U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center
United States Coast Guard

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5890
April 29, 2013

VIA EMAIL [redacted]@ecy.wa.gov

State of Washington
ATTN: David Byers
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

RE: 913042-0001

Dear Mr. Byers:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 913042-0001 involving the leaking oil from a transformer at the Dalles Dam on the Columbia River near The Dalles Oregon on December 23, 2009. Please see the attached Claim Summary / Determination Form for an explanation regarding 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 913042-0001.

Mail reconsideration requests to:

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

Sincerely,

[redacted]
Galen Wetzel
Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 913042-0001
Claimant	: State of Washington
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Galen Wetzel
Amount Requested	: $13,309.11

FACTS:

Oil Spill Incident: On December 23, 2009, a transformer stored near the base of the Dallas Dam on the Columbia River near the Dalles Oregon was leaking transformer oil which escaped from the secondary containment after an automatic sump pump was activated. Oil then migrated over the ground's surface and through the soil to the sluiceway (man made channel that redirects excess water). The oil entered the Columbia River through the dam's ice and trash sluiceway.

The initial quantity of spilled oil was estimated to be 3,250 gallons but was later revised to 2, 250 gallons based on recovered oil mass balance calculations. Ultimately, 1,522 gallons of oil was recovered during cleanup and 140 gallons from the sluiceway. The National Response Corporation (NRC) was contracted by the Responsible Party to clean-up the spill.

Responsible Party: United States Army Corp of Engineers (USACE), Portland Oregon District, has been identified as the Responsible Party (RP), as the operator of the dam and facility of the Dalles Dam at the time of the incident and is a responsible party under the Oil Pollution Act.

Description of Removal Activities for this Claimant: On December 23, 2009, the Washington State Department of Ecology responded to the incident as part of the Unified Command (UC) and worked with the USACE and NRC regarding the clean-up and mitigation of the spill. Cleanup included the removal of oil from the secondary containment; the removal of contaminated soil; and the removal of oil remaining in the leaky transformer. The outfall of the sluiceway was boomed and oil was recovered from the waterway using sorbent booms and pads. An underflow dam was installed in the sluiceway.

Because of worker and environmental safety issues, the Claimant sampled the transformer's oil for PCBs. The samples were annualized at the Manchester Environmental Laboratory and found to contain traces of PCBs.

The Claim: On April 16, 2013, The State of Washington, Department of Ecology, presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs in the amount of $13,309.11.

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 as a result of these actions;
(c) That the actions taken were determined by the Federal on Scene Coordinator (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. FOSC coordination was provided by U.S. EPA Region 10 (Andi Smith) in accordance with CFR § 136.203.
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 U.S.C. §2701 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 within the six year statute of limitations for removal costs.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the removal costs presented were not for actions in accordance with the NCP and that the costs for these actions are not 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 FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The claimant has failed to provide substantiation that the oil was oil as defined by OPA, and did not contain ANY hazardous materials such as Polychlorinated Biphenyls (PCBs). 33 USC 2701(23)

- "Oil" must be discharged to impose liability under the Oil Pollution Act (OPA). The facts as presented in the documentation from the Claimant indicates the contamination consisted of Polychlorinated Biphenyls (PCBs), which are listed "hazardous substances" under CERCLA and are thus excluded from the definition of oil under OPA. The claim package included the Final Analysis Report for PCBs; dated January 7, 2010 which shows the presence of PCBs regardless of the amount. A press release issued by the USACE on January 26, 2010 titled "Low Levels of PCBs Detected in Leaked the Dalles Dam Transformer Oil" therefore the substance involved in this incident does not meet the definition of oil under OPA but rather is considered a "mixed spill".

C. Determined Amount:

Based upon the foregoing, the NPFC denies this claim because the product associated with this incident constitutes a "mixed spill" and not OPA oil therefore the claims process is not available for anything other than strictly OPA oil.

AMOUNT: **$0.00** [redacted]

Claim Supervisor: [redacted]

Date of Supervisor's Review: *4/29/13*

Supervisor Action: ***Denial approved***

Supervisor's Comments: