

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPE24902-URC001
Claimant:	DR Mason Construction
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$22,835.00
Action Taken:	Denial

EXECUTIVE SUMMARY:

On January 22, 2024, over four inches of rain fell in the San Diego watershed area.² The rain drained into Chollas Creek, a thirty-mile long natural and concrete creek flood basin.³ Chollas Creek is generally a dry creek upstream of the confluence of the north and south Chollas Creek channels.⁴ The location where the actions the claimant took are upstream of the confluence.⁵ The rain caused the water level to rise in some places of the creek to five feet above ground level flooding some businesses in the Logan Barrio of San Diego.⁶

The United States Environmental Protection Agency (EPA) Region IX is the Federal On-Scene Coordinator (FOSC) for the incident.⁷ A letter provided by the EPA stated the claimant performed cleanup in the Broad Street [sic] alley along 33rd Street.⁸ With regard to the exact location of the claimant's activities, the source of the oil and the responsible party were not definitively identified by the EPA. However, the EPA stated in its Pollution Report for the entire event, that mud had commingled with oil which was believed to originate from an automotive shop, a hydraulic business and/or a crane service.⁹

¹ This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant's rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant's rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

² U.S. EPA Region IX POLREP # 1, section 1.1.2 Site Description dated January 25, 2024.

³ U.S. EPA Region IX POLREP # 1, section 1.1.2 Site Description dated January 25, 2024.

⁴ California Regional Water Quality Control Board, San Diego Region Investigative Order No. R9-2015-0058 report at p. 2 of 18.

⁵ For the sole purposes of providing a detailed analysis and articulating the other deficiencies attendant with this claim that render it non-compensable, the NPFC will assume without deciding that the area where the claimant's actions took place qualifies as "navigable waters" as that term is defined by OPA. *See*, 33 U.S.C. § 2701(21).

⁶ U.S. EPA Region IX POLREP # 1, section 1.1.2.1 Location dated January 25, 2024.

⁷ U.S. EPA Region IX POLREP # 1 dated January 25, 2024.

⁸ U.S. EPA letter to DR Mason Construction dated February 13, 2024, submitted with claim. Based on a holistic review of the area in question, for the purpose of clarity, we believe the location should have read, "Broad Avenue alley along 33rd Street."

⁹ U.S. EPA Region IX POLREP # 3, section 1.1.3 Preliminary Removal Assessment/Removal Site Inspection Results dated January 30, 2024.

On May 15, 2024, the NPFC received the claimant's submission seeking reimbursement of removal costs totaling \$22,835.00.¹⁰ The entirety of the submission consisted of the OSLTF Optional Claim Form with a general description of the event, a letter from the USEPA Region IX FOOSC to the claimant and a copy of the claimant's business card.¹¹ No other information was provided. Highlighting several deficiencies in the submission centered on the dearth of evidence provided, the NPFC on multiple occasions from early June to late July spoke with and sent correspondence to the claimant.¹² In those communicate, the NPFC ensured the claimant was aware that more information was required to favorably adjudicate its claim, and provided specific examples of what was lacking, such as proof of the removal costs it incurred.¹³ The NPFC then followed up with the claimant to ensure it understood the claims process and what the NPFC required under the regulations to pay the claim.¹⁴ Despite this detailed outreach, the claimant did not provide any additional documentation. Because the claimant did not provide sufficient documentation as to what removal actions were performed, the basis for the amount claimed, or any evidence supporting the claim in accordance with the regulations, the claim must be denied.¹⁵

I. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁶ 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.¹⁷ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁸ 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.

¹⁰ Original Claim submission received May 15, 2024.

¹¹ *Id.*

¹² *See*, email and phone communications on June 3rd, July 9th, July 12th, July 13th, and July 29th, respectively.

¹³ *Id.*

¹⁴ *Id.* *See*, 33 CFR 136.105; 33 CFR 136.203; 33 CFR 136.205.

¹⁵ *See*, 33 CFR 136.105; *see generally*, 33 CFR Part 136.

¹⁶ 33 CFR Part 136.

¹⁷ *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)).

¹⁸ *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).

II. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On January 22, 2024, over four inches of rain fell in the San Diego watershed area.¹⁹ The rain drained into Chollas Creek, a thirty-mile long natural and concrete creek flood basin.²⁰ Chollas Creek is generally a dry creek upstream of the confluence of the north and south Chollas Creek channels.²¹ The location where the actions the claimant took are upstream of the confluence. The rain caused the water level to rise in some places of the creek to five feet above ground level flooding some businesses in the Logan Barrio of San Diego.²²

The United States Environmental Protection Agency (EPA) Region IX is the Federal On-Scene Coordinator (FOSC) for the incident.²³ A letter provided by the EPA stated the claimant performed cleanup in the Broad Street [sic] alley along 33rd Street.²⁴ With regard to the exact location of the claimant's activities, the source of the oil and the responsible party were not definitively identified by the EPA. However, the EPA stated in its Pollution Report for the entire event, that mud had commingled with oil which was believed to originate from an automotive shop, a hydraulic business and/or a crane service.²⁵

Responsible Party

No responsible party has been specifically identified at this time for the oil found in the area that is the subject of this claim.

Recovery Operations

This section describes the recovery operations attendant to the entirety of the incident, not necessarily operations that occurred in the location of the activities that gave rise to this claim.

