

CLAIM SUMMARY / DETERMINATION FORM

Date	: 11/3/2011
Claim Number	: 911115-0001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$9,255.36

FACTS:

Oil Spill Incident: On August 8, 2006, California Department of Fish & Game (Claimant) reported that they became aware that the F/V SEA was in possible danger of sinking in Morro Bay, a navigable waterway of the US. The responding officer indicated that he visited the location and determined that the F/V SEA posed a risk to the marine environment. The responding officer stated he then gave a summary of his findings to the OSPR Administrator, [REDACTED]. The OSPR Administrator, [REDACTED] issued a cleanup and abatement order to the owner of the vessel, Mr. [REDACTED].

On August 9, 2006, [REDACTED] served the order in person to Mr. [REDACTED] Mr. [REDACTED] agreed that his vessel was in danger of sinking and that it had petroleum products on board. Mr. [REDACTED] stated he had no money to comply with the order. Mr. [REDACTED] signed a release of liability and also acknowledged that he would be responsible for any costs incurred during the removal of the petroleum products from his vessel. The Claimant then hired a contractor to remove all petroleum products from the vessel. The Claimant states the work was completed on August 11, 2006.

The Claim: On August 26, 2011, CA OSPR (Claimant) submitted a removal cost claim to the National Pollution Fund Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$9,255.36.

CA OSPR is claiming personnel expenses of \$854.72, State operating expenses of \$6,988.00, and CA OSPR overhead costs of \$1,492.64.

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. Findings of Fact:

1. No FOSC coordination was established for this incident therefore the FOSC did not determine that the actions undertaken by the Claimant were deemed consistent with the NCP. 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The Claimant asserted that the incident involved the substantial threat of discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. A Responsible Party was identified. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six-year period of limitations for claims. 33 U.S.C. § 2712(h)(2).
5. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim. The NPFC was unable to determine that the costs presented were for actions in accordance with the NCP and that the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

The NPFC Claims Manager has reviewed the actual cost documents 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, and (4) whether the costs were adequately documented and reasonable.

The NPFC notified the Claimant on September 1, 2011 of receipt of the claim and that the Claimant needed to provide the following information:

- FOSC coordination pursuant to 33 CFR 136.203 & 205;
- A copy of the vendor rate schedule;
- A copy of the disposal manifest(s) demonstrating proper disposal in accordance with the NCP;
- Proof of payment to the response contractor.

The NPFC gave the Claimant 14 days to provide the necessary information. On October 3, 2011, the NPFC notified the Claimant via email that the requested information was not received. On October 4, 2011, the Claimant provided the vendor contract and rate schedule, a posting tag which is confirmation the Claimant paid the contractor. The Claimant advised they were still trying to obtain the disposal manifest(s) as requested.

On October 18, 2011, the NPFC received an email from the Claimant confirming that the State On Scene Coordinator (SOSC) advised there was no FOSC coordination because he determined the incident was an imminent threat. On October 19, 2011, the NPFC responded to the Claimant and provided the citation for the governing claims regulations that state the amount of compensation allowable for removal costs is the total of uncompensated reasonable removal costs of actions taken that were determined by the "FOSC" not the SOSC to be consistent with the NCP or were directed by the FOSC (33 CFR 136.205).

Additionally, the NPFC advised that 33 CFR 136.203(c) states that the actions taken were determined by the "FOSC" to be consistent with the NCP or were directed by the FOSC. The NPFC then granted an additional 10 days for the Claimant to obtain the necessary coordination. To date, the Claimant has not provided FOSC coordination pursuant to 33 CFR 136.203 & 205 nor has the Claimant provided disposal manifest(s) in order to demonstrate that proper disposal was performed in accordance with the National Contingency Plan (NCP)

Based on the foregoing, this claim is denied.

AMOUNT: 0.00

Claim Supervisor:  *Thomas Morrison*

Date of Supervisor's review: *11/7/11*

Supervisor Action: *Denial approved*

Supervisor's Comments: