

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100

E-mail: [REDACTED]

Phone [REDACTED]

Fax: 703-872-6113

5890

6/30/2014

Sent Via Email: [REDACTED]

State of Washington Department of Ecology
ATTN: Mr. David Byers
PO Box 47611
Olympia, WA 98504-7611

Re: Claim Number 914022-0001

Dear Mr. Byers:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.* (OPA), has determined that it will offer \$344,647.86 as full compensation for OPA claim number 914022-0001.

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.

All costs that are not determined as compensable are considered denied. 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 or within thirty (30) days from the date received, whichever is earlier, and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claims. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration 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 corresponding claim number.

Mail reconsideration request to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If you accept this determination, please sign the enclosed Acceptance / Release Agreement where indicated and return to the above address.

If we do not receive the signed original Acceptance / Release Agreement within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Contractor Registration record prior to payment. If you do not, you may register free of charge at www.SAM.gov. Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Agreement.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at 1-800-280-7118.

[REDACTED]
Claims Manager
U.S. Coast Guard

ENCL: Claim Summary / Determination Form
Acceptance/Release Form
Summary of Costs spread sheet

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100

E-mail: [REDACTED]
Phone: [REDACTED]
Fax: 703-872-6113

Claim Number: 914022-0001

Claimant Name: State of Washington Department of Ecology
PO Box 47611
Olympia, WA 98504-7611

I, the undersigned, ACCEPT this settlement offer of \$344,647.86 as full and final compensation for removal costs arising from the specific claim number identified above. With my signature, I also acknowledge that I accept as final agency action all costs submitted with subject claim that were denied in the determination and for which I received no compensation.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the amounts paid for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

With my signature, I acknowledge that I accept as final agency action all amounts paid for this claim and amounts denied in the determination for which I received no compensation.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation, by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party. **In the event that WA DOE is paid restitution for its costs any and all money received shall be returned to the Fund.**

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

Title of Person Signing

Date of Signature

Typed or Printed Name of Claimant or Name of
Authorized Representative

Signature

Title of Witness

Date of Signature

Typed or Printed Name of Witness

Signature

DUNS #

Bank Routing Number

Bank Account Number

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 914022-0001
Claimant	: State of Washington Department of Ecology
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$347,657.28

FACTS:

Oil Spill Incident:

On Monday, February 4, 2008, Craig Gallinton of the Wishkah Valley School District, called the National Response Center (NRC) and reported that someone attempted to steal gasoline from the school's storage tank and left the hose in the storage tank, which resulted in a discharge of oil. The caller reported that the Gray's Harbor Sheriff's Office has the name of the suspected party.

The State of Washington Department of Ecology (Ecology) responded to the report of a gasoline spill at the Wishkah Valley School near Aberdeen, Washington. Once on scene, Ecology met with school officials, law enforcement, and a cleanup contractor hired by the School's Administration. The officials explained that during the early Sunday morning hours, a thief attempted to steal gasoline from the school's 500-gallon fuel tank and ended up spilling approximately 350 gallons of it on the school property. The spill site drains into an unnamed tributary, which leads to the Wishkah and Chehalis Rivers, ultimately draining into Grays Harbor, all navigable waterways of the US.¹

Claimant reports that there was a strong odor of gasoline in the air and the School Administration's cleanup contractor (hired prior to Ecology arriving on-scene) was utilizing a vacuum truck to recover spilled fuel from a sump near the school's septic tank. The pump for the sump had been shut off to stop the flow of gasoline to the stream. However, run-off from the school's football field had started to flood the school. Approximately 100 gallons of gasoline had already been pumped to the stream and was visible as free product and sheen on the surface of the creek.

Responsible Party:

Wishkah School District owns the storage tank, located at 4640 Wishkah Road, Aberdeen, WA 98520,² and is the Responsible Party (RP) under the Oil Pollution Act (OPA).³ The Claimant provided evidence to the NPFC that Mr. Ryan Allen, a nearby resident to the Wishkah School, was apprehended and questioned by Grays Harbor County Sheriff's Department where he subsequently provided a written confession statement of his attempted theft in the second degree dated February 3, 2008.⁴ He was subsequently convicted; thus, there is convincing evidence that he caused the discharge and is the RP for this incident.

Description of removal actions performed:

Prior to Ecology's arrival to the spill site, the School's Administration hired a local contractor to begin cleanup of the oil spill. As noted above, initially, vacuum trucks were utilized to remove the gasoline and runoff from the spill area, although this proved inefficient and unsustainable. Numerous absorbents, including pads, sweep, and sausage boom, were deployed in the creek.

Mr. Doug Stolz, Washington State Department of Ecology Spill Responder, contacted United States Environmental Protection Agency (EPA) Region X, Federal On Scene Coordinator (FOSC), Mr. Matt Carr,

¹ See, Tab A of Claim Package; OSLTF Modified Claim Form dated February 7, 2014.

² See, NRC Report # 861473 dated February 4, 2008.

³ See, Tab W of Claim Package; Grays Harbor County Sheriff's Department Initial Report dated February 4, 2008.

⁴ See, Tab W of Claim Package; Witness statement of Mr. Ryan Allen and Grays Harbor County Sheriff's Department Initial Report.

at 1243 hours on February 4, 2008, advising him of his on-scene observations, impacts to the creek, and suspected impacts downstream.⁵ When the incident was reported to the National Response Center (NRC), USCG Sector Portland also responded by requesting a call back with "downstream information."⁶ After consultation with Coast Guard Sector Portland and EPA Region X, excavation of the entire spill area was considered, but ruled out, because of the high volume of water draining to the area, as well as the extreme height of the watertable due to heavy rains throughout the entire event. Also, the recovery of gasoline was no longer feasible except possibly in a few pockets near the school. It was agreed that, since gasoline was not to be contained for safety reasons and the initial source was "controlled," the spill to surface water would be left to dissipate on its own. Eventually, a plan was developed to pump the contaminated rainwater and surface runoff through industrial-sized carbon-filtration units, aerate it in large mobile tanks to remove all of the gasoline constituents and finally, discharge it to its original destination, the nearby creek, thereby avoiding flooding the entire area.

USCG Sector Portland and EPA's FOSC agreed that they would not respond unless impacts downstream to the Chehalis River or Grays Harbor were observed and reported. Both federal entities were satisfied with Ecology's response to the incident and the cleanup/mitigation efforts.

Pockets of gasoline and sheen remained visible in the creek until February 7, 2008, with strong odors even after the installation of the filtration system. Daily samples analyzed by a mobile laboratory, confirmed the presence of gasoline. By February 10, 2008, the water level had subsided enough to allow the immediate area to be excavated. Although this effectively removed a majority of the contaminants, filtration was still needed to remove residual gasoline for several weeks following. Once the filtration system was installed and activity had decreased at the site, one of the Claimant's pre-bid response contractors (NRCES) was brought in to take over the ongoing cleanup activities at the site and dispose of the contaminated soil. This was done as a cost-control measure, as the cleanup was expected to be somewhat long-term. Response actions ended on March 8, 2008 when a water filtration system to remove residual gasoline was installed and final demobilization was complete. Final disposal activities took place the end of March 2008.

The Claim

On February 20, 2014, Ecology presented a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of its uncompensated removal costs in the amount of \$347,657.28 for the services provided from February 4 through April 2, 2008. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim file.

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 FOSC, and (4) whether the costs were adequately documented.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), a responsible party for a vessel or facility from which oil is discharged or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for removal costs and damages resulting from such incident. 33 USC § 2702(a). In any case in which a responsible party establishes that a discharge or threat of a discharge of oil and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) the third party shall be treated as the responsible party for purposes of determining liability under this subchapter. 33 USC § 2702(d)(1)(A).

⁵ Mr. Carr was the EPA duty officer when the call came in.

⁶ The USCG was subsequently advised by Ecology and Fish & Wildlife that the creek was devoid of life all the way to the Whsikah River downstream. Several dead fish and other organisms had been recovered.

"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".

"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". 33 USC § 2701(31).

Removal costs referred to in 33 USC 2702(a) include any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan. 33 USC § 2702(b)(1)(B).

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.

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party of the source designated under section 2714(a) of this title. The Governor of a State seeking reimbursement of removal costs is not required to first present its claim to the responsible party. 33 USC § 2713(a).

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action the claimant has under any other law. 33 USC § 2715(a).

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 136.203, the claimant bears the burden to prove the removal costs 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:

Findings of Fact:

1. The NPFC determines that the removal actions undertaken by the Claimant are deemed consistent with the NCP. This determination is made in accordance with the NPFC Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);⁷
2. In accordance with 33 USC § 2713(b)(2) and 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
3. The claim was submitted within the six year period of limitations for claims to the Fund. 33 U.S.C. § 2712(h)(1).

⁷ See, Email between EPA Region X, Mr. Matthew Carr, and Donna Hellberg, NPFC dated April 25, 2014.

4. A Responsible Party has been identified for this incident. 33 U.S.C. §§ 2701(32).
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

Analysis:

Presentment

Claimant, a State agency seeking reimbursement of its removal costs, is not required to first present its claim to the responsible party.

Removal Cost 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 Claims Manager validated the costs incurred and determined they were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

The USCG Sector Portland (now Sector Columbia River) and EPA Region X were aware of the incident and the removal actions performed by the Claimant. The Claimant provided contractor dailies, invoicing and lab analysis of the work performed, including its own personnel and equipment costs. These were deemed reasonable to accomplish the response objective. The contractor rate schedules (for all of the different vendors) in place at the time services were rendered was reviewed. Verbal oversight was performed by the EPA Region X Federal On-Scene Coordinator, Mr. Matt Carr, as well as USCG Sector Portland Case # 642027. As such, the work performed has been deemed reasonable, necessary and in accordance with the NCP in order to mitigate the effects of the spill.

Based on the evidence in this claim submission for the actions undertaken by Ecology, the Claims Manager hereby determines that the Claimant incurred \$344,647.86 of uncompensated removal costs and that the Fund will offer this amount as full compensation for the reimbursable removal costs incurred by Ecology and submitted to the NPFC under claim #914022-0001.

Upon adjudication of the costs, \$9.42 in claimed NRCES subcontractor costs are denied due to math errors on the part of the Claimant. These denied costs are reflected in the attached summary of costs spreadsheet for this claim. The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident from February 4 through April 2, 2008. Ecology represents that all costs paid by it are compensable removal costs, payable by the OSLTF as presented by the claimant.

Determined Amount: \$344,647.86

The NPFC hereby determines that the OSLTF will offer \$344,647.86 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim 914022-0001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant. \$9.42 in claimed costs are denied.

Please note that if Mr. Allen provides restitution to Washington Department of Ecology for removal costs associated with this incident all or any amount of the restitution received by the County or the Department of Ecology shall be returned to the Fund.

Claim Supervisor



Date of Supervisor's review: *6/30/14*

Supervisor Action: *Approved*

Supervisor's Comments: