

CLAIM SUMMARY / DETERMINATION

Claim Number:	915071-0001
Claimant:	State of California Dept. Fish & Wildlife, OSPR
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	██████████
Amount Requested:	\$41,817.73

FACTS:

Background:

In the Summer of 2013, California Department of Transportation (Cal-Trans) and its contractor, Granite Construction Company (Granite), began work on an 18 million dollar sea wall restoration project near Solimar Beach and north of Emma Wood State Beach.¹ The construction project was to replace deteriorating sea walls and also remove a rocky rip rap barrier. The construction process involved drilling 60 feet below the ground surface to install piles for the new seawall.²

In September 2013, while drilling holes for the new piles, construction workers encountered oily groundwater between 20 and 40 feet below the surface. Cal-Trans did not report the oily groundwater to the California Office of Emergency Services (OES) or the California Department of Fish and Wildlife's Office Spill Prevention and Response (OSPR).³ Instead, Cal-Trans hired Pacific Petroleum to remove the oily groundwater from under its construction site. Pacific Petroleum drilled three extraction wells to pump out the oily groundwater and place the oily groundwater in Baker tanks for vacuum trucks to transport it to a disposal facility. According to OSPR's Narrative #5, during the extraction process construction crews demolished the old seawall and observed oily groundwater into the sand berm that Granite excavated between its construction site and the Pacific Ocean.

On November 5, 2013 the Environmental Coordinator for the Ventura County Chapter of the Surf Riders Foundation phoned California OES to report that construction on the beach struck an oil pipeline. The caller related that on October 22, 2013 the sand berm holding the oil was breached by a large wave and it washed the oil into the Pacific Ocean.⁴ Because the caller reported that the pollution event occurred on October 22, 2013, OES created Hazardous Materials Spill Report #13-6853 as a "Historical Report."⁵

A year later, on November 10, 2014, ██████████ of OSPR wrote Narrative Report 4 outlining the above OSPR activities from November 5, 2013 to November 22, 2013.⁶ On November 5, 2013, ██████████ responded to the Historical Report on November 5, 2013 and

¹ The California Department of Transportation (Cal-Trans) owns the right-of-way and seawall along Highway 1 in Ventura County

² See EMA Historic Report 13-6853 in the administrative record

³ See Narrative 4 Investigation Report Case Synopsis dated November 10, 2014 in the administrative record

⁴ See California Emergency Management Agency Hazardous Materials Spill Report 13-6853 November 5, 2013 in administrative record Part 3

⁵ See Narrative 4 Investigation Report Case Synopsis dated November 10, 2014 in the administrative record

⁶ *Id*

drove to the construction site. Upon arrival on site, construction was closed for the day. He reported that he did see or not smell any petroleum or see anything that would lead him to believe there was an oil spill.⁷

The California Coastal Commission (Commission) is a state agency that has regulatory oversight for land use and public access in the California coastal zone. The Commission authorized Cal-Trans to widen Ventura Highway and replace the old deteriorating seawall. On November 8, 2013, the Commission asked OSPR about the November 5, 2013 incident report (#13-6853). OSPR dispatched Environmental Scientist [REDACTED] to the construction site. [REDACTED] met with personnel from Cal-Trans, Granite Construction and Pacific Petroleum and was informed that a few weeks earlier Cal-Trans saw oil in the groundwater beneath the old rip-rap that was removed from the beach. [REDACTED] contacted the USCG Marine Safety Detachment Santa Barbara, CA.⁸

Federal On-Scene Coordination:

MST2 [REDACTED] of USCG Marine Safety Detachment, Santa Barbara was the acting Federal On-Scene Coordinator- Representative (FOSC-R). MST2 [REDACTED] arrived at the construction site on November 8, 2013 and set up a Unified Command consisting of Cal-Trans OSPR and Pacific Petroleum.

Potential Responsible Party:

Because several oil companies operated underground pipelines in the area, initially all pipeline operators were considered potential responsible parties. However, each pipeline operator proved by pressure testing and oil samples, that their pipelines were not the source of the oil. Ultimately, no responsible party was identified.

Claim:

On March 20, 2015, the NPFC received OSPR's claim for uncompensated removal costs totaling \$41,817.73 for pollution investigation from November 8, 2013 until November 22, 2013. OSPR's invoice represents personnel costs of \$26,696.81, travel expenses of \$30, vehicle costs of \$1,042.65, laboratory fees of \$10,138.00, and administrative costs of \$3,910.27.⁹

APPLICABLE LAW:

Under OPA 90 33 USC § 2701(7) "'discharge' means any emission (other than natural seepage) intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;"

Under OPA 90 33 USC § 2701(13) Definitions: "incident" means 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 a discharge of oil;

⁷ *Ibid*

⁸ See OSPR Narrative 4 Investigation Report Case Synopsis dated November 10, 2014 in the administrative record

⁹ See OSPR form 1081 Voucher and Schedule of Withdrawal and Credits dated March 14, 2015.

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).

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:

Overview:

1. The Federal On-Scene Coordinator along with the Unified Command investigated the source of the alleged oil in the groundwater. And, in accordance with USC § 2701(13), the FOSC has determined that this was not an OPA incident,
2. In accordance with 33 USC § 2701(7), the Claimant has not proven that there was an OPA incident that involved a discharge or substantial threat of discharge of oil to “navigable waters.”
3. The Claimant is a state and is not required to present its claim to the responsible party before presenting it to the Fund.
4. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified that no suit has been filed in court for the claimed costs.
5. In accordance with 33 U.S.C. § 2712(h)(1), the claim was submitted within the six year period of limitations for removal costs.
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that none of the costs claimed are allowable under OPA and 33 CFR § 136.205.

A. Analysis:

Description of Removal Actions Performed:

On November 5 and November 8, 2013, OSPR personnel responded to a Historic Report of an incident that was initially reported on or about November 5, 2013 whereby the Case Synopsis indicated that the alleged release had been ongoing since October 22, 2013.¹⁰ OSPR personnel went to the incident scene and investigated the source of the oily groundwater by taking oil samples to its lab for analysis. OSPR personnel checked with oil pipeline companies to see if they could find the source of the oil. From November 8, 2013 through November 22, 2013 OSPR personnel monitored Pacific Petroleum’s remediation of the oily groundwater and served on the Unified Command.

Summary of the Geotechnical Survey:

In 2010, Cal-Trans commissioned [REDACTED], Geotechnical and Environmental Sciences Consultants to perform a pre-construction geophysical site survey of the proposed seawall construction area. The purpose of survey was to report any oil in the soil or groundwater along Route 1 in Ventura County. This included the area between Solimar Beach and Emma Woods Beach, where the discharge was reported to have occurred. The geotechnical survey sampled the groundwater and found hydrocarbons present at 20 and 40 feet below the surface. The report

¹⁰ See OSPR’s Narrative Supplemental #4 Page 1 of 6; Case Synopsis Section

concluded that the oil was probably from a naturally occurring crude oil seep and warned about encountering oily groundwater during excavation of the seawall piles. The report specifically recommended that Cal-Trans obtain a permit to remove the oily groundwater before excavating the seawall.¹¹

Not an OPA Incident:

According to the OSPR investigation and Coast Guard FOSC-R reports on September 30, 2013, Cal-Trans observed oily groundwater while installing new 60 foot pilings during a road widening project. Cal-Trans did not report the encounter of oil to either California OES or to OSPR. Instead, Cal-Trans initiated response measures by hiring Pacific Petroleum to contain and remove the oily groundwater from the construction site. Pacific Petroleum drilled three extraction wells to pump out the oily groundwater and stored it in Baker tanks for disposal. Pacific Petroleum later told OSPR [REDACTED] that some of the oily groundwater had flowed into the sand berm area and during a high tide, a wave washed over the berm and carried the oil out into the waters of the Pacific Ocean. No incident date was provided in this statement.

A call from Surf Rider Foundation was made 15 days after the caller alleged the incident occurred. So, California OES labeled the report a “Historical Report.” The OSPR investigation report shows that [REDACTED] initially investigated on November 5, 2013 and found nothing to report. The reason appears to be because the incident occurred on October 22, 2013.¹² [REDACTED] reported in his Narrative 4 that he too responded to the OES report on November 5, 2013. But, he did not find any evidence of an oil spill.¹³ In addition, another supplemental Narrative 5 report from [REDACTED] states that later on November 12, 2013 that he did not see any oil on the beach or in the water.¹⁴ From the information submitted by OSPR, no OSPR personnel found evidence of oil contamination on the beach or in the waters of the Pacific Ocean or impact to wildlife.

The FOSC-R reports in the Incident Action Plan (IAP) on November 8, 2013 that MSD responded to the incident location and confirmed the presence of oil in the groundwater and sand berm area. The FOSC-R reports in IAP that, “Because groundwater flow in the area of contamination was being pumped/ contained it was determined to not be an emergency response by USCG.”¹⁵ Also, OSPR’s Narrative #4 reads that, due to the lack of presence of oil, or sheen in the immediate worksite, or on the beach or in the sand the (FOSC-R and his superiors) did not classify the response as an “emergency response.”¹⁶

Under OPA 90, 33 USC § 2701(13): “incident” means 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 a discharge of oil.” The NPFC finds that the source of the oil was not from a vessel or facility.

¹¹ See [REDACTED] geophysical report of February 25, 2010 pg 1 Part 2: Property Background Research in the administrative record

¹² See OSPR’s Narrative Supplemental #4 Page 4 Line 42

¹³ See OSPR’s Narrative Supplemental #4 Page 4 Line 49

¹⁴ See OSPR’s Narrative Supplemental #5 Page 3 Line 8-11

¹⁵ See IAP, Ventura County Seawall, Page 1, in administrative record

¹⁶ See OSPR Narrative #4

The administrative record shows that beginning November 8, 2013, OSPR personnel were engaged in trying to find a responsible party for the oil in the groundwater. OSPR personnel checked with the oil pipelines companies operating in the area and took oil samples for lab analysis. Lab analysis found that there were hydrocarbons in the soil and groundwater but, that the samples were inconclusive as to the identity of a responsible party.

On November 22, 2013, the FOSC-R discovered a geotechnical report by [REDACTED] that had confirmed the presence of hydrocarbons in the groundwater back in February 25, 2010. The [REDACTED] survey included Solimar Beach to Emma Woods State Beach. The 2010 geotechnical survey stated, "Naturally occurring petroleum hydrocarbon contamination was discovered in one geotechnical boring, therefore, there is a potential for encountering soil containing naturally occurring petroleum hydrocarbons during site excavation for piles." The geotechnical survey recommended that Cal-Trans apply for a permit to remove the oily groundwater when it encountered it. After reading the geotechnical report, the FOSC-R concluded that there was no responsible party or facility for the oil in the groundwater.¹⁷

C. Determination:

Based upon a preponderance of the evidence, the NPFC had determined that there is no evidence (1) that an OPA compensable oil spill occurred, and (2) nor did the FOSC direct the actions of the Claimant in response to an OPA event. The NPFC has determined that the investigation and its costs presented are not related to an OPA incident and therefore, are not payable by the OSLTF. The NPFC denies OSPR's claim for uncompensated removal costs that it incurred and submitted to the NPFC under claim #915071-0001.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *6/10/15*

Supervisor Action: *Denial Approved*

Supervisor's Comments:

¹⁷ See [REDACTED] the administrative record