

CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/6/2011
Claim Number	: 912007-0001
Claimant	: State of Kentucky
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Donna Hellberg
Amount Requested	: \$12,167.82

FACTS:

- 1. Oil Spill Incident:** On April 21, 2010, the Claimant, State of Kentucky Department of Environmental Protection (KDEP) investigated the report of an oil spill incident. The Claimant performed an investigation in response to a report from Pike County Solid Waste Coordinator, Mike Lyons, who states that some drained, stripped, and burned several large transformers near the head of Miller's Creek. The Claimant reported the incident to the National Response Center (NRC) on April 21, 2010 via report # 937789. No responsible party has been identified according to the Claimant's submission.
- 2. Description of removal actions:** Inspectors measured the area saturated with transformer oil and determined it to be 85 feet long by 35 feet wide. An unknown amount of transformer oil was reported to have entered into Miller's Creek as the transformers were being emptied and burned. The Claimant then decided to contact Ecotech to handle the site cleanup. Ecotech containerized and removed contaminated soil and samples were taken.
- 3. The Claim:** The Claimant presented a claim for its uncompensated removal costs associated with the Millers Fork Road transformer incident in the amount of \$12,167.82. The claim consisted of: cover letter, KDEP report summary, Ecotech invoice, solicitation for bid by Ecotech, NRC report, KDEP compliance evaluation report, photographs, waste manifest fax coversheet, waste permit application, sample certification, sample analysis, and chain of custody record.

APPLICABLE LAW:

"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. Findings of Facts:

1. The removal actions were coordinated with a Federal on Scene Coordinator (FOSC). 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4).
2. The incident did not involve the discharge nor substantial threat of discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23) to navigable waters.
3. A Responsible Party was not identified. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six-year statute of limitation for removal costs. 33 U.S.C. § 2712(h)(2).
5. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim.

B. Analysis:

Upon review of the incident specifics and the documentation provided, this claim is denied. The OSLTF claims program is only available to pay claims for strictly oil pollution incidents. This incident involves a “mixed spill substance” which is not considered OPA compensable oil. The facts as presented in this case indicate that the contamination consisted of polychlorinated biphenyls (PCBs), which are listed as hazardous substances under CERCLA and are thus excluded from the definition of oil under OPA. CERCLA requires different procedures and allows different types of recovery than OPA does.

Based on the foregoing, this claim is denied.

Claim Supervisor: *Thomas Morrison*

Date of Supervisor’s review: *12/6/11*

Supervisor Action: *Denial approved*

Supervisor’s Comments:

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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12/6/2011

VIA EMAIL: [REDACTED]@ky.gov

State of Kentucky
ATTN: Robert Francis
Dept for Env Protection
Env Response Branch
300 Fair Oaks Lane
Frankfort, KY 40601

RE: Claim Number: 912007-0001

Dear Mr. Francis:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 912007-0001 involving the Miller Fork Road transformer incident. Please see the attached Claim Summary / Determination Form for details associated with this denial.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number 912007-0001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,

Donna Hellberg
Lead Claims Manager
U.S. Coast Guard