

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	A02005-0001
<b>Claimant:</b>	State of California Dept. Fish & Wildlife, OSPR
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$10,851.00

### **FACTS:**

***Oil Spill Incident:*** Between the dates of December 14 and December 19, 2015, following a large ocean swell that occurred on or about December 11, 2015, a total of ten oiled birds were found and collected on the beaches between the Monterey and Santa Cruz counties. Sample analysis revealed that the oil on nine out of the ten birds was scientifically connected to a recent discharge from the S/S Jacob Luckenbach oil spill, identified under Federal Project Number (FPN) A02005. Scientific evidence indicates that following a large ocean swell that occurred on or about December 11, 2015, in the vicinity of the S/S Lukenbach wreck location, a discharge of oil occurred as proven by the oiled birds that were discovered to be scientifically connected to the S/S Jacob Lukenbach oil.<sup>1</sup>

***Description of Removal Activities for this Claimant:*** Between December 14 and December 19, 2015, California OSPR collected ten oiled birds in Monterey and Santa Cruz Counties and transferred them to the Oiled Wildlife Care Network for cleaning and rehabilitation.<sup>2</sup> Oiled feather samples were taken from the collected birds and forwarded to OSPR's chemistry lab for testing.

***The Claim:*** On January 02, 2018, California OSPR submitted a removal cost claim to the National Pollution Fund Center (NPFC) in the amount of \$10,851.00 for reimbursement. The Claimant is the California Department of Fish and Wildlife, Office of Spill Prevention and Response (OSPR). It seeks reimbursement of its uncompensated "response costs" related to their treatment of oiled birds and the associated sample analysis that was performed.<sup>34</sup>

### **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).

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<sup>1</sup> See, CA OSPR Arrest/Investigation Report dated June 9, 2016.

<sup>2</sup> *Id.*

<sup>3</sup> See, OSLTF Claim Form dated December 19, 2017.

<sup>4</sup> See, CA OSPR Arrest/Investigation Report dated June 9, 2016,

"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. The NPFC has determined that the actions undertaken by the Claimant and its Oiled Wildlife Care Network are deemed consistent with the NCP. This determination is made in accordance with its Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 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 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 that the removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

***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.

Upon adjudication of the claim, the NPFC was able to determine by way of sample analysis, that all of the birds were oiled by an oil that has been determined not to be a natural seep and were all with the exception of one, similar to the S/S Jacob Lukenback oil. The NPFC then determined based on full medical record history provided that it could account for each day the birds were in treatment at a cost of \$25.00 per day and then the NPFC determined the laboratory tests and costs identifying nine of the birds to an OPA oil, are reasonable and necessary.

The costs associated with one bird indicated there were no petroleum hydrocarbons present at all and therefore no comparison could be made to other potential sources. Based on this scientific finding, all costs associated with SFOS-2015-0026 (bird identification label) are denied in their entirety.

The NPFC determined that a total of \$3,245.00 in costs are denied and they are outlined as follows:

**Denied Items:**

1. \$25.00 Daily rehab charge for SFOS-2015-0026 is denied because the sample analysis of its feather showed no hydrocarbons present and therefore not an OPA compensable costs;
2. \$300.00 sample analysis charge for S-125-15-1 is denied. This sample analysis charge showed no hydrocarbons present and as such, this analysis is not an OPA compensable cost;
3. \$1,168 sample analysis charge for Invoice S00116 is denied. There were two samples taken on January 8, 2016 following the oiled bird discovery the month prior. These samples were affiliated with mystery tar balls that were discovered from Weston Beach, Pt. Lobos (middle of the cove) and from Pt. Lobos (from the small cove south of Weson Beach). Both of the samples revealed that it is a possible natural seep oil similar to the weathered Monterey Formation Crude; and
4. \$1,752 sample analysis charge for Invoice S00316 is denied. It is for three samples that were taken on January 11, 2016 from slot Beach, Pt. Lobos and the lab results reveal that they are a possible natural seep oil similar to the weathered Monterey Formation Crude.

**Overall Denied Costs = \$3,245.00**

Based on the foregoing, the NPFC has determined that the majority of the costs incurred by the Claimant in this determination were reasonable and necessary to mitigate the effects of the incident. Upon review of the information provided by the Claimant, the NPFC has determined that the payable costs were billed in accordance with the rate schedule and/or contractual agreements in place at the time the services were rendered, unless otherwise indicated below, and were determined by the NPFC, pursuant to its Delegation of Authority, to be consistent with the NCP.

The NPFC hereby determines that the OSLTF will pay \$7,606.00 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # A02005-0001. 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.

**DETERMINED AMOUNT: \$7,606.00**

Claim Supervisor:



Date of Supervisor's review: *January 11, 2018*

Supervisor Action: *Approved*