

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/18/2010
Claim Number	: E09902-001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$24,862.48

I. FACTS:

1. Oil Spill Incident:

On 30 January 2009, at 5:24 AM the 911 operator routed a call to the Ventura County Fire Department (VCFD), California. The caller reported that a truck went down an embankment off Highway 33, near the intersection of Cherry Creek Road. The accident site was at milepost 40.9 on a steep downhill gradient, in a remote area of the Los Padre National Forest, which operated and maintained by the US Forest Service (USFS).

VCFD arrived at the accident site and found an abandoned, overturned truck with an estimated 7,100 gallons of one-gallon plastic containers, which had discharged approximately 1,700 gallons what smelled like diesel oil that was on its way to Adobe Creek. Adobe Creek had water flow at the time of this incident. VCFD HAZMAT preliminary tests showed that the liquid was a petroleum-based product and contacted. VCFD contacted the California Department of Fish and Game (DFG), Office of Oil Spill Prevention and Response (OSPR) to respond to the scene.

OSPR personnel arrived on scene and tracked an estimated, 1,000 gallons of petroleum product (diesel oil) that had traveled about one and a quarter miles downstream, at which point, there was no longer water on the surface. Adobe Creek flows toward Sespa Creek, which flows into the Santa Clara River then on to the Pacific Ocean. Adobe Creek is a navigable waterway of the US. The discharge occurred on land owned by the US Department of Agriculture Forest Service (USFS). USFS set up the Unified Command and acted as the on-scene coordinator. A contractor was hired to remove the oil from the creek bed and to set up an underflow dam. The steep embankment, brush and difficulty accessing the spill area created additional costs for time. There was a question about how much oil to remediate because of a Steelhead Salmon spawning area downstream from the spill site.

2. Claimant:

The claimant is the California Department of Fish and Game (DFG), Office of Oil Spill Prevention and Response (OSPR), which has primary authority to direct removal, abatement, response, containment and cleanup efforts for any spill in State waters. Three OSPR personnel were on scene during the initial response. OSPR personnel collected oil samples from the containers, the truck, and soils down to the creek, then to the furthest point that the oil reached downstream. Additional, OSPR personnel observed cleanup activities by the contractor and represented the state's interests at the Unified Command near the spill site.

3. Claim:

On February 24, 2010, the NPFC received the State of California DFG claim for a sum certain of \$24,862.48 for its response and removal costs incurred during this incident. DFG cooperated with the FOSSC as specified in the National Contingency Plan. The claimant submitted daily reports by its OSPR

officers and cost accounting of its travel time and vehicles. The US Environmental Protection Agency (EPA) Federal on Scene Coordinator directed DFG to apply for reimbursement of its costs through the NPFC.

4. Vehicle Investigation:

EPA, USFS and DFG personnel coordinated their investigation with the California State Highway Patrol on the ownership of the vehicle. California Highway Patrol Officer ██████ questioned the last registered owner, on February 4, 2009, a Mr. ██████ of ██████ Oxnard, California 93036. Mr. ██████ bought the vehicle June 7, 2006 but failed pay registration fees on the vehicle and told investigators that he sold the vehicle to ██████ on January 17, 2009. There is no record of this sale on the Vehicle Registration History and no release of liability filed by Mr. ██████. Investigators conducted surveillance then closed the investigation, after concluding that they would find a responsible party. The vehicle, a red dump truck with California license 7P40258 was placed in an impound lot.

II. 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 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 because 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].

III. DETERMINATION OF LOSS:

A. Overview:

1. The Federal on Scene Coordinator, ██████████ of the EPA Region IX took over the response and cleanup activities from USFS, on March 3, 2009. The incident was federalized because the scope of work and cleanup cost issues.
2. DFG Office of Spill Prevention and Response were initially on scene acting on behalf of the State's interests until federal coordination took over.
3. The NPFC has determined that the actions undertaken by the claimant are deemed consistent with the National Contingency Plan (NCP). This determination is made in accordance with the Delegation Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims under section 1012(a)(4), Oil Pollution Act of 1990 (OPA 90).
4. 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.
5. The claim was submitted within the time limit for removal claims under OPA 90.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the removal costs presented were for actions in accordance with the NCP and that costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 as set forth below.

B. Analysis:

The Claims Manager reviewed the costs presented by the claimant and confirmed the reasonableness of these costs with the FOSC, ██████████ on March 1, 2010. The review focused on the following issues:

- (1) Whether the actions taken were compensable "removal actions" under OPA and its governing 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 FOSC, and
- (4) Whether the costs were adequately documented and reasonable.

Having reviewed this claim, the Claims Manager determines that there are no discrepancies regarding reimbursement or cost documentation provided by the claimant. The claims manager contacted the FOSC to ask why DFG's could not have been placed on a PRFA and was told that DFG's OPPR team had been overlooked largely because when EPA federalized the incident on March 3, 2009 the state response was overlooked. Mr. ██████████ explained that due to the remoteness of the spill site and difficulty accessing the creek bed that costs may appear high but are within reason for the travel time to and from the scene and the work by the OSPR team in assisting on scene.

Personnel costs were the largest component at \$20,479.08 with 353.75 hour invoiced for eight employees from February 9, 2009 through July 7, 2009. One employee's travel expenses came to \$48.00. DFG vehicle usage costs for 4-wheel vehicles came to \$3,602.40. State's administrative costs for fiscal year '09/'10 (see memorandum dated August 9, 2009 effective July 1, 2009 20.08% department overhead rate) came to \$733.00 (with Fish & Game Patrol Lieutenant had most hours and admin rate of \$61.40).
Administrative Costs:

IV. AMOUNT: \$24,862.48

V. RECOMMENDATION:

The NPFC determines that the Oil Spill Liability Trust Fund will compensate the claimant for the full amount of the sum certain.

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: