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

Director
National Pollution Funds Center

4200 Wilson Blvd Stop 7100
Arlington VA 20598-7100
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5890
March 6, 2014

State of Washington Department of Ecology
Spill Prevention, Preparedness & Response Program
Attn: David Byers
P.O. Box 47600
Olympia, WA 98504-7600

RE: 914024-0001

Dear Mr. Byers:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 914024-0001 involving the F/V Joanne Grounding - 914024 spill.

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 914024-0001.

Mail reconsideration request to:
Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

Sincerely,

[redacted]

ERIC BUNIN
Claims Manager
U.S. Coast Guard
By direction

Enclosures: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION

Claim Number:	914024-0001
Claimant:	State of Washington Department of Ecology
Type of Claimant:	State
Type of Claim:	Removal Costs
Claim Manager:	Eric Bunin
Amount Requested:	$6,926.94

FACTS:

Event:

On December 29, 2008, the wooden-hull F/V JOANN was blown from its anchorage in Bellingham Bay (a navigable water of the U.S.) and drifted to a rocky shoreline. The State of Washington's Department of Ecology personnel contacted USCG Station Bellingham via telephone. The State personnel decided that the vessel posed a risk of breaking up and sinking with an unknown quantity of oil onboard. The State hired Top to Bottom Diving and Marine, Inc. to perform salvage operations and tow the vessel to safe moorage.

Claimant:

Claimant is the State of Washington, Department of Ecology, which hired contractors to tow the vessel away from shore and to moorage.

Claim:

Claimant seeks reimbursement of its uncompensated removal costs in the amount of $6,926.94 expended in response to the vessel grounding and salvage. Claimant alleges that its claimed costs are reimburseable removal costs in accordance with OPA 90.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), **each** 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 is liable for removal costs and damages 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".33 USC § 2701(31).

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party or guarantor. 33 USC § 2713(a).

If a claim is presented in accordance with subsection (a) of this section and the claim is not settled by any person by payment within 90 days after the date on which the claim was presented the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 USC § 2713(c)(2).

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 (NCP) 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. There is no evidence that a Federal On-Scene Coordinator (FOSC) directed the response to this event, nor did one determine that the actions undertaken by the Claimant were consistent with the National Contingency Plan (NCP). 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. There is no evidence that an FOSC determined that an OPA incident occurred, nor has the Claimant proven that the incident involved a discharge or substantial threat of discharge of oil to "navigable waters."
3. The Claimant is a state and is not required to present its claim to the responsible party before presenting it to the Fund. However, Claimant indicated that it did present its claim to the RP before coming to the Fund.

4. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified that no suit has been filed in court for the claimed costs.
5. In accordance with 33 U.S.C. § 2712(h)(1), the claim was submitted within the six year period of limitations for removal costs.
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that no costs are allowable under OPA and 33 CFR § 136.205.

B. Analysis:

NPFC CA reviewed the documentation provided. The review focused on: (1) whether a discharge or substantial threat of a discharge to a navigable waterway occurred; (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 an incident); (3) whether the costs were incurred as a result of these actions; (4) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (5) whether the costs were adequately documented and reasonable.

In this case, the facts and evidence do not support a finding that an OPA-incident occurred. They also do not support a finding that the claimed costs would be compensable under OPA. The Claimant has not provided documentation to demonstrate a discharge or substantial threat of a discharge to a navigable waterway, as required under OPA. The evidence also does not demonstrate that Claimant's actions were directed by an FOSC or that an FOSC determined that they were consistent with the NCP.

Under 33 CFR 136.203, a claimant must establish that the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. The Claimant provided no documentation that shows any involvement by an FOSC. There were verbal communications with CG Station Bellingham personnel who "stated they had just been there in a vessel and checked it out." The CG took no other action and did not order a response. Other verbal communications between the State personnel and CG personnel at the local unit and Sector Seattle occurred without CG action or instructions. A CG Auxiliarist arrived on scene, but there is no indication that he represented the FOSC or performed the duties of the FOSC. There is no indication that he determined that an OPA-incident occurred that required a response to prevent or minimize a spill or threat of a spill of oil.

Further, Claimant has not provided evidence that a discharge or a substantial threat of a discharge to a navigable waterway occurred. Claimant provided photographs of the vessel grounded near the rocky shore, but there is no indication in the photos that the weather or seas posed a significant risk to the integrity of the vessel's hull. The location appears to be in a cove protected by a breakwater. The CG did not deem it necessary to remove the vessel as a threat of oil discharge even though the wind forced the CG small boat station to shut down operations. Thus, the evidence does not support a finding that the vessel posed a substantial threat of discharging oil. For these reasons the spill does not constitute an OPA incident and the claim is not compensable under OPA.

Claim Supervisor: [redacted]

Date of Supervisor's review: ***3/6/14***

Supervisor Action: ***Denial approved***

Supervisor's Comments: