, Claimant admits that the vessel did not pose a substantial threat of discharging oil into the water at that point in time. The evidence does not show what would have happened had the vessel been left alone.

Given the FOSC's authority to make such determinations and the FOSCR's determination that the vessel was not discharging and did not pose a substantial threat of discharging oil at the time, the NPFC finds that the evidence in the record as to the CG investigators' findings is more probative credible evidence that the vessel did not pose a substantial threat of discharge.

Further, because the actions performed relating to the vessel and the costs incurred were not at the direction of the FOSC or determined by the FOSC to be consistent with the NCP, the costs cannot be reimbursed from the OSLTF. 33 C.F.R. §§136.203 and 136.205. The requirement to have FOSC direction or his determination of consistency with the NCP before costs may be paid from the OSLTF was confirmed in Gatlin Oil Co. v. United States, 169 F.3d 207, 213 (4th Cir. 1999)(the response actions taken by Gatlin at the direction of the State were not reimbursable from the Fund because the FOSC had not directed Gatlin to follow state directives and had not determined that the actions were consistent with the NCP).

NPFC Conclusion

The actions taken by WA DOE in response to the NORTHERN RETRIEVER did not result from a discharge or substantial threat of a discharge of oil to navigable waters; thus, an OPA-incident had not occurred.[16] Additionally, the actions were not directed by the FOSC and the FOSC did

[12] See Ballard Diving & Salvage, Inc Hull Survey dated January 6, 2009.
[13] Claimant's Oil Spill Liability Trust Fund Modified Claim Form, p. 2.
[14] The record contains no indication that anyone reported to the National Response Center that there was a discharge from the vessel.
[15] Claimant's Oil Spill Liability Trust Fund Modified Claim Form, p. 2.
[16] Had this claim been the result of an OPA-incident, NPFC would further determine whether the Claimant State was owner/operator and, thus, the responsible party for said incident. OPA provides that a State or a unit of state or local government that acquired ownership or control of a vessel involuntarily through seizure or law enforcement activity,

not determine that the actions were consistent with the NCP. Therefore, the Claimant has not shown that the claimed costs were a result of an OPA incident and the Fund is not available for reimbursement. The claim is denied in its entirety.

[redacted]

Claim Supervisor: [redacted]

Date of Supervisor's Review: ***October 6, 2015***

Supervisor Action: ***Denial approved***

Supervisor's Comments:

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bankruptcy, tax delinquency, abandonment, or "other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign" is not an "owner or operator." 33 USC §2701 (26)(B)(i). However, this exclusion does not apply when the State or local government causes or contributes to the vessel's discharge or substantial threat of the discharge of oil into or upon the navigable waters of the United States. 33 USC §2701 (26)(A)(v). When the State or local government has custody of a vessel and causes or contributes to the discharge or substantial threat of a discharge of oil while the vessel is under its custody and removal actions are necessary, the State or local government is responsible for the discharge and liable for the removal costs associated with the removal actions. Should Claimant seek reconsideration and demonstrate that its costs resulted from an OPA incident, the State would have to provide evidence of the timing and cause of the incident and show that the State and/or government entity did not cause or contribute to the incident.