

CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/08/2010
Claim Number	: 910066-001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$18,332.13

FACTS:

- Oil Spill Incident:*** The State of California (CA) Department of Fish and Game (DFG) Office of Spill Prevention and Response (OSPR),¹ reports that on May 14, 2008, approximately 600-1000 gallons of red-dye diesel fuel were released onto the ground due to a generator failure at a rural indoor marijuana grow operation. The fuel released from the grow site, migrating downhill and into a tributary of upper Hacker Creek, which is a tributary of South Fork Salmon Creek, which leads into Salmon Creek, leading to South Fork Eel River, which becomes Eel River, all navigable waterways of the US.

On May 14, 2008, at approximately 17:45 hours, Fish and Game ██████████ was notified by the Eureka DFG that an unknown caller reported a diesel spill into Hacker Creek. Because daylight was ending, the location was remote and the area was known for its illicit marijuana potential, ██████████ made the decision to investigate on-scene the following day.²

On May 15, 2008, ██████████, along with ██████████, ██████████ and ██████████ found and inspected the grounds of the spill site. It was determined that a generator running inside a makeshift enclosure attached to one of the three buildings on the property was the cause of the fuel spill. The building was on the bank of Hacker Creek, and the soil appeared to be soaked with diesel. On closer inspection, it was discovered that the same red-dye diesel was found in the waters of Hacker Creek.

Because of the possibility of this location being used as an illegal marijuana grow, the ██████████ left the spill site and returned the next day, May 16, 2008, along with members from Humboldt County Drug Task Force and Humboldt Sheriff's Department. The address of the spill site was determined to be 1480 Road B, Upper Thomas Road, Miranda, CA, with the owner (now deceased³) being named as Mr. ██████████. Mr. ██████████ denied that he was responsible for the diesel spill, as he lived in Thailand and stated to ██████████ that he rented out his property to Mr. ██████████ and Mr. ██████████ (He stated to ██████████, however, that he rented out the property to an "█████████," and that he had a notarized rental contract, which he never produced). Mr. ██████████ also stated that he did not know what was going on at his property in his absence; however, several CA 215 Prescription Documentation sheets were posted around the property (allowing him to spoke marijuana for medicinal purposes). When asked if he was illegally cultivating marijuana on his property, he stated that he liked

¹ See CA DFG OSPR Incident Report # 58391, dated 5/14/2008

² See CA DFG Arrest/Investigation Report, completed by ██████████, submitted to the NPFC by the claimant on 2/01/2010

³ See email from Ms. ██████████, CA DFG, to ms. ██████████, NPFC, dated 2/03/2010

“outdoor stuff, not indoor weed,” and that he had just recently returned from Thailand, his place of residence.

Mr. ██████ told CA DFG OSPR that he had been in contact with Mr. ██████, owner of North Coast Environmental Construction (North Coast), and would pay for the clean-up and removal of the diesel and contaminated soil/debris. North Coast retained SHN Engineering to assist them in the cleanup and removal activities.

In June of 2008, ██████ spoke with ██████ and informed him they were no longer working with Mr. ██████, as he had fled the country and was in Thailand. Mr. ██████ was not planning on returning to the United States. On September 16, 2009, Mr. ██████ was reported dead in Thailand, from a brain hemorrhage. North Coast was not paid by Mr. ██████ before he fled the United States. However, in civil court, they received Mr. ██████’s property in lieu of payment.⁴

Description of removal actions performed: The claimant, CA DFG OSPR, performed the initial response to the spill site. After locating the owner of the property, Mr. ██████, and speaking with the contractor hired for cleanup and removal of the red-dye diesel from the property and affected waterway, CA DFG OSPR maintained a presence as monitoring the work being performed. The use of personnel and vehicles to perform this assessment, monitoring and response were uncompensated by the property owner, Mr. ██████, before he fled the United States.

- The Claim:*** On February 1, 2010, CA DFG OSPR submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$18,332.13 for the services provided from May 14 through August 15, 2008. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim submission.

This claim consists of copies of the invoicing and associated dailies, a copy of CA DFG Investigation reports written by ██████ and ██████, a copy of CA Regional Water Quality Control Board North Coast Region Cleanup and Abatement Order, a copy of the Humboldt County Biological Injury Report, a copy of North Coast Laboratories, Ltd Case narrative for Lab Order # 0805450, photographs and internal email correspondence.

The review of the actual cost invoicing and dailies focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party’s liability will include “removal

⁴ See email from Ms. ██████, CA DFG, to ms. ██████, NPFC, dated 2/03/2010

costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan”. 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”.

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. 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”.

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that “If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.”

Under 33 CFR 136.105(a) and 136.105(e)(6), 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.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, “a claimant must establish -

- (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 determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR 136.205 “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.” [Emphasis added].

DETERMINATION OF LOSS:

A. Overview:

1. The State OSC coordination has been established via CA DFG OSPR Incident Report # 58391.⁵
2. The incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted on time.
5. As Mr. [REDACTED] is deceased, the NPFC has determined that there is no Responsible Party.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOOSC, to be consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented and reasonable.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$18,332.13 of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #910066-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident from May 14 through August 15, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$18,332.13 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim 910066-001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

AMOUNT: \$18,332.13

Claim Supervisor: [REDACTED]

⁵ See CA DFG OSPR Incident Report # 58391, dated 5/14/2008

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: