

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100
Staff Symbol: (CA)
Phone: 202-493-6694
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5890
4/16/2012

Sent Via E-mail: [REDACTED]@ospr.dfg.ca.gov

State of California
ATTN: Kelly Abe
Dept of Fish and Game
Office of Spill Prevention and Response
P.O. Box 944209
Sacramento, CA 94233-2090

RE: Claim Number: A06017-0001

Dear Ms Abe:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number A06017-0001 involving *F/V Delaware*. See the attached Claim Summary/Determination Form for details 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. If however, 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 A06017-0001.

Mail reconsideration requests to:

DIRECTOR
NATIONAL POLLUTION FUNDS CENTER
US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON, VA 20598-7100

[REDACTED]
Claims Manager
U.S. Coast Guard

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: A06017-0001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Felita Jackson
Amount Requested	: \$5,187.34

FACTS:

1. ***Oil Spill Incident:*** On May 17, 2006, United States Coast Guard Sector San Francisco (Coast Guard) received a report that the sunken vessel *F/V Delaware* had discharged about 50 gallons of diesel fuel into the Pacific Ocean, at Pillar Point Harbor in Half Moon Bay, California.¹ The Pacific Ocean is a navigable waterway of the United States. The National Response Center (NRC) notified the California Emergency Management Agency (CalEMA) of the incident.² The Coast Guard Incident Management Division Response Team arrived on-scene and observed what had been reported, to include a rainbow sheen created by the spill. Federal On-Scene Coordinator Representative (FOSCR) MST2 Patrick Tkacz coordinated with State On-Scene Coordinator (SOSC) Brian Arnold of the California Department of Fish and Game Office of Spill Prevention and Response (OSPR) for the response. OSPR also had an Environmental Unit at the incident site, consisting of environmental scientists. The responsible party (RP), Ravel Herron, was not able to pay for the clean-up. The incident was federalized by the FOSCR. Contractor NRC Environmental Services, Incorporated (NRCES) was hired for the clean-up and response to the incident.
2. ***Description of Removal Activities for this Claimant:*** NRCES performed response and clean-up efforts. Global Inshore (later renamed Global Diving & Salvage, Incorporated) was hired by the FOSCR to access the vessel fuel tanks and remove the fuel. OSPR was a part of the Unified Command as part of their primary responsibilities as State on Scene Coordinator (SOSC). They observed the work performed by the contractors and met with the Coast Guard and contractors regarding the clean-up activities.
3. ***The Claim:*** On September 28, 2011, the Claimant submitted a claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated response costs and costs for monitoring clean-up efforts in the amount of \$5,187.34. OSPR is claiming expenses of \$5,012.07 for personnel costs; \$147.50 for vehicle usage costs; and \$27.77 in overhead costs. The claim consists of the OSPR Incident Billing Summary of Costs and Invoice, CalEMA Hazardous Materials Spill Report, dailies, employee time records and mileage logs.

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

¹ See NRC Report #797498.

² See California Emergency Management Agency Emergency Services Hazardous Materials Spill Report, dated 05/17/06.

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 FOSC coordination has been provided for the Claimant.
2. The incident involved a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), 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)(1).
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, or whether the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

The NPFC Claims Manager has 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, and (4) whether the costs were adequately documented and reasonable.

The Claimant seeks reimbursement for uncompensated costs associated with vehicle use and the personnel hours for a Fish & Game Patrol Supervisor, three Environmental Scientists and an Information Officer to perform monitoring of the clean-up and response. Upon review of the facts presented by the Claimant and supplemental information obtained by the NPFC, the Claims Manager hereby determines that the OSPR personnel were at the incident site, and took part in UC meetings and observations, but they did not have FOSCR coordination for the work they performed.

On May 18, 2006, OSPR faxed a Pollution Removal Funding Authorization Request (PRFA) to Sector San Francisco.³ The request, dated May 17, 2006, requested a ceiling authorization amount of \$6,000.00, for personnel provided to assist with overseeing clean-up – including investigation, SCAT input, resource at risk data and liaison; rescue, cleaning, and care of oiled birds and wildlife through the Oiled Wildlife Care Network **if necessary**; and to provide cost documentation providing detailed information.⁴ The May 18, 2006 OSPR Incident Billing Cost Summary requested payment of \$5,579.44 for \$4,956.84 in personnel costs, \$238.00 in travel expenses, \$295.00 for operating expenses, and \$89.60 in administrative costs.⁵ The personnel listed were Kathleen Jennings (Staff Environmental Scientist), Lt. Brian Arnold (Supervisor), and Mike Schommer (Environmental Scientist).

³ S. Potstada, OSPR fax coversheet to Jason Munoz, USCG request for PRFA Authorization, dated 05/18/06.

⁴ OSPR Pollution Removal Funding Authorization Request, dated 05/17/06.

⁵ See OSPR Cost Summary or Invoice #: PRFA 3 day Est., dated 05/18/06.

On June 21, 2006, OSPR submitted a claim to Sector San Francisco requesting reimbursement of \$4,947.87 for \$4,548.95 in personnel costs, \$335.71 in vehicle usage costs, and \$63.21 in administrative costs.⁶ The personnel listed on the June 19, 2006 Incident Billing Cost Summary were Brian Arnold (Fish & Game Patrol Lt.), Dana Michaels (Information Officer I), Kathleen Jennings (Staff Environmental Scientist), and Michael Schommer (Oil Spill Prevention Specialist). The submission included employee time records, dailies, and mileage logs.

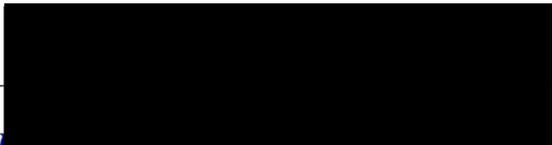
For this claim submission to the NPFC, the personnel were listed as Brian Arnold (Fish & Game Patrol Lt.), Kathleen Jennings (Staff Environmental Scientist), Dana Michaels (Information Officer I), and Mike Schommer (Environmental Scientist).⁷ Scientists Jennings and Schommer are listed as performing the activity "Environmental Unit;" SOSC Arnold is listed as performing the activity "Incident Commander;" and "PIO" is the activity designated to Information Officer I Michaels.

In response to the Claimant's PRFA request, on July 24, 2006, FOSCR Tkacz wrote and signed a statement to accompany the Claimant's PRFA request.⁸ In his statement, he expressed that the Claimant was not specifically requested by any Sector San Francisco personnel and that the Claimant did not complete any tasks outside of their normal scope of work. FOSC Tkacz also noted that the SOSC is required by law to be filled and is one of OSPR's primary responsibilities; and that the tasks completed by scientists were not directed by Sector San Francisco personnel; and that it was in his "best judgment" that he recommended that the PRFA request not be approved.

On March 5, 2012, the Claims Manager e-mailed the Claimant to inform them that the NPFC was aware that a PRFA was not issued because the FOSCR did not think their services were needed.⁹ In that e-mail, the NPFC requested that the Claimant contact the FOSCR and submit their documents to determine if his decision remained; and to advise the NPFC within 30 days if FOSCR coordination had been provided, with the deadline April 5, 2012. The Claimant did not respond.

Based on the foregoing, this claim is denied because the Claimant has failed to obtain FOSC coordination pursuant to 33 CFR §136. 203 & 205.

AMOUNT: \$0.00

Claim Supervisor:  *Donna Heiberg*

Date of Supervisor's review: *4/16/12*

Supervisor Action: *Denial approved*

Supervisor's Comments:

⁶ S. Potstada, OSPR letter to USCG Sector San Francisco re Pollution Removal Funding Authorization, dated 06/21/06.

⁷ See OSPR Cost Summary or Invoice #: FED CLAIM 56193, dated 08/26/11.

⁸ Patrick J. Tkacz MST2 USCG, FOSCR Statement to Accompany F/V Delaware PRFA Request, dated 07/24/06.

⁹ E-mail from Felita Jackson, NPFC to Kelly Abe, OSPR requesting FOSCR coordination confirmation, dated 03/05/12.