

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 917022-0001
Claimant	: State of California Department Fish & Wildlife, Office of Spill Prevention and Response
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$3,804.75

FACTS:

1. Oil Spill Incident: The State of California Department Fish & Wildlife, Office of Spill Prevention and Response (OSPR) reports that on February 4, 2016, an abandoned 40-foot wooden vessel was beached on the rocks (rip-rap) of Emory Cove Harbor. Emory Cove Harbor flows into San Francisco Bay, both of which are navigable waterways of the US. It was estimated that approximately 400 gallons of diesel was onboard the vessel.

This incident was reported to the National Response Center via incident #1162655.¹

2. Description of removal actions performed: The Claimant, OSPR, arrived on site and assessed the situation. After assessment of the vessel, and due to the amount of oil being on board, OSPR personnel decided to secure it and tow it to the Army Corps of Engineers dock in Sausalito.

THE CLAIMANT AND THE CLAIM:

On May 26, 2017, OSPR submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$3,804.75 for the services provided on February 4, 2016. This claim is for removal costs based on the rate schedule in place at the time services were provided.

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 Federal On-Scene Coordinator (FOSC), and (4) whether the costs were adequately documented.

APPLICABLE LAW:

"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”.

¹ See, NRC Report # 1139858, dated 2/04/2016.

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 at 33 USC § 2701(31) 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].

Under 33 USC §2713(a), all claims for removal costs or damages must (with certain exceptions not applicable here) be presented first to the responsible party or guarantor of the designated source of the incident. Then, as provided in 33 U.S.C. §2713(d), “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 Director, 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.”

In addition, 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 is no evidence that the response was directed by a FOSC or determined by him/her to be 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 claim was submitted to NPFC within the six year period of limitations. 33 U.S.C. § 2712(h)(1).
4. A Responsible Party has not been identified. 33 U.S.C. § 2701(32).
5. In accordance with 33 CFR § 136.105(e)(12), the Claimant has certified that no suit has been filed by or on behalf of the Claimant in court for the claimed uncompensated removal costs.

B. Analysis:

OSPR states in its claim submission that all costs claimed are for uncompensated removal costs incurred for this incident. It represents that all costs presented to the Fund are compensable removal costs, payable by the OSLTF.

The NPFC Claims Manager reviewed OSPR’s actual cost invoicing and dailies to ensure that the Claimant had incurred all costs claimed and that the costs were adequately documented and reasonable. Pursuant to 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.

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. The Claimant’s Investigation Report states that the fuel tanks were still intact and no hull damage was present. The Claimant has not provided documentation to demonstrate that a substantial threat of a discharge to a navigable waterway existed, not to mention the amount of diesel, if any, was unknown at the time of the response by the Claimant. The evidence presented also does not demonstrate that the Claimant’s actions were directed by an FOSC or that an FOSC determined that the actions performed by the Claimant were consistent with the NCP.

Even if the circumstances gave rise to an OPA incident, the evidence provided does not support a finding that the claimed costs would be compensable under OPA. 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, much less that

Claimant's actions were directed by an FOSC or that an FOSC determined that they were consistent with the NCP.

C. Determined Amount: \$0.00

The NPFC hereby determines this claim is denied because (1) the evidence does not demonstrate that there was a discharge or substantial threat of discharge of oil into navigable waters of the U.S., (2) there is no evidence that the actions taken by the Claimant were directed by an FOSC in accordance with the governing claims regulations found at 33 CFR 136.203 and 205, and (3) the Claimant failed to demonstrate that the costs claimed are OPA compensable removal costs vice salvage costs. Should the Claimant request reconsideration, it must provide evidence that a discharge or substantial threat of discharge of oil into or upon the navigable waters of the U.S. occurred, it must obtain an FOSC's concurrence that an incident occurred and the FOSC's determination that the actions taken were consistent with the NCP, and lastly, the Claimant must have the FOSC determine that the response costs incurred were not salvage but rather response and provide supporting justification for that decision.

This claim is denied.

Claim Supervisor:

[REDACTED]

Date of Supervisor's review: *6/21/17*

Supervisor Action: *Denial Approved*

Supervisor's Comments: