

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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5890

December 17, 2013

CERTIFIED MAIL NUMBER:

7011 1570 0001 2445 2583

Offshore Specialty Fabricators, LLC
[REDACTED]

RE: N09Z28-0002

Dear [REDACTED]

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on claim number N09Z28-0002. This determination is based on an analysis of the administrative record, which includes all documentation and information submitted by the Claimant. Please see the attached determination for further details regarding the rationale for this decision.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,
[REDACTED]

Chief, Claims Adjudication Division
U.S. Coast Guard

Enclosures: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION

Claim Number: N09Z28-0002
Claimant: Offshore Specialty Fabricators, LLC
Type of Claimant: Corporate
Type of Claim: Affirmative Defense
Claim Manager: [REDACTED]
Amount Requested: \$25,973.10

Incident

Between 2345 on April 2, 2009 and 0001 on April 3, 2009, approximately 150 gallons of oil was discovered in the Galveston Ship Channel. The oil was migrating easterly, moving on an ebb tide, and eventually migrated across the Channel to the Galveston Ferry Terminal, collecting along the wall and staining the rocks and piers around the ferry terminal. The oil was first discovered by crew members aboard vessels moored at Halliburton Docks, which is located on the shores of the Channel. Captain [REDACTED] Captain of the M/V ST. JOHN, one of the vessels at Halliburton Docks, notified CG Sector Houston/Galveston of the discharge via VHF 16/22A at 0003 on April 3, 2009.¹

Background

The Federal On-Scene Coordinator Representative (FOSCR), Marine Safety Unit (MSU) Galveston, arrived on scene at 0130 on April 3, 2009 and conducted a physical investigation to determine the source of the discharge. Because neither the source of the discharge nor the responsible party (RP) was initially identified, the FOSCR opened Federal Project Number (FPN) N09Z28, and hired T&T Marine Salvage, Inc. to conduct removal activities. The FOSCR took samples of oil from various vessels located in the area of the discharge of oil and sent the samples to the Coast Guard Marine Safety Laboratory (MSL) for analysis. Based on the results of the MSL analysis claimant's vessel, the OFFSHORE KING, was identified as the source of the discharge.

The removal costs incurred by T&T Marine Salvage, the MSL and Coast Guard costs totaling \$25,973.10 were paid from the Oil Spill Liability Trust Fund (OSLTF or the Fund). The NPFC issued an invoice to Offshore Express Inc.² on September 2, 2009. The Coast Guard hearing office imposed an \$8,000 civil penalty to Offshore Specialty Fabricators, LLC, (OSF), on October 13, 2009. Claimant paid the removal costs invoice on November 20, 2009. On January 18, 2009, the Appellate Authority discharged the civil penalty against OSF.

History of the Claim

OSF presented a claim to the Oil Spill Liability Trust Fund (OSLTF) on March 20, 2013, seeking reimbursement of the \$25,973.10 it paid to the OSLTF for removal costs "plus interest."³ The claimant argued that the Appellate Authority overturned the civil penalty against OSF on the grounds that evidence identifying the source of the discharge was inconsistent with certain evidentiary standards required in civil penalty determinations. Claimant posited that the FOSCR uses the same evidence to identify a Responsible Party (RP) as a hearing officer who imposes a civil penalty; therefore, since the Appellate Authority overturned the civil penalty, the identification of OSF as the RP cannot stand. Claimant denied

¹ E-mail from [REDACTED] Hos ST. JOHN to [REDACTED] Offshore dated April 3, 2009.

² Offshore Express, Inc. and Offshore Specialty Fabricators, LLC are the owner and operator of the OFFSHORE KING.

³ See letter dated March 20, 2013. Claimant did not provide a sum certain that included interest.

that it is the responsible party and stated that its \$25,973.10 removal cost payment to the Fund was “entirely and solely a pragmatic business decision” and the payment was made to avoid additional costs.

The NPFC denied OSF’s claim on October 10, 2013 on the grounds that the claimant had not demonstrated entitlement to compensation as a third party claimant and had not demonstrated entitlement to a defense as a responsible party claimant.

Request for Reconsideration

On November 12, 2013, the claimant sent a request for reconsideration to the NPFC. A claimant seeking reconsideration must provide factual or legal grounds to support the request, providing any additional support for the claim. 33 CFR 136.115(d). Claimant did not provide new information or legal grounds in support of its request but only reiterated its arguments set forth in its initial claim.⁴ Claimant stated that the FOSC “failed to meet his burden of proof with a preponderance of the evidence.”⁵ He did not sample all feasible sources of the discharge and violated the Commandant’s evidentiary standards; the scientific evidence does not, and cannot by itself, support a conclusion that the OFFSHORE KING is the source of this discharge because other potential sources could have been identified if they had been sampled. Referring to the NPFC’s denial determination, the claimant argues that any evidentiary standard implicating all feasible sources in a purely circumstantial case is conveniently erased from relevance by the NPFC’s repetitious recitation of the scientifically inaccurate mantra, “a match.” Claimant argues that the NPFC ignored the import of the true meaning, “derived from a common source,” and not an exclusive derivation absent missing evidence. It also states that the NPFC did not share a letter from the Pollution Investigator (PI) and that it is neither new evidence and nor can it be.

NPFC Determination on Reconsideration

The initial determination is incorporated by reference.⁶ Upon reconsideration the NPFC performed a *de novo* review of the administrative record, which included Claimant’s initial claim submission, its request for reconsideration statement, the Marine Safety Laboratory (MSL) results and analysis, the hearing office records, the Appellate Authority opinion and the Pollution Investigator’s letter to the NPFC.

We understand Claimant’s argument on reconsideration, which was a reiteration of its original claim argument, to be that (1) the evidence does not support that the OFFSHORE KING is the source of this spill because other feasible sources were overlooked and therefore cannot be excluded, and (2) the NPFC, rather than adhering to the Appellate Authority’s opinion that the civil penalty was overturned on evidentiary grounds and that OSF might not be the responsible party, disregarded the Appellate Authority’s opinion and relied solely, and improperly, on OPA and the Claims Regulations as grounds for denial of the claim.

Claimant seems to argue that when the Appellate Authority overturned the penalty because of a failure to comply with civil penalty evidentiary standards the Coast Guard determined for all purposes that the oil was not discharged from the OFFSHORE KING and OSF is not the responsible party for the discharge incident. Therefore OSF should be treated like any third party claimant.

Claimant’s arguments are not persuasive. The Appellate Authority’s decision to overturn the penalty did not determine that the OFFSHORE KING was not the source of the discharge, only that penalty evidentiary standards to exclude other potential sources of discharge were not complied with. In fact the Appellate Authority opinion acknowledged that OSF might be a responsible party. “It is nevertheless true

⁴ See, Claimant’s letter dtd November 12, 2013

⁵ Id.

⁶ See, NPFC’s denial determination dtd October 10, 2013

that this case might still be proved despite the evidence that vessels were present that were not sampled”⁷ Further, the record shows that samples were taken from several vessels in the area, including claimant’s vessel, the samples were sent to the USCG, Marine Safety Lab, (MSL) and the analysis reflected that the oil in the slop tanks on OFFSHORE KING was a match to the oil discharged into the water.

It is fundamental that in making a claim to the Fund, the claimant bears the burden to show its entitlement to compensation. Here the Claimant maintains it is a third party claimant but has not provided evidence to overcome the evidence of a match between the oil in the slop tanks of the OFFSHORE KING and the discharged oil. In light of the evidence that Claimant is an RP for the incident. NPFC determines that Claimant has not established third party status. To the extent the Claimant may be a responsible party for this discharge incident and it may be compensated from the Fund for the removal costs claimed if it demonstrates a defense to liability. 33 USC 2708(a)(1). Claimant has provided no evidence that it is entitled to a defense to liability.⁸

Because the claimant has not established third party status or demonstrated entitlement to a responsible party defense to liability, the claimant has not met its burden to show entitlement to compensation from the Fund.

The claim is denied on reconsideration.

Claim Supervisor: 

Date of Supervisor’s review: 12/17/13

Supervisor Action: Denial Allowed

7 Appellate Authority opinion, page 3.

8. Claimant seems to argue that the NPFC is bound by decisions of other Coast Guard commands; it should have accepted the Appellate Authority’s opinion discharging the civil penalty because there might have been other feasible sources of the discharge. The NPFC is not necessarily bound by the decisions of other commands. Bean Dredging LLC v. United States of America, 773 F. Supp. 2nd, 63, 71 (U.S.D.C. 2010) (The NPFC is free to conduct a de novo review of the evidence and reach its own conclusions.) It also is not bound as Claimant argues in this case because the Appellate Authority’s opinion did not state that OSF was not a responsible party; it only stated there could be other sources of the discharge.