

CLAIM SUMMARY / DETERMINATION

Claim Number:	921014-0001
Claimant:	State of Washington Department of Ecology
Type of Claimant:	State Government
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$7,232.88
Action Taken:	Denial

EXECUTIVE SUMMARY:

On April 5, 2017 at 3:37 pm local time, the State of Washington Department of Ecology (“Ecology” or “claimant”) was notified of an incident at Willapa Bay, a navigable waterway of the United States.¹ The oil involved in the incident was lube oil. On April 6, 2017, Ecology, in its capacity as the State On Scene Coordinator (SOSC), responded to a report of heavy oil on the beach and on driftwood in the vicinity of Jacobson Jetty at Washaway Beach in Pacific County. Ecology found a five gallon bucket of used lube oil that floated ashore and “someone” had opened the bucket and then dumped the lube oil over the driftwood and sand. The bucket was open and turned upside down so the oil was still dripping out of the bucket to the sand. The affected area was heavily covered in driftwood. The oil impacted an area about 20 to 25 square feet, and was estimated as 4/10th of a mile from the parking area. Ecology was not able to identify a Responsible Party (“RP”).²

On April 6, 2017, Ecology made initial contact with the United States Coast Guard’s (USCG) Sector Columbia River, Astoria Branch and reported there was oil on the beach and requested that the hire a contractor to handle cleanup. The USCG, in its capacity as the Federal On Scene Coordinator (FOSC), stated they preferred not to respond and advised the SOSC that they could hire a contractor. Ecology hired Cowlitz Clean Sweep (“CCS”) for the clean-up.³ The cleanup was completed by CCS the same day.⁴

Ecology presented its uncompensated removal costs claim to the National Pollution Funds Center (“NPFC”) on February 11, 2021.⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that this claim must be denied in full because there is no evidence of a substantial threat of discharge into a navigable waterway or that the FOSC coordinated the actions undertaken by Ecology’s contractor.⁶

¹ Tab R, State of Washington Department of Ecology claim submission, Ecology Incident Detail Report, Incident Information Section dated April 6, 2017.

² Tab R, State of Washington Department of Ecology claim submission, Ecology Follow Up Incident Detail Report dated April 10, 2017, page 5 of 5 of the report.

³ Cowlitz Clean Sweep Invoice #1327258 dated May 8, 2017.

⁴ Tab R, State of Washington Department of Ecology claim submission, Ecology Follow Up Incident Detail Report dated April 10, 2017, page 5 of 5 of the report.

⁵ 33 CFR 136.103(c).

⁶ FOSC email dated March 19, 2021, states Ecology was already in the process of responding to the incident by the time the FOSC was notified.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On April 5, 2017, the Washington State Department of Fish and Wildlife forwarded an email to Ecology that originated from the University of Washington Coastal Observation and Seabird Survey Team (“COASST”) regarding the incident at Washaway Beach.⁷ On April 6, 2017, Ecology responded to the report of oil on the beach and on driftwood in the area of Jacobson Jetty. Ecology reported that a five (5) gallon bucket of lube oil discharged onto the sand and driftwood.⁸

Responsible Party

No Responsible Party (RP) has been identified.⁹

Recovery Operations

On April 7, 2017, Cowlitz Clean Sweep (CCS) began recovery and cleanup operations placing absorbent pads around the driftwood and affected area and used a gator to remove all contaminated sand and wood.¹⁰ CCS disposed of the oily contaminated sand and wood.¹¹

II. CLAIMANT AND RP:

Claims for removal costs or damages may first be presented to the Fund by the Governor of a State for costs that are incurred by the State. The claimant could not determine a Responsible Party.¹²

III. CLAIMANT AND NPFC:

On February 11, 2021, the NPFC received a claim for uncompensated removal costs from the claimant dated February 9, 2021. The claim included the invoice from contractor Cowlitz Clean Sweep for labor, equipment, disposal, and supplies for \$5,988.43, which was paid in full to them

⁷ Tab R, State of Washington Department of Ecology claim submission, Ecology Incident Detail Report, Incident Information Section dated April 6, 2017.

⁸ Tab R, State of Washington Department of Ecology claim submission, Ecology Follow Up Incident Detail Report dated April 10, 2017, page 5 of 5 of the report.

⁹ Tab R, State of Washington Department of Ecology claim submission, Ecology Follow Up Incident Detail Report dated April 10, 2017, page 5 of 5 of the report.

¹⁰ Cowlitz Clean Sweep Invoice #1327258 dated May 8, 2017 and associated supporting documentation and disposal information.

¹¹ Disposal Manifests #9317094-001 dated April 14, 2017.

¹² State of Washington Department of Ecology Oil Spill Liability Trust Fund Modified Claim Form submittal signed by [REDACTED] on February 9, 2021.

on May 9, 2017. The claimant also included compensation for Ecology salaries, benefits, and indirect costs totaling \$1,244.45 for Spill Responders [REDACTED] and [REDACTED].¹³

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁴ As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its decision. This determination is issued to satisfy that requirement.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.¹⁵ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁶ If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and makes its determination based on the preponderance of the credible evidence.

V. DISCUSSION:

When enacting OPA, Congress “explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim’s recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills.”¹⁷ OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred removal costs where the responsible party has failed to do so. 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.”¹⁸ 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.”¹⁹

¹³ State of Washington Department of Ecology claim submission dated February 9, 2021.

¹⁴ 33 CFR Part 136.

¹⁵ See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2011 WL 5187292, (E.D. La. 2011), “[T]he Fifth Circuit specifically recognized that an agency has discretion to credit one expert's report over another when experts express conflicting views.” (Citing, *Medina County v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010)).

¹⁶ See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them).

¹⁷ *Apex Oil Co., Inc. v. United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002) (citing S. Rep. No. 101-94 (1989), reprinted in 1990 U.S.C.C.A.N. 722).

¹⁸ 33 U.S.C. § 2701(31).

¹⁹ 33 U.S.C. § 2701(30).

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).²⁰ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²¹ 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 claim.²²

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

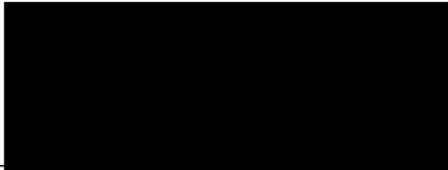
- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.
- (d) That the removal costs were uncompensated and reasonable.²³

Upon receipt of the claim submission, the NPFC requested additional information and clarification from both the claimant and the FOSC on March 11, 2021. On March 19, 2021 the NPFC received a written response from the FOSC advising the NPFC that Ecology was already in the process of cleaning up the incident site when they notified the FOSC. The FOSC informed the NPFC that Ecology never reported the incident to the National Response Center (NRC) nor was there a threat to Willapa Bay, a navigable waterway of the United States.²⁴

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the State of Washington Department of Ecology request for uncompensated removal costs is denied.

Should the Claimant decide to request reconsideration of this denial it will need to demonstrate that the incident in fact posed a substantial threat of discharge into Willapa Bay and will need to obtain FOSC coordination for all actions undertaken by its contractor.

Claim Supervisor: 

²⁰ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²¹ 33 CFR Part 136.

²² 33 CFR 136.105.

²³ 33 CFR 136.203; 33 CFR 136.205.

²⁴ FOSC email to NPFC dated March 19, 2021.

Date of Supervisor's review: *3/29/21*

Supervisor Action: *Denial Approved*