

CLAIM SUMMARY / RECONSIDERATION DETERMINATION

Claim Number:	917007-0002
Claimant:	International Bird Rescue
Type of Claimant:	Corporate (US)
Type of Claim:	Removal Costs
Claim Manager:	(b) (6), (b)
Amount Requested:	\$124,234.11
Action Taken:	Offer on reconsideration in the amount of \$118,326.50

EXECUTIVE SUMMARY:

On January 16, 2015, an East Bay Regional Park's (EBRP) Supervisor notified the State of California Department of Fish and Wildlife's Office of Spill Prevention and Response (OSPR), in its capacity as the State On-Scene Coordinator (SOSC), of a wildlife incident caused by an unknown substance found along Hayward Shoreline Park¹ in Hayward, California.² In coordination with the Federal On-Scene Coordinator, the SOSC responded to the incident, recovering a large amount of birds covered in, what was later determined to be an oil, as defined by the Oil Pollution Act.³ No Responsible Party (RP) has been identified for this incident.⁴

International Bird Rescue ("IBR" or "Claimant") became involved when EBRP advised IBR that it was bringing sixty-nine (69) contaminated animals to IBR's facility for care and rehabilitation. On August 27, 2019, the Claimant presented its original claim for uncompensated removal costs to the NPFC for \$124,234.11 resulting from IBR's involvement in caring for the wildlife brought to its facility during the response. The NPFC denied the original claim because the claimant failed to meet its burden in supporting the costs claimed.

On April 13, 2020, the NPFC received the Claimant's timely request for reconsideration for \$124,234.11 and a request for an extension of time to submit additional information in support of its request.⁵ The NPFC approved the request for an extension of time and executed a tolling agreement with IBR.⁶

Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by the Claimant, information it obtained independently, and the applicable law and regulations. Based on the additional information provided by the Claimant upon reconsideration, the NPFC offers to reimburse the claimant \$118,326.50 for removal costs as outlined in the original determination and below.

¹ Hayward Shoreline Park is adjacent to San Francisco Bay, a navigable waterway of the United States. See also, National Response Center (NRC) Report # 1105833 dated January 16, 2015 reporting a sheen affecting hundreds of birds along the shoreline of San Francisco Bay.

² State of California Department of Fish and Wildlife Narrative/Supplemental Report dated January 15, 2015.

³ *Id.* See also, USEPA National Enforcement Investigation Center (NEIC) Analytical Results Memorandum dated April 15, 2015.

⁴ State of California Department of Fish and Wildlife Narrative/Supplemental Report dated January 15, 2015.

⁵ Email from Claimant to NPFC dated April 13, 2020 requesting reconsideration and seeking an extension of time to submit additional information in support of its request.

⁶ See, tolling agreement between IBR and NPFC executed April 16, 2020.

I. CLAIM HISTORY:

On August 27, 2019, the Claimant presented its original claim for uncompensated removal costs to the NPFC for a final sum certain amount of \$124,234.11.⁷ The NPFC denied the original claim because the claimant failed to meet its burden in supporting the costs claimed.⁸ The NPFC's initial determination is hereby incorporated by reference.

On April 13, 2020, the NPFC received the Claimant's timely request for reconsideration and for an extension of time to provide its additional supporting documentation. The NPFC executed a Tolling Agreement with the claimant that granted it until June 13, 2020 to provide additional evidence in support of its request for reconsideration and extended the deadline for the NPFC to issue its determination on the request for reconsideration to November 10, 2020.⁹ The Claimant provided the additional information in support of its claim to the NPFC on June 10, 2020.

II. REQUEST FOR RECONSIDERATION:

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim. The Claimant has the burden of providing all evidence, information, and documentation deemed necessary by the NPFC to support the claim.¹⁰ When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final.¹¹

The NPFC has thoroughly reviewed and considered the Claimant's request for reconsideration and additional information in support of its request. Specifically, on reconsideration, IBR provided a detailed explanation of the database systems used to verify and confirm all rescued bird cases claimed and an extensive cross-walk of all case numbers to each database entry. Additionally, IBR provided a complete roster of paid staff members and volunteers. Finally, IBR provided a statement from a Supervisory Veterinary that specifically elucidated the treatments provided, and the amounts of food, medications, medical supplies and staff time spent on, the rescued birds. Based on the detailed documentation accompanying its request for reconsideration, the NPFC identified and validated the majority of the costs claimed as outlined below.

III. DISCUSSION:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP). The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.

The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the

⁷ Original claim submission dated August 27, 2019. The claimant later revised its sum certain to \$124,234.11.

⁸ Original determination dated February 14, 2020.

⁹ See, tolling agreement between IBR and NPFC executed April 16, 2020.

¹⁰ 33 CFR 136.105(a).

¹¹ *Id.*

claim. 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.” The term “remove” or “removal” means “containment and removal of oil [...] from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

- 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 directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.
- d) That the removal costs were uncompensated and reasonable.

The NPFC analyzed each of the factors and determined the costs incurred by Claimant and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined that \$118,326.50 of removal costs claimed are compensable, while \$5,907.61 were deemed not compensable as further explained below.

Credit Card Expenses

1. IBR claimed costs for a flight for (b) (6), (b)(b) (6), (b) to San Francisco. This person is not listed on the roster of IBR staff personnel or volunteers and on that basis, the NPFC denies \$128.99 associated with the flight.
2. IBR claimed lodging for (b) (6), (b) for the dates from 1/25/2015 to 2/5/2015. This item includes duplicate billing and NPFC denies \$246.62 for the duplicated expense.
3. IBR claimed \$16.00 for car washes on 1/27/2015 and 1/30/2015. The NPFC denies these expenses, as they are not OPA-compensable.
4. IBR claimed \$4.28 for purchasing antacid. The NPFC denies this expense, as is not an OPA compensable.
5. IBR claimed \$26.33 for taxes paid for items purchased at Costco. Some of the tax was paid on non OPA-compensable items. The NPFC calculated the tax on the non-OPA compensable items as \$11.97 and denies that amount.
6. IBR claimed \$1.52 for taxes paid for items purchased at Walmart. Some of the tax was paid on non OPA-compensable items. The NPFC calculated the tax on the non-OPA compensable items as \$0.34 and denies that amount.
7. IBR claimed \$11.96 for taxes paid for items purchased at Home Depot. This expense is duplicated elsewhere in the claim. The NPFC denies the duplicated expense of \$11.96.

Utilities

1. IBR claimed \$11,803.33 for Fairfield Municipal Services which provides daily water and sewage services. Upon adjudication, the NPFC adjusted the cost claimed based on the ratio of rescued birds to overall birds at the facility.¹² Based on this adjustment, the NPFC denies \$3,568.84.
2. IBR claimed \$2,914.43 for Allied Propane which provides propane services. Upon adjudication, the NPFC adjusted this cost based on the ratio of rescued birds to overall birds at the facility.¹³ Based on this adjustment, the NPFC denies \$10.26.
3. IBR claimed \$3,662.91 for Pacific Gas and Electric utility expenses. IBR failed to provide two invoices. One invoice was for services provided from 2/11/2015 to 3/12/2015 totaling \$1,303.30 and the second invoice was for services provided from 3/13/2015 to 4/12/2015 totaling \$392.37. The NPFC denies \$1,695.67 for lack of supporting documentation.¹⁴

Overall Denied Costs = \$5,907.61¹⁵

IV. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, International Bird Rescue's request for uncompensated removal costs is approved in the amount of \$118,326.50.

This determination on reconsideration is a settlement offer;¹⁶ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.¹⁷ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.¹⁸ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

¹² See, claimant submission on reconsideration - Attachment 5b. Rev.1. This spreadsheet contains four tabs of data pertaining to utilities usage and the number of birds associated with the incident on any given day.

¹³ *Id.*

¹⁴ Upon adjudication, the NPFC adjusted the cost claimed based on the ratio of rescued birds to overall birds at the facility; however for this expense, the final adjusted amount was greater than the amount claimed and thus, unlike the other utility expenses, no amount was denied for this reason. *Cf/cx, supra*, notes 13 and 14 and accompanying text. *Id.*

¹⁵ See, Enclosure 3 for a detailed analysis of the amounts approved and denied by the NPFC.

¹⁶ Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the uncompensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person. 33 CFR § 136.115(a).

¹⁷ 33 CFR § 136.115(b).

¹⁸ *Id.*

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Date of Supervisor's review: *9/16/2020*

Supervisor Action: *Offer on Reconsideration Approved*