U.S. Department of Homeland Security
United States Coast Guard

Director
National Pollution Funds Center

4200 Wilson Blvd Stop 7100
Arlington VA 20598-7100
Staff Symbol: Ca
Toll-Free: 1-800-280-7118
Fax: 703-872-6113
Email: ARL-PF-NPFCCLAIMSINFO@uscg.mil

5890
December 17, 2013

VIA EMAIL: jgould@lewisenvironmental.com

Lewis Environmental Inc.
Attn: James Gould
155 Railroad Plaza
Royersford, PA 19468

RE: 914006-0001

Dear Mr. Gould:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies your claim number 914006-0001 involving the vessel STX FLAMINGO. This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

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 913061-0001.

Mail reconsideration request to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

Claims Manager
U.S. Coast Guard

Encl: Claim Summary Determination Form

CLAIM SUMMARY / DETERMINATION

Claim Number:	914006-0001
Claimant:	Lewis Environmental Inc.
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	Eric Bunin
Amount Requested:	$41,563.65

BACKGROUND

The following background is as alleged by the Claimant, Lewis Environmental Inc. On December 29, 2012, the vessel STX FLAMINGO sailed from the Port of Wilmington, Delaware. It encountered inclement weather, which caused the vessel to list. Heavy cargo broke free on 5-deck and slid into the hydraulic line control panel, causing hydraulic oil to contaminate multiple decks, duct work, the engine room and engine bilges. The vessel then returned to port on January 1, 2013[1] for repairs and decontamination. The Claimant alleges that on January 2, 2013, the release and contamination inside the vessel presented a substantial threat of a petroleum discharge to the Delaware River, a navigable water of the United States.

CLAIMANT

Claimant, Lewis Environmental Inc. (Lewis), is an oil spill response organization contracted to clean up the hydraulic oil that leaked inside the vessel STX FLAMINGO. The responsible party for the vessel was STX Pan Ocean Co. Ltd. (STX).[2]

CLAIM

On December 4, 2013, NPFC received Lewis' claim seeking $41,563.65 from the Oil Spill Liability Trust Fund (OSLTF) for removal costs associated with cleaning the vessel and disposal of the waste material. Claimant and STX executed a contract for services on January 2, 2013. Claimant argues that its services eliminated the threat of petroleum discharge to the Delaware River. Lewis was paid $150,000 and now seeks the balance from the OSLTF.

APPLICABLE LAW:

"Incident" means "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of a discharge of oil." 33 USC § 2701(14).

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

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[1] January 2, 2013 email from STX to Norton Lilly.
[2] Via telephone conversation with Tom Johnston of Norton Lilly, NPFC learned that STX Pan Ocean declared bankruptcy in June 2013.

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 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:

NPFC CA reviewed the claim to determine whether it was compensable under OPA. The review focused on: (1) whether there was a discharge or substantial threat of a discharge to U.S. navigable waters; (2) 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); and (3) whether the actions taken were determined by the FOSC, to be consistent with the National Contingency Plan (NCP) or were directed by the FOSC.

The NPFC has determined that this claim is not compensable for several reasons. First, the claimant has failed to demonstrate that the hydraulic oil was oil as defined by Oil Pollution Act (OPA), and did not contain ANY hazardous materials. 33 USC 2701(23). Claimant provided no documentation of the lab analysis results demonstrating that the material was oil and not a mixed substance. "Oil" must be discharged to impose liability under the OPA. Should the Claimant decide to request reconsideration, the Claimant will need to provide a full sample analysis which delineates all the constituents contained in this spill, and showing that the material was only oil and not a mixed spill.

Second, after a review of the administrative record, the NPFC finds that the evidence does not reflect that this was an OPA incident. While the Claimant argues that the STX FLAMINGO's internal contamination presented a threat to the Delaware River, there is no evidence in the administrative record to support this allegation. The oil was contained on the vessel. There was no evidence of oil in the water or that oil posed a substantial threat of discharging into the water. There is no evidence of a report to the National Response Center. The Coast Guard FOSC would determine whether a substantial threat exists and would direct a response. Because the evidence does not demonstrate that oil discharged or substantially threatened to discharge into navigable waters of the U.S., NPFC cannot conclude that an OPA-incident existed.

Finally, in such cases, the regulations require that removal actions be directed by the FOSC or that they have been determined by the FOSC to be consistent with the NCP. Here, we have no evidence of FOSC involvement at all. Should the Claimant request reconsideration, it will need to provide coordination with the FOSC for the actions undertaken.

Therefore, the non-emergency condition presented by the STX FLAMINGO's internal contamination and the activities related to the internal cleaning did not pose a substantial threat of a discharge and did not create an incident under OPA. Without an OPA incident, the Fund is not available to pay the Claimant. For the reasons stated above, the claim is denied.

Claim Supervisor: [redacted]

Date of Supervisor's review: ***12/16/13***

Supervisor Action: ***Denial approved***

Supervisor's Comments: