

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

US COAST GUARD STOP 7100
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ARLINGTON VA 20598-7100
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5890
7/14/2011

Via email [REDACTED]@marinepollutioncontrol.com

Marine Pollution Control
Attn: Mr. Walter Putman
8631 West Jefferson Ave
Detroit, MI 48209

RE: Claim Number: 911093-0001

Dear Mr. Putman:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 911093-0001 involving the Shell gas station oil spill in Rochester, MI. Please see the claim analysis for further details.

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 911093-0001.

Mail reconsideration requests to:

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

Sincerely



Alyssa Lombardi
Claims Manager
U.S. Coast Guard

CLAIM SUMMARY / DETERMINATION FORM

Date : 7/14/2011
Claim Number : 911093-0001
Claimant : Marine Pollution Control
Type of Claimant : Corporate
Type of Claim : Removal Costs
Claim Manager : Alyssa Lombardi
Amount Requested : \$2,637.74

FACTS:

- 1. Oil Spill Incident:** On August 3, 2010, Marine Pollution Control (MPC) claims it was contacted by the Rochester Hills Fire Department (RHFD) to respond to a gasoline spill at a Shell gas station in Rochester, MI. The Shell station is operated by Safeway Oil (the named Responsible Party (RP)), which purportedly made the initial contact with the RHFD.¹ The RP contracted out MPC for cleanup and removal of the affected area, signing a work order.²
- 2. Description of removal actions performed:** After receiving approval from the RP, the claimant, MPC, arrived on-site August 3, 2010. Upon arrival, MPC deployed absorbent material around the affected area. Claimant states it also utilized a vacuum truck to remove approximately 186 gallons of product, transporting it to a disposal facility. All spent sorbents were placed into three 55-gallon drums and left on-site for future disposal.³
- 3. The Claim:** On June 23, 2011, MPC submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$2,637.74 for the services provided August 3, 2010.

This claim consists of copies of the invoicing, the Optional OSLF Claim form signed by the claimant, a copy of the MPC Daily Worksheet, a copy of the Disposal Manifest, copies of pages 2 and 7 of the signed contract between the RP and the claimant, a copy of the USPS Confirmation Receipt, a copy and internal email correspondence.

The review of the actual cost invoicing and dailies 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 consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented.

APPLICABLE LAW:

¹ See Optional OSLTF claim form, submitted to the NPFC by the claimant on 6/23/2011.

² See work order signed by the RP, submitted to the NPFC by the claimant on 6/23/2011. It should be noted that the entirety of the work order has not been submitted by the claimant—only pages 2 and 7. As such, no date could be determined as to when this contract was signed between the RP and the claimant.

³ See Optional OSLTF claim form and MPC Daily Worksheet, both submitted to the NPFC by the claimant on 6/23/2011.

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 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. No Federal On-Scene Coordinator (FOSC) or State OSC could be determined for this claim. 33 U.S.C. § 1321(d)(2)(K).
2. While the incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), it could not be determined if it entered or was a threat 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. 33 U.S.C. § 2712(h)(2)
5. The Claims Manager made notification to the RP but, to date, has received no response. 33 U.S.C. § 2701(32).
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim to determine whether or not all removal costs presented were for actions in accordance with the National Contingency Plan (NCP) and if the costs for these actions were reasonable and 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.

MPC claims a total of \$2,637.74 in uncompensated removal costs; however, there are problems with its claim. First, MPC argues that an OPA event occurred, but it has not shown, through the preponderance of the evidence, what actions were reasonable, necessary and performed in accordance with the National Contingency Plan (NCP). There was no FOSC coordination, no State coordination, and no report in to the National Response Center. MPC claims that the only authority on this incident was the FHFD, but did not provide any written statement regarding the incident-- that it was oil and that it was a threat to a navigable waterway. The claims manager did request this information from the claimant, but MPC either could not or would not provide it.⁴

MPC bears the burden of showing costs billed and actions performed were reasonable. It did not provide a rate schedule nor did it provide a complete copy of its contract with the RP, Safeway Oil. Additionally, it has not provided documentation that the sorbent materials were properly disposed, which is a requirement of the NCP.

Determined Amount:

⁴ See NPFC email to claimant, dated 7/05/2011, and claimant’s response email, dated 7/13/2011.

The NPFC hereby determines that the OSLTF will pay \$0.00 as full compensation for the claimed removal costs incurred by the claimant and submitted to the NPFC under claim 911093-0001.

AMOUNT: \$0.00

Claim Supervisor 

Date of Supervisor's review: 7/14/11

Supervisor Action: Denial Approved

Supervisor's Comments: