

CLAIM SUMMARY / DETERMINATION

Claim Number:	914017-0001
Claimant:	State of California Dept of Fish & Game, OSPR
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$21,201.27

FACTS:

Event:

On October 8, 2010, Los Angeles County Fire reported diesel fuel was flowing into a storm drain on Castaic Road. The diesel leaked from an underground storage tank at the Castaic Truck Stop, which has been identified as the responsible party (RP). The diesel released under pressure and ran across the parking lot, into the storm drain leading to the Violin Canyon storm channel and reached Castaic Creek.¹ According to the Claimant's incident report, no surface water was flowing in the Castaic Creek. "Therefore, the spill path terminated shortly after entering the creek." No oil was observed on surface water in the creek, but sheen was found underground during excavation of the creek. The RP contracted with Patriot Environmental Services to contain and clean up the spill.

Claimant:

Claimant is the State of California, Department of Fish and Game, Office of Spill Prevention and Response (OSPR). OSPR personnel responded to and oversaw the response at the spill site.

Claim:

OSPR seeks reimbursement of its own costs amounting to \$21,201.27 expended in response to the diesel spill. OSPR alleges that its claimed costs are reimburseable removal costs in accordance with OPA 90.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), **each** responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters is liable for removal costs and damages 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". 33 USC § 2701(31).

¹ Supplemental Environmental Incident Report prepared by OSPR

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party or guarantor. 33 USC § 2713(a).

If a claim is presented in accordance with subsection (a) of this section and the claim is not settled by any person by payment within 90 days after the date on which the claim was presented the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 USC § 2713(c)(2).

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 (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. There is no evidence that a Federal On-Scene Coordinator directed the response to this incident, nor did one determine that the actions undertaken by the Claimant were consistent with the National Contingency Plan (NCP). 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. There is no evidence that an FOSC determined that an OPA incident occurred, nor has the Claimant proven that the incident involved a discharge or substantial threat of discharge of oil to "navigable waters."
3. The Claimant is a state and is not required to present its claim to the responsible party before presenting it to the Fund. However, Claimant indicated that it did present its claim to the RP before coming to the Fund.

4. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified that no suit has been filed in court for the claimed costs.
5. In accordance with 33 U.S.C. § 2712(h)(1), the claim was submitted within the six year period of limitations for removal costs.
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that no costs are allowable under OPA and 33 CFR § 136.205.

B. Analysis:

NPFC CA reviewed the documentation provided. The review focused on: (1) whether a discharge or substantial threat of a discharge to a navigable waterway occurred; (2) 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 an incident); (3) whether the costs were incurred as a result of these actions; (4) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (5) whether the costs were adequately documented and reasonable.

In this case, the facts and evidence do not support a finding that an OPA-incident occurred. They also do not support a finding that the claimed costs would be compensable under OPA. Though oil did leak into the environment, the Claimant has not provided documentation to demonstrate a discharge or substantial threat of a discharge to a navigable waterway, as required under OPA. The evidence also does not demonstrate that OSPR's actions were directed by an FOSC or that an FOSC determined that they were consistent with the NCP.

Under 33 CFR 136.203, a claimant must establish that the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. The Claimant provided no documentation that shows any involvement by an FOSC. The Claimant does not even allege that the USCG or EPA were even contacted, much less present on scene.

Further, Claimant has not provided evidence that a discharge or a substantial threat of a discharge to a navigable waterway occurred. Rather, Claimant's own statements support the contrary. Claimant's incident report states that there was no surface water flowing in Castaic Creek and no oil was observed on the surface water. No flowing water was affected once the diesel terminated at the dry Castaic Creek bed. The documentation only supports a finding that there was no discharge to a navigable waterway. Further, because the oil terminated in a dry creek bed and soaked into the soil, it is clear that it would not have reached a navigable waterway. Thus, it did not pose a substantial threat of discharging into one. For these reasons the spill does not constitute an OPA incident and the claim is not compensable under OPA.

Claim Supervisor:

Date of Supervisor's review: *2/4/14*

Supervisor Action: *Denial Approved*

Supervisor's Comments: