

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	917023-0001
<b>Claimant:</b>	State of California Dept. of Fish & Wildlife, OSPR
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$3,727.72

### **FACTS:**

On September 24, 2015, the U.S. Coast Guard Incident Management Division (IMD) notified the California Department of Fish and Wildlife, Office of Spill Prevention and Response (OSPR) that three vessels were afire at the Oxbow Marina in the city of Isleton. An OSPR Fish and Game Warden responded on scene. The first boat to catch fire burned to the waterline and sunk in the channel after the owner untied it and pushed it away from the slips and other boats. However, two other boats had already caught fire. The sunken boat, a 30ft TollyCraft, released gasoline into the marina, which resides in Georgiana Slough, a navigable water of the U.S. The vessel was raised, and all three vessels were removed from the water.<sup>1</sup> The responsible party for the sunken vessel is [REDACTED], its owner. There are two other responsible parties relating to the other burned vessels, which the State officers determined presented a threat to discharge pollution.<sup>2</sup>

### **CLAIMANT AND CLAIM:**

The Claimant is the California Department of Fish and Wildlife, Office of Spill Prevention and Response. It seeks reimbursement of its uncompensated "response costs" related to the personnel time and vehicle costs it expended in order to respond to the subject boat fire incident. The Claimant requests reimbursement in the total amount of \$3,727.72.

### **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".

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

<sup>1</sup> See Narrative/Supplemental to Arrest/Investigation report prepared by the Fish and Game Warden.

<sup>2</sup> See "Narrative Regarding Boat Fire at Oxbow Marina, CAL-EMA #15-5634."

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].

Rights of subrogation – “Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.” 33 U.S.C. § 2712(f)

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law. 33 U.S.C. § 2715(a)

### **DETERMINATION:**

#### ***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. 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 certified that it has not filed an action in court for the claimed costs;
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1);
5. As a State, the Claimant can submit its claim directly to the Fund under 33 U.S.C. § 2713.

#### ***B. Analysis:***

NPFC CA reviewed the documentation provided by the Claimant. 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, to be consistent with the NCP or directed by the FOSC, (4) whether the costs were adequately documented and reasonable, and (5) whether the Claimant retained rights against the RP that it could transfer to the Fund.

Claimant did not Retain its Subrogable Rights Against the RP:

In order to ensure that the OSLTF can pursue cost recovery against responsible parties, the Oil Pollution Act (OPA) imposes several requirements that must be satisfied before a claim may be paid. Of relevance here, 33 U.S.C. § 2712 (f) provides: "Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party." Based on this requirement, a claim must be denied if the claimant's right of recovery against a responsible party has been prejudiced.

The responsible party informed the Claimant, OSPR, that he could not pay his debt to the State for its response costs.<sup>3</sup> Via a letter dated October 13, 2016, OSPR informed Mr. [REDACTED] that it had discharged his liability for the State's costs resulting from the incident. This letter constitutes a waiver of liability against Mr. [REDACTED].

The NPFC finds that since the Claimant has extinguished the RP's liability, the Claimant no longer has the right to pursue recovery against Mr. [REDACTED]. In doing so, the Claimant waived its subrogable rights for this claim. The OSLTF cannot compensate the Claimant because it has prejudiced its right of recovery against the RP.

On that basis, the Claims Manager hereby determines that the claim cannot be paid. The claim is denied.

[REDACTED]

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *6/1/17*

Supervisor Action: *Denial Approved*

Supervisor's Comments:

<sup>3</sup> August 16, 2016 letter from [REDACTED] to the Dept. of Fish and Wildlife.