

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	917007-0001
<b>Claimant:</b>	State of California Dept. of Fish & Wildlife
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████ ██████████
<b>Amount Requested:</b>	\$64,125.39

### FACTS:

**Oil Spill Incident:** On January 16, 2015, the State of California Department of Fish and Wildlife's Office of Spill Prevention and Response (OSPR) was notified by East Bay Regional Parks (EBRP) of an unknown substance found on the bodies of dead birds along the San Francisco Bay shoreline in Hayward, California. OSPR was further notified by the San Leandro Police Department of both live and dead birds covered with an oil-based substance found on the San Francisco Bay shoreline in San Leandro, and an oil sheen in San Francisco Bay extending from Hayward to San Leandro.<sup>1</sup> USCG Sector San Francisco coordinated with OSPR and permitted them to oversee the response due to the incident's substantial wildlife impact.<sup>2</sup> Extensive investigation has not revealed a responsible party/source for this incident and as such, the incident is considered a mystery spill.

**Description of Removal Activities for this claimant:** OSPR personnel performing on-site investigation confirmed the substance found in San Leandro was the same as the substance found in Hayward. Aerial observation of the San Francisco Bay near San Leandro could not find the reported oil sheen and did not reveal the source of the substance. Between January 17, 2015 and January 22, 2015, the unknown substance was discovered by OSPR, EBRP, International Bird Rescue Center and San Leandro Police Department personnel upon the bodies of hundreds of live and dead birds in various locations throughout the San Francisco Bay shoreline. OSPR investigated water treatment plants and a specific discharge pipe in the San Francisco Bay area, as well as reviewing vessel traffic information that was provided by the USCG, but were unable to identify the source of the substance.<sup>3</sup> Shoreline recovery efforts were terminated on January 22, 2015.

Lab analysis was performed on the unknown substance by US Fish and Wildlife, EPA and the Fish and Wildlife Petroleum Chemistry Lab. EPA's lab analysis number NEICRP1627Z01 determined the material to be an oil or oil-based substance.<sup>4</sup>

**The Claim:** On February 28, 2017, the State of California Department of Fish and Wildlife submitted a removal cost claim to the National Pollution Fund Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of \$64,125.39.<sup>5</sup>

### APPLICABLE LAW:

<sup>1</sup> See Emergency Services Hazardous Materials Spill Report 15-0297 dated January 16, 2015.

<sup>2</sup> See email sent by LTJG ██████████ to Claims Manager ██████████, dated February 28, 2017.

<sup>3</sup> See State of California Department of Fish and Wildlife Claim Package dated February 14, 2017.

<sup>4</sup> See EPA NEIC Work Product No. NEICRP1627Z01 dated April 15, 2015.

<sup>5</sup> See State of California Department of Fish and Wildlife Claim Package dated February 14, 2017.

"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. LTJG [REDACTED] confirmed response actions were in accordance with NCP and provided FOSC coordination. 33 U.S.C § 2702(b)(1)(B) and 2712(a)(4)<sup>6</sup>;
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. 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;
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1);
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined the need for a more detailed explanation of all sampling, analysis and research activities of OSPR personnel involved with the oil spill response, as well as a more detailed description of daily activities. The claimant was emailed the additional information request by the NPFC Claims Manager, and provided an extension on the due date for additional information requested<sup>7</sup>. Claimant failed to provide information supporting the daily activity reports of personnel for all time periods claimed in the costs.

**B. Analysis:**

NPFC CA reviewed the actual cost invoices and dailies 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 to be consistent with the NCP in accordance with the NPFC delegation of authority for determination of consistency, and (4) whether the costs were adequately documented and reasonable.

The NPFC has determined that the majority of the costs incurred by the Claimant in this determination are OPA compensable removal costs based on the supporting documentation provided. The NPFC has determined that the costs invoiced were in accordance with the state’s rates that were in effect at the time services were rendered. The NPFC communicated with the FOSC who determined that any costs the NPFC were to offer and pay, are determined to be consistent with the National Contingency Plan (NCP). The NPFC has determined that \$53,466.61 is supported by the record and fully documented. The NPFC has denied the following amounts:

**Denied Items:**

1. Costs paid to Information Officer [REDACTED] in the amount of \$72.75/hour, were denied by NPFC as public affairs/media relations and is not an OPA compensable removal cost. As such, all amounts invoiced for [REDACTED], totaling \$3,710.25, are denied;
2. Costs paid to Information Officer [REDACTED] in the amount of \$72.75/ hour, were denied by NPFC as public affairs/media relations and is not an OPA

<sup>6</sup> See email sent by LTJG [REDACTED] to Claims Manager [REDACTED], dated February 28, 2017.

<sup>7</sup> See emails sent by NPFC Claims Manager [REDACTED] to Ms. [REDACTED] titled 217 03 03 Claim 917007-0001 Out of Office.

compensable removal cost. Furthermore, costs paid for [REDACTED] lodging and eating expenses are likewise denied. As such, all amounts invoiced for [REDACTED] totaling \$4,444.89, are denied;

3. Costs paid to Senior Environmental Scientist (SPEC) [REDACTED] in the amount of \$87.70/hour, for the dates of June 9, 2015, June 25, 2015 and June 30, 2015 are denied as shoreline recovery efforts were terminated on January 22, 2015, and all supporting evidence of removal activity was dated prior to June, 2015. As such, all amounts invoiced for June, 2015, totaling \$877.00, are denied;
4. Costs paid to Senior Environmental Scientist (SPEC) [REDACTED] in the amount of \$95.69/hour, for the date of July 9, 2015 are denied as shoreline recovery efforts were terminated on January 22, 2015, and all supporting evidence of removal activity was dated prior to July, 2015. As such, all amounts invoiced for July, 2015, totaling \$287.07, are denied;
5. Costs paid to Senior Environmental Scientist (SPEC) [REDACTED] in the amount of \$95.69/hour, for the dates of September 17, 2015 and September 18, 2015 are denied as shoreline recovery efforts were terminated on January 22, 2015, and all supporting evidence of removal activity was dated prior to September, 2015. As such, all amounts invoiced for September, 2015, totaling \$1,339.66, are denied.

**Overall Denied Costs** = \$10,658.86<sup>8</sup>

The NPFC hereby determines that the OSLTF will pay \$53,466.61 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 917007-0001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

Should you request reconsideration, you will need to provide more detailed daily information of work performances by individual, as well as obtain all case information for actions undertaken and bird statistics from the International Bird Rescue Center for the time periods of which you are requesting cost reimbursement.

**AMOUNT:** \$53,466.61

[REDACTED]

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Claim Supervisor: [REDACTED]

Date of Supervisor's review: *3/28/17*

Supervisor Action: *Approved*

Supervisor's Comments:

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<sup>8</sup> See Claim 917007-0001 OSPR Spreadsheet for specifics regarding the amounts approved and denied by the NPFC.