

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP924031-URC001
Claimant:	State of CA, Dept of Fish & Wildlife, OSPR
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$2,572.33
Action Taken:	Denial

EXECUTIVE SUMMARY:

On January 28, 2021 the State of California, Department of Fish & Wildlife, OSPR (“OSPR” or “Claimant”) responded to an incident at the Berkeley Marina, located at 201 University Avenue in Berkeley, CA. The reported incident was a sunken vessel in slip 112 that belonged to Mr. (b) (6). There was a petroleum sheen in the water and the vessel was boomed off to prevent it from spreading.² The Berkeley Marina is located in the San Francisco Bay, which is a navigable waterway.

On January 28, 2021 United States Coast Guard (USCG) Sector San Francisco received notification of a sunk vessel by the name Angry Fish that had discharged approximately 5 gallons of motor oil into the San Francisco Bay, a U.S. navigable waterway. Mr. (b) (6), who was identified as the owner, stated that the vessel sunk due to heavy rain. Mr. (b) (6) hired Lind Marine to salvage the vessel and remove any remaining oil.³

OSPR submitted its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$2,572.33 on March 21, 2024.⁴ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable laws and regulations, and after careful consideration has determined that all costs must be denied.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On January 28, 2021 a sunken passenger vessel by the name Angry Fish had released 5 gallons of motor oil into Berkeley Marina, which leads to San Francisco Bay, a navigable waterway of the United

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 with 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 See, State of California OSPR Original Claim Submission dated March 13, 2024.

³ See, USCG Sector San Francisco PR/FOSCR dated February 10, 2021.

⁴ National Response Center (NRC) Report #1296890 dated January 27, 2021.

States. A rainbow sheen was on the water, booms were deployed and the release was stopped.⁵ The incident was reported to the National Response Center, NRC Case Number 1296890.⁶

USCG Sector San Francisco received the notification and verified that the incident was not in the vicinity of any sensitive sites. The owner, (b) (6), was contacted and he estimated that approximately 5 gallons of motor oil was discharged into the water. He hired Lind Marine to salvage the vessel and remove any remaining oil.⁷

On January 28, 2021, OSPR received notification through the California Emergency Management Agency – Emergency Services and (b) (6) responded to the scene. Mr. (b) (6) found the petroleum sheen at the dock and saw the containment boom that was deployed to stop the pollution from spreading. Mr. (b) (6) also noticed small pockets of dark product in the water. Mr. (b) (6), the vessel owner, was there using sorbents to recover the floating product. Mr. (b) (6) advised him to concentrate on the dark product and to dispose of the soiled absorbents properly. They also discussed the lack of a working bilge pump on the vessel which was the possible cause of the vessel sinking during the recent rain storms.⁸

Mr. (b) (6) found a 6 gallon diesel fuel tank with no cap near the slip and Mr. (b) (6) confirmed that he pulled this from the water. Samples were taken from the fuel tank, the sheen and dark floating material found in the water. OSPR's water pollution lab tested the samples and found that they were petroleum hydrocarbons with characteristics similar to diesel and motor oil.⁹

Responsible Party

The Oil Pollution Act identifies the owner and/or operator of a vessel resulting in an OPA incident to be the Responsible Party (RP) for that incident.¹⁰ In this case, the vessel was owned by Mr. (b) (6) of Hayward, CA.¹¹

Recovery Operations

Mr. (b) (6), the vessel owner, used sorbents to recover the floating product and containment boom to stop the source of the pollution. Mr. (b) (6) hired Lind Marine to salvage the vessel and remove any remaining oil.

II. CLAIMANT AND NPFC:

On March 21, 2024, the NPFC received a claim in the amount of \$2,572.33 from OSPR.¹² OSPR provided the NPFC with an OSLTF claim form, SF 1081, Incident billing which includes the invoice and support documentation, State of CA Laboratory Report, Arrest/Investigation Report, OSPR Daily Activity Report, and an hourly rate schedule.¹³

⁵ See, State of California OSPR original claim submission dated March 13, 2024 pg.13 of 20.

⁶ NRC Report #1296890 dated January 27, 2021.

⁷ USCG Sector San Francisco PR/FOSCR dated February 10, 2021.

⁸ See, State of California OSPR original claim submission dated March 13, 2024 pg.13 of 20.

⁹ *Id.*

¹⁰ 33 U.S.C. § 2701(32).

¹¹ USCG Sector San Francisco PR/FOSCR dated February 10, 2021.

¹² State of California OSPR original claim submission dated March 13, 2024.

¹³ *Id.*

On March 29 and April 1, 2024, the NPFC requested additional support information via e-mail from OSPR relative to the incident.¹⁴¹⁵ On April 11, 2024, OSPR replied to the NPFC's request, providing their responses which included additional support.¹⁶

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).¹⁷ 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.¹⁸ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁹ 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.

IV. 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.²⁰ An RP's liability is strict, joint, and several.²¹ 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."²² 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."²³ 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."²⁴

¹⁴ See, NPFC email to OSPR dated March 29, 2024 requesting additional information.

¹⁵ E-mail to OSPR from NPFC dated April 1, 2024.

¹⁶ See, OSPR e-mail to NPFC dated April 11, 2024 including attachments.

¹⁷ 33 CFR Part 136.

¹⁸ 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)).

¹⁹ 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).

²⁰ 33 U.S.C. § 2702(a).

²¹ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

²² *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).

²³ 33 U.S.C. § 2701(31).

²⁴ 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).²⁵ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁶ 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.²⁷

OPA defines “compensation allowable” to mean “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.”²⁸

An “incident” under OPA is defined as any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.”²⁹

OPA defines “oil” as “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601) and which is subject to the provisions of that Act [42 USCA Section 9601 et seq.]”³⁰

CERCLA defines “hazardous substance” broadly.³¹ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”³² Further, the definition goes on to exclude “natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”³³

OPA defines “removal costs” to mean “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 a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.”³⁴

The NPFC requested “after-the-fact” coordination by the FOSC to give them the opportunity to review the response actions performed. USCG Sector San Francisco has determined that the spill did not pose a substantial threat and would not consider the OSPR’s actions to be consistent with the NCP. ³⁵ The

²⁵ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁶ 33 CFR Part 136.

²⁷ 33 CFR 136.105.

²⁸ 33 CFR 136.205.

²⁹ 33 U.S.C. § 2701(14).

³⁰ 33 U.S.C. § 2701(14).

³¹ “Hazardous substance means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606].”

³² *Id.*

³³ *Id.*

³⁴ 33 U.S.C. § 2701(31).

³⁵ Email from USCG Sector San Francisco to NPFC dated April 22, 2024.

claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.³⁶ Based on the administrative record and evidence submitted, the NPFC denies the claim because the Claimant has not provided sufficient evidence to establish that the uncompensable removal costs of actions claimed were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.³⁷

V. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, OSPR's request for uncompensated removal costs is denied as not supported by the record.

Claim Supervisor

(b) (6)

Date of Supervisor's review: 5/1/2024

Supervisor Action: Denial Approved.

³⁶ 33 CFR 136.105.

³⁷ 33 CFR §§136.203(c) & 205.