

CLAIM SUMMARY / DETERMINATION

Claim Number	: 917012-0001
Claimant	: Lac du Flambeau Tribe
Type of Claimant	: Municipality
Type of Claim	: Removal Costs
Claim Manager	: (b) (6)
Amount Requested	: \$9,091.00

FACTS:

Oil Spill Incident: On January 31, 2016, the National Response Center (NRC) was notified of a vehicle falling through the ice, releasing gasoline into Flambeau Lake. Flambeau Lake, a navigable waterway of the United States, is a 1166 acre lake located in Vilas County, Wisconsin.¹ The rear portion of the 2000 Ford Explorer, broke through the ice while the driver was ice fishing. Subsequently, the vehicle completely broke through the ice before settling at the bottom of the lake. The incident occurred on the Lac du Flambeau Reservation. Ms. (b) (6), United States Environmental Agency (USEPA) Region 5, Federal On-Scene Coordinator (FOSC) provided after the fact FOSC concurrence.²

Claimant: The Claimant, Lac du Flambeau Band Tribal Natural Resource Department, presented a removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$9,091.00. Pollution removal activities were conducted by Kumbier Towing and Recovery and included equipment and personnel costs for the removal of the vehicle from the lake, associated transportation costs, and the deployment of absorbent materials.

The claim consists of an OSLTF Claim Form, supplemental OSLTF form contents, FOSC coordination letter, NRC Report #1139552, LDF Police Report, LDF Citation # S569630, LDF Tribal Court Orders # NR-16-101 and NR-16-011, Kumbier Trucking Removal Invoice, proof of payment information, and the Standard Form 1080.

Responsible Party: The Responsible Party (RP) is identified as (b) (6) (Mr. (b) (6)). Mr. (b) (6) was issued a Natural Resources Citation for littering on March 9, 2016.³ Subsequently, Mr. (b) (6) pled guilty “to Failure to Obtain Permit for Structure or Deposit in Reservation Water” and the Lac du Flambeau Tribal Conservation Department “agreed to accept restitution in the amount of 50% of the amount paid to Kumbier’s Towing Service as and for towing and vehicle recovery services.”⁴

¹ See Flambeau Lake. Available at: <http://dnr.wi.gov/lakes/lakepages/LakeDetail.aspx?wbic=2320500>

² See USEPA letter to the NPFC dated May 17, 2016.

³ See Lac du Flambeau Department of Natural Resources, Natural Resources Citation dated March 9, 2016.

⁴ See Lac du Flambeau Tribal Court Order Case Nos. NR-16-010 and NR-16-011 dated October 5, 2016.

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:

Overview:

1. Ms. (b) (6), USEPA, as the Federal On-Scene Coordinator (FOSC) for this incident, determined that the actions undertaken by Kumbier Towing were consistent with the NCP for the payment of uncompensated removal costs and is consistent with the provisions of 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The claimant failed to provide sample analysis testing for the spill therefore it is not confirmed that the incident involved the report of a discharge of “oil”;
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)

NPFC 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 Part 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, and (4) whether the costs were adequately documented and reasonable.

Upon adjudication of the claim, the NPFC specifically requested a copy of sample analysis from the Claimant via an email dated April 13, 2017. It is important to note that the claimant bears the burden of proving its claim. In this instance, the Claimant must provide evidence indicating that the product spilled is strictly an OPA oil. On May 12, 2017, the Claimant responded to the NPFC’s request for sample analysis and stated, “No water samples were collected. After removal no gas remained in the gas tank (the gas tank cover had been removed).” Ms. Hanson also provided additional photographs of the “observed light sheen” present during removal actions.⁵

In the case where there is the potential to have “mixed substances”, sample analysis is the only way to prove that the product spilled was in fact an OPA oil. Vehicles contain CERCLA products such as antifreeze therefore the burden is on the Claimant to demonstrate that the

⁵ See email from (b) (6), Lac du Flambeau, to Mr. (b) (6), NPFC, dated May 12, 2017.

product recovered is strictly oil and not a mixed substance. The OSLTF claims program is only available to pay claims for strictly oil pollution incidents. This incident potentially involves a “mixed spill substance” which is not considered an OPA compensable oil. The facts as presented in this case indicate that the contamination possibly consisted of polychlorinated biphenyls (PCBs), which are listed as hazardous substances under CERCLA and are thus excluded from the definition of oil under OPA. Until such time as the Claimant can demonstrate the costs associated with this response were for an OPA event, the NPFC cannot compensate the costs claimed.

Additionally, the NPFC requested the Claimant provide a pricing schedule for Kumbier Trucking who performed the removal actions at the time of the incident and the NPFC also requested a copy of Hazwoper Certificates for the employees of Kumbier Trucking to confirm that the workers were properly certified to perform the response actions invoiced. On May 23, 2017, the Claimant responded to the NPFC’s request and stated that the Claimant only received an ‘estimate’ at the time they determined to go with Kumbier Trucking. The Claimant also stated that they requested copies of the Hazwoper Certificates for the employees of Kumbier Trucking and its response to the NPFC was that it was unable to obtain such documentation.

Based on the foregoing, this claim is denied because the Claimant has failed to demonstrate that the product released from the vehicle causing the sheen and ensuing response was oil as defined by Oil Pollution Act (OPA), and did not contain ANY hazardous materials. 33 USC 2701(23). Claimant provided no documentation of the lab analysis results demonstrating that the material was oil and not a mixed substance. “Oil” must be discharged to impose liability under the OPA. Should the Claimant decide to request reconsideration, the Claimant will need to provide a full sample analysis which delineates all the constituents contained in this spill, and showing that the material was only oil and not a mixed spill.

(b) (6)

Claim Supervisor: [REDACTED]

Date of Supervisor’s review: *6/1/17*

Supervisor Action: *Denial approved*

Supervisor’s Comments: