

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center  
United States Coast Guard

NPFC CA MS 7100  
US COAST GUARD  
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Arlington, VA 20598-7100  
Staff Symbol: (CA)  
Phone: 202-493-6839  
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5890  
5/3/2012

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Number: 7011 1570 0001 4802 9754

Phoenix Pollution Control & Environmental Services, Inc  
ATTN: Nelson Fetgatter  
7111 Decker Drive  
Baytown, TX 77520

RE: Claim Number: 911086-0001

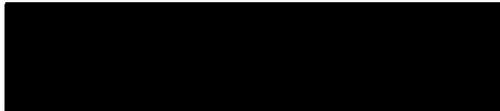
Dear Mr. Fetgatter:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 911086-0001 involving the Galveston Bay Biodiesel LP incident on March 29, 2010. Please 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. 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 911086-0001.

Mail reconsideration requests to:

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

  
Claims Manager  
U.S. Coast Guard

Encl: Claim Summary / Determination Form

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 911086-0001
Claimant	: Phoenix Pollution Control & Environmental Services, Inc
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: Donna Hellberg
Amount Requested	: \$6,067.07

### **FACTS:**

On March 29, 2010, Phoenix Pollution Control (Phoenix) reported that they were hired by Galveston Bay Biodiesel LP to conduct cleanup and remedial action to minimize environmental impact. The vendor invoicing indicates that they vacuumed sump, ditches, inside firewall and pump pad at barge dock. It is important to note that the Claimant provided little to no information about the details associated with this alleged oil pollution incident.

### **THE CLAIM AND CLAIMANT:**

On June 2, 2011, Phoenix presented a claim for costs they incurred associated with the March 29, 2010 response to Galveston Bay Biodiesel LP facility. Phoenix is seeking reimbursement of \$6,067.07.

Phoenix submitted copies of the following: cover letter dated 4/25/11; an OSLTF Optional Claim Form, Phoenix invoice # 2849 in the amount of \$6,067.07 with an accompanying field daily, Petro-Tech Environmental invoice # 12599, Petro-Tech Environmental Sample Evaluation and Pricing Report dated March 29, 2010, Bill of Lading from Oil Patch Transportation dated March 29, 2010, Shipping order form from Oil Patch Transportation indicating the transport of oily water mix dated March 29, 2010, handwritten daily log of duties identified by times, Gulf Coast Vacuum Service invoice # 205019 dated April 14, 2010 for vac truck services provided to Phoenix on March 29, 2010, and Bill of Lading from Gulf Coast dated March 29, 2010.

### **APPLICABLE LAW:**

"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".

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.

Claims for removal costs or damages may be presented first to the Fund by the Governor of a State for removal costs incurred by that State. 33 USC § 2713(b)(C).

sent another email to Claimant Counsel with a copy to the Claimant advising that the NPFC still had not received requested information. Again on February 22, 2012, the NPFC notified the Claimant Counsel and Claimant via email that the NPFC has still not received anything since the last communications in July 2011. The NPFC then advised the Claimant that if no response was made by the last day of February 2012, the claims would be adjudicated based on the information the NPFC presently had. On February 28, 2012, the NPFC notified the Claimant and Claimant Counsel that the package of court documents associated with the RP bankruptcy was received.

Upon review of the bankruptcy documents provided to the NPFC, the NPFC was able to confirm the bankruptcy case is closed. The Liquidating Trustee filed a motion to reopen the case because of pending IRS issues; the court denied the motion stating that the parties to the trust have remedies for reimbursement outside the bankruptcy court therefore the Claimant would have to establish that it has not filed or won't file an action outside of the bankruptcy case should the Claimant decide to request reconsideration.

The NPFC reviewed the actual cost invoices and dailies to determine that the Claimant incurred all costs claimed. The focus was 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 and reasonable.

The NPFC performed independent research of the spill location and was not able to confirm a nexus to a navigable waterway with the presence of a firewall and as such, the Claimant has failed to meet its burden to demonstrate that the alleged oil spill discharged or substantially threatened to discharge into a navigable waterway. Additionally, the Claimant's submission contains minimal details regarding what happened, how it happened, and how the waste water as reported by the Claimant was an OPA oil as opposed to a possible mixed substance since no sample analysis was provided to identify the product.

Upon further review of the claim submission, the Claimant has failed to provide the following documentation needed in order to make a proper adjudication of this claim:

- 1- The Claimant has failed to provide evidence that the incident was reported to the National Response Center (NRC) in accordance with the National Contingency Plan (NCP);
- 2- The Claimant has failed to provide any details as to who called Phoenix to the site to perform response actions, was an agreement executed or was Phoenix identified as the cleanup contractor under a facility response plan and if so, the Claimant has not provided any of the contracts/agreements etc associated with that contractual relationship;
- 3- The Claimant has not provided its rate schedule that governs the rates it charged to Galveston Bay Biodiesel for its own personnel/materials/equipment nor has the Claimant provided any agreements/ rate schedules or contracts it has with its affiliated subcontractors that also responded to this incident;
- 4- The Claimant has not provided proof of payment for the costs invoiced by Phoenix's subcontractors which demonstrates Phoenix has the subrogable rights to submit the subcontractors' costs to the NPFC;

- 5- The Claimant has not demonstrated that the actions they undertook were determined by the Federal On Scene Coordinator (FOSC) to be consistent with the NCP pursuant to the governing claims regulations. The FOSC in this case would be either the United States Coast Guard (USCG) or the United States Environmental Protection Agency (USEPA);
- 6- The Claimant did not provide sample analysis to evidence that the product spilled was an OPA oil.

Based on the information provided by the Claimant, the NPFC has determined this claim is denied because (1) the Claimant failed to demonstrate the incident was reported to the National Response Center (NRC) pursuant to the National Contingency Plan (NCP), (2) the Claimant has failed to provide sufficient details and information regarding the incident and ensuing response, (3) the Claimant has failed to demonstrate that the product was an OPA oil, (4) the Claimant has failed to provide sufficient supporting documentation for this claim as identified above, (5) the Claimant has failed to provide proof of payment to each of its subcontractors, (6) the Claimant has failed to provide evidence that a discharge or substantial threat of discharge to a navigable waterway existed, and (7) the Claimant has failed to demonstrate that the actions undertaken were directed by the FOSC and determined to be consistent with the NCP.

Should the Claimant decide to request reconsideration of this claim, the Claimant will need to provide documentary evidence from the FOSC that the actions undertaken by the Claimant were in response to an oil pollution event that actually substantially threatened or discharged into a navigable waterway of the US and the Claimant will need to address each of the identified deficiencies above. The Claimant will also need to provide a response to the lingering issue identified above that is associated with the RP's bankruptcy.

Based on the foregoing, this claim is denied.

Claim Supervisor 

Date of Supervisor's review: *5/3/12*

Supervisor Action: *Denial approved*

Supervisor's Comments: