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
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 202-493-6839
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[redacted]@uscg.mil
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5890
5/3/2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 9952

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

RE: Claim Number: 911090-0001

Dear Mr. Fetgatter:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 911090-0001 involving Galveston Bay Biodiesel LP and an alleged incident on January 21, 2010. Please see the attached Claim Summary / Determination Form for the details associated with 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 911090-0001.

Mail reconsideration requests to:

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

Sincerely,

[redacted]

Claims Manager
U.S. Coast Guard

Enclosure: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 911090-0001
Claimant	: Phoenix Pollution Control & Environmental Services, Inc
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: Donna Hellberg
Amount Requested	: $3,157.75

FACTS:

On January 21, 2010, Phoenix Pollution Control (Phoenix) reported that they were hired by Galveston Bay Biodiesel LP to remove oil that spilled in a ditch on the facility property. The Claimant has provided very few details for the NPFC to understand where the location of the ditch was, how and what was spilled, and what the nexus to the navigable waterway is.

THE CLAIM AND CLAIMANT:

On June 2, 2011, Phoenix presented a claim for costs they incurred associated with the September 14 2008 response to Galveston Bay Biodiesel LP facility. Phoenix is seeking reimbursement of $3,157.75.

Phoenix submitted copies of the following: cover letter dated 4/25/11; an OSLTF Optional Claim Form, Phoenix invoice # 2777 in the amount of $3,157.75 with accompanying field dailies, Gulf Coast Vacuum Service invoice # 204935 for cleaning of a firewall on January 22, 2010, Bill of Lading for Oil Patch Transportation, Gulf Coast Vacuum Service invoice # 204936 for services cleaning an alleged oil spill on January 21, 2010, and Phoenix invoice # 2804 for personnel, vac trucks and wash out charges for January 21-22, 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).

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 responding to an OPA event.
2. The National Response Center (NRC) was not notified of this incident pursuant to the National Contingency Plan (NCP).
3. No evidence has been provided to indicate the spilled product was oil or that it discharged or threatened to discharge into a navigable waterway.
4. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1)
5. A Responsible Party was identified by the Claimant for this incident. 33 U.S.C. § 2701(32).
6. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified that they filed an action in the Bankruptcy case of the RP which was finalized by the Bankruptcy Court on February 1, 2012..
7. 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 made an initial request for additional information to the Claimant via email twice in June 2011 in order to get a full understanding regarding the court action the Claimant indicated on the OSLTF Claim Form presented. Again in July 2011, the NPFC

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 a complete review of the information provided. The Claimant has not demonstrated that they were responding to an oil pollution incident that substantially threatened a navigable waterway of the US. The Claimant only stated on the OSLTF Claim Form that they were called to remove an oil spill from a ditch on the facility property. The Claimant has provided no details regarding the magnitude of the spill in the ditch, the location of the ditch on the property, or any nexus to a navigable waterway of the US. Additionally, the Claimant's submission contains minimal details regarding what happened, how it happened, and how the product recovered 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 provide any agreements/ rate schedules or contracts it has with its affiliated subcontractor that also responded on this incident;

4- The Claimant has not provided proof of payment for the costs billed to Phoenix by its subcontractor that demonstrates it has the subrogable rights to submit their 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 its subcontractor, (6) the Claimant has failed to demonstrate that the actions undertaken were directed by the FOSC and determined to be consistent with the NCP, and (7) the Claimant has failed to demonstrate that the incident posed a substantial threat of discharge into a navigable waterway.

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: [redacted]

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

Supervisor Action: ***Denial approved***

Supervisor's Comments: