

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPE24902-URC002
Claimant:	State Of California Dept. Of Fish And Wildlife: OSPR
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$27,295.01
Action Taken:	Offer in the amount of \$25,610.78

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 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.⁵

The United States Environmental Protection Agency (EPA) Region IX is the Federal On-Scene Coordinator (FOSC) for the incident.⁶ California Department of Fish and Wildlife: Office of Spill Prevention and Response (“Claimant” or “OSPR”) activated as the state’s responding agency, providing State On-Scene Coordinators (SOSC) and participating as a stakeholder in the Unified Command (UC). With regard to the entire response, the source of the oil and the responsible party were not definitively identified by the FOSC. However, the FOSC 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.⁷

On June 20, 2024, the NPFC received the claimant’s submission seeking reimbursement of removal costs totaling \$27,295.01.⁸ The NPFC thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful

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 *Id.*

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

⁵ U.S. EPA Region IX POLREP # 1, section 1.1.2.1 Location dated January 25, 2024.

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

⁷ U.S. EPA Region IX POLREP # 3, section 1.1.3 Preliminary Removal Assessment/Removal Site Inspection Results dated January 30, 2024.

⁸ Original Claim submission received June 20, 2024.

consideration has determined that \$25,610.78 of the claimed costs are compensable and offers this amount as full and final compensation.

I. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁹ 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.¹⁰ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹¹ 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.

II. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On January 22, 2024, over four inches of rain fell in the San Diego watershed area.¹² The rain drained into Chollas Creek, a thirty-mile long natural and concrete creek flood basin.¹³ Chollas Creek is generally a dry creek upstream of the confluence of the north and south Chollas Creek channels.¹⁴ 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.¹⁵

The California Department of Fish and Wildlife: Office of Spill Prevention and Response (“Claimant” or “OSPR”) activated as the state’s responding agency, providing State On-Scene Coordinators (SOSC) and participating as a stakeholder in the UC. The United States Environmental Protection Agency (EPA) Region IX is the Federal On-Scene Coordinator (FOSC) for the incident.¹⁶ With regard to the entire response, the source of the oil and the responsible party were not definitively identified by the FOSC. However, the FOSC stated in its

⁹ 33 CFR Part 136.

¹⁰ 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)).

¹¹ 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).

¹² U.S. EPA Region IX POLREP # 1, section 1.1.2 Site Description dated January 25, 2024.

¹³ *Id.*

¹⁴ California Regional Water Quality Control Board, San Diego Region Investigative Order No. R9-2015-0058 report at p. 2 of 18.

¹⁵ U.S. EPA Region IX POLREP # 1, section 1.1.2.1 Location dated January 25, 2024.

¹⁶ U.S. EPA Region IX POLREP # 1 dated January 25, 2024.

Pollution Reports 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.¹⁷

Responsible Party

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

Recovery Operations

OSPR is the State On Scene Coordinator for the incident. The SOSC notified the FOSC about the incident on the evening of January 22, 2024.¹⁸

The San Diego County Environmental Health (SDCOEH) Hazardous Incident Response Team (HIRT) and OSPR responded to the flood and related spills.¹⁹ SDCOEH placed sorbent boom in the creek.²⁰ The FOSC arrived in the morning on January 23, 2024.²¹

The FOSC hired an Emergency and Rapid Removal Services (ERRS) contractor, Patriot Environmental Services.²² Boom and sorbents were deployed to mitigate the damage. Contaminated debris was collected by contractors and private business owners and was placed in bins.²³ The response included removal of contaminated soil and sediment, drain cleaning, and pressure washing after soils and sediments were removed.²⁴

III. CLAIMANT AND NPFC:

On June 20, 2024, the NPFC received the claimant's submission seeking reimbursement of removal costs totaling \$27,295.01.²⁵ The claimant submitted the Optional OSLTF Claim Form; documentation of labor, equipment and travel costs; labor and equipment rates; supplemental summary report; and daily activity reports.²⁶

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.²⁷ An RP's liability is strict, joint, and several.²⁸ When enacting OPA, Congress "explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required

¹⁷ U.S. EPA Region IX POLREP # 3, section 1.1.3 Preliminary Removal Assessment/Removal Site Inspection Results dated January 30, 2024.

¹⁸ U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

¹⁹ *Id.*

²⁰ *Id.*

²¹ U.S. EPA Region IX POLREP # 1, section 1.1 Background Mobilization Date dated January 25, 2024.

²² U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

²³ *Id.*

²⁴ U.S. EPA Region IX POLREP # 1 dated January 25, 2024.

²⁵ Original Claim submission received June 20, 2024.

²⁶ *Id.*

²⁷ 33 U.S.C. § 2702(a).

²⁸ *See*, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

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."²⁹ 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."³⁰ 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."³¹

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³² The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³³ 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.³⁴

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.³⁵

The claimant seeks reimbursement of \$27,295.01 for labor, equipment and travel expenses incurred for deployment to the Chollas Creek incident in January 2024. The OSPR personnel arrived on-scene prior to the FOSC and notified him of the situation and they remained part of the UC with the FOSC once he arrived.³⁶ After analyzing the documentation provided by the claimant, the NPFC finds that most of the costs relating to the state's employees working in their capacity as SOSCs, Oil Spill Prevention Specialists, and an Environmental Scientist are compensable as OPA removal costs. Those personnel worked in coordination with the FOSC as

²⁹ *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).

³⁰ 33 U.S.C. § 2701(31).

³¹ 33 U.S.C. § 2701(30).

³² See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³³ 33 CFR Part 136.

³⁴ 33 CFR 136.105.

³⁵ 33 CFR 136.203; 33 CFR 136.205.

³⁶ U.S. EPA Region IX POLREP # 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

part of the UC and occupied Incident Command System (ICS) positions.³⁷ Their positions and most of their actions detailed on the state's daily activity reports demonstrate that their primary purpose of attendance at the incident was oil spill response.

Where the state's employees' activities were not clearly identifiable as removal costs, the NPFC noted the insufficiency of the documentation on the attached spreadsheet.³⁸ The NPFC deducted costs where the documentation did not demonstrate to the NPFC that the activities were oil-removal actions and/or the documentation did not support the charged hours or mileage of some employees.

Upon adjudication of the costs, the NPFC has determined that the amount of compensable removal costs is \$25,610.78 while \$1,684.23 is denied for the following reasons:³⁹

1. (b) (6), Fish and Game Lieutenant acting as SOSOC: 0.5 hours on January 26, 2024 are denied because the documentation provided was insufficient to determine that the work done met the definition of a removal cost. \$67.38 is denied.
2. (b) (6), Oil Spill Prevention Specialist: 0.5 hours on January 22, 2024 are denied because while 5 hours of work were claimed the daily activity report only documented 4.5 hours. \$39.21 is denied.
3. (b) (6), Fish and Game Warden, acting as Deputy SOSOC: 0.5 hours on January 26, 2024 are denied because while 7 hours of work were claimed, the daily activity report only documented 6.5 hours. Additionally, the documentation provided was insufficient to determine that the work done for one hour met the definition of a removal cost. 1.5 hours totaling \$148.40 are denied.
4. (b) (6), Senior Environmental Scientist: 8 hours on January 29, 2024 and 4 hours on January 31, 2024 are denied. The daily activity reports do not provide sufficient documentation that these hours met the definition of removal costs. \$1,318.20 is denied.
5. (b) (6), Technician Specialist: 1 hour of overtime on February 2, 2024 is denied because while 6 hours were claimed, the daily activity report only documented 5 hours of overtime worked.. \$78.41 is denied..
6. Mileage charged on behalf of (b) (6): NPFC denied 51 miles driven from Anaheim to Laguna Beach on January 25, 2024 at 9 p.m. This mileage appears to be unrelated to the Chollas Creek oil spill incident. because the spill was in San Diego. \$32.64 on is denied.

Overall Denied Costs: \$1,684.23⁴⁰

³⁷ OSPR Supplemental Report Case Summary dated April 18, 2024, pp. 97-99 of 100 of "Chollas Creek Federal Claim Additional Docs", provided with original claim submission.

³⁸ Enclosure 3 provides a detailed analysis of the amounts approved and denied by the NPFC.

³⁹ *Id.*

⁴⁰ Enclosure 3 provides a detailed analysis of the amounts approved and denied by the NPFC.

V. 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 has demonstrated entitlement to payment for certain compensable removal costs.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the California Department of Fish and Wildlife – Office of Spill Prevention and Response’s request for uncompensated removal costs is approved in the amount of \$25,610.78.

This determination is a settlement offer,⁴¹ the claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.⁴² The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.⁴³ Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

<p style="text-align: center;">(b) (6)</p> <p>Claim Supervisor: (b) (6)</p> <p>Date of Supervisor’s review: 10/24/2024</p> <p>Supervisor Action: <i>Offer Approved</i></p> <p>Supervisor’s Comments:</p>
--

⁴¹ 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).

⁴² 33 CFR 136.115(b).

⁴³ *Id.*