The California Department of Fish and Wildlife Office of Spill Prevention and Response ("CADFW OSPR" or "SOSC") is the State On Scene Coordinator for the incident. The SOSC notified the FOSC about the incident on the evening of January 22, 2024.²⁶

¹⁹ U.S. EPA Region IX POLREP # 1, section 1.1.2 Site Description dated January 25, 2024.

²⁰ U.S. EPA Region IX POLREP # 1, section 1.1.2 Site Description dated January 25, 2024.

²¹ California Regional Water Quality Control Board, San Diego Region Investigative Order No. R9-2015-0058 report at p. 2 of 18.

²² U.S. EPA Region IX POLREP # 1, section 1.1.2.1 Location dated January 25, 2024.

²³ U.S. EPA Region IX POLREP # 1 dated January 25, 2024.

²⁴ U.S. EPA letter to DR Mason Construction dated February 13, 2024, submitted with claim. Based on a holistic review of the area in question, for the purpose of clarity, we believe the location should have read, "Broad *Avenue* alley along 33rd Street."

²⁵ U.S. EPA Region IX POLREP # 3, section 1.1.3 Preliminary Removal Assessment/Removal Site Inspection Results dated January 30, 2024.

²⁶ U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

The San Diego County Environmental Health (SDCOEH) Hazardous Incident Response Team (HIRT) and CADFW OSPR responded to the flood and related spills. SDCOEH placed sorbent boom in the creek.²⁷ The FOSC arrived in the morning on January 23, 2024.²⁸

The FOSC hired an Emergency and Rapid Removal Services (ERRS) contractor, Patriot Environmental Services.²⁹ Boom and sorbents were deployed to mitigate the damage. Contaminated debris was collected by contractors and private business owners and was placed in bins.³⁰ The response included removal of contaminated soil and sediment, drain cleaning, and pressure washing after soils and sediments were removed.³¹

III. CLAIMANT AND RP:

Since no RP has been specifically identified at this time for the oil found in the area that is the subject of this claim, the claimant was not required to present its claim to the RP.³²

IV. CLAIMANT AND NPFC:

On May 15, 2024, the NPFC received the claimant's submission seeking reimbursement of \$22,385.00 in removal costs. The entirety of the submission consisted of the OSLTF Optional Claim Form with a general description of the event, a letter from the USEPA Region IX FOSC to the claimant and a copy of the claimant's business card.³³ No other information was provided.

V. DISCUSSION:

An RP is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.³⁴ An RP's liability is strict, joint, and several.³⁵ 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."³⁶ 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

²⁷ U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

²⁸ U.S. EPA Region IX POLREP # 1, section 1.1 Background Mobilization Date dated January 25, 2024.

²⁹ U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

³⁰ U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

³¹ U.S. EPA Region IX POLREP # 1 dated January 25, 2024.

³² See, 33 CFR 136.103.

³³ *Id.*

³⁴ 33 U.S.C. § 2702(a).

³⁵ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

³⁶ *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).

incident.”³⁷ 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.”³⁸

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁰ 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.⁴¹

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.⁴²

The administrative record lacks the relevant information the NPFC requires to determine what response actions were performed by the claimant for which it seeks reimbursement. The regulations governing the adjudication of claims against the OSLTF state that 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.⁴³ Without supporting documentation for labor, materials, equipment, or supplies used, and an explanation describing the nature of the work performed, the NPFC is unable to determine the validity of the costs claimed. The claimant has been unresponsive to the NPFC’s requests for additional information.⁴⁴

The only documentation the claimant provided in support of its claim is a letter from the FOSC to the claimant, which the FOSC provided to them to support a claim against the OSLTF.⁴⁵ The letter purports to confirm that the claimant cleaned up the Broad Street alley along 33rd Street in San Diego and implies that the claimant’s work was coordinated with the FOSC.⁴⁶ However, the letter does not detail work performed by the claimant or describe the necessity of work performed as part of an OPA-oil pollution response. Due to the lack of

³⁷ 33 U.S.C. § 2701(31).

³⁸ 33 U.S.C. § 2701(30).

³⁹ *See generally*, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁰ 33 CFR Part 136.

⁴¹ 33 CFR 136.105.

⁴² 33 CFR 136.203; 33 CFR 136.205.

⁴³ 33 CFR 136.105.

⁴⁴ *See*, email and phone communications on June 3rd, July 9th, July 12th, July 13th, and July 29th, respectively. Despite these multiple communicate, the claimant has not provided any additional information in support of its claim.

⁴⁵ Letter from the FOSC to the Claimant dated February 13, 2024.

⁴⁶ *Id.*

specificity by both the FOSC in his letter and by the claimant in its claim submission, the NPFC finds that the FOSC letter is not sufficient to demonstrate that the claimant's work was directed by the FOSC, nor does it establish that the work was performed in accordance with the NCP or that it was in response to oil pollution.

Since the claimant has not met its burden under the regulations, the claim must be denied. Should the claimant decide to request reconsideration, it would need to remedy the evidentiary issues by addressing the requirements of OPA and its attendant regulations found at 33 CFR Part 136.

VI. CONCLUSION:

After careful analysis of all the supporting documentation provided by the claimant and the entire administrative record, the NPFC determines and finds as a matter of fact that the claimant did not prove its entitlement to reimbursement of uncompensated removal costs in the amount of \$22,835.00.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, DR Mason Construction's request for uncompensated removal costs is denied.

Claim Supervisor:	(b) (6)
Date of Supervisor's review:	9/16/2024
Supervisor Action:	<i>Denial Approved</i>
Supervisor's Comments:	