

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: 202-493-6849
E-mail: [REDACTED]@uscg.mil
Fax: 202-493-6937

5890
7/03/2012

VIA EMAIL: [REDACTED]@nrccs.com

NRC Environmental Services Inc
ATTN: Todd Roloff
1605 Ferry Point
Alameda, CA 94602

RE: Claim Number: 912019-0001

Dear Mr. Roloff:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 912019-0001 involving the M/V Teng He. Compensation is denied because Claimant has not established that its uncompensated removal costs were associated with removal actions for an OPA incident. Please refer to the Claim Summary / Determination form for a detailed analysis.

You may make a written request for reconsideration of this claim. The reconsideration request must be received by the NPFC within 60 days of the date of this letter or within 30 days of your receipt of this letter, whichever date is earlier, 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 912019-0001.

Mail reconsideration requests to:

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

[REDACTED]
Claims Manager
U.S. Coast Guard

Encl.: Claim Summary / Determination

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 912019-0001
Claimant	: NRC Environmental Services Inc
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Amount Requested	: Amended to \$66,000

BACKGROUND¹

On May 13, 2011, USCG Sector Los Angeles/Long Beach (CG LA/LB) was notified that the container vessel TENG HE, scheduled to arrive in Long Beach on May 19, 2011, experienced a fuel oil spill in China during bunkering; oil leaked into the #4 cargo hold and contaminated eleven containers. Oil spilled out of the #4 fuel oil tank because the vessel's third engineer forgot to close the manhole on it after repairs were completed.² The cargo hold was emptied and cleaned in China. The contaminated containers were cleaned on the outside and relocated to cargo hold #8. However, unbeknownst to the Master, fuel oil had entered the containers and, during the transit to the United States, it leaked out and into the #8 cargo hold, also re-contaminating the containers.

On May 18, 2011, prior to the vessel's entry into port, CG personnel met with representatives of the terminal facility, COSCO Container Lines Co. Ltd. (COSCO), O'Brien's Response Management (the Qualified Individual) and NRCES and other government agencies to develop a plan for the ship's entry and cargo offload. As a condition of the vessel's entry into Long Beach, the Coast Guard required precautions to be in place to ensure the safe offload of the contaminated containers when the vessel was at berth, followed by the decontamination of the containers onshore and the decontamination of the vessel's cargo hold. The plan discussed how to handle each container if the outflow of oil was observed and if it was not observed.³ The parties determined that Visqueen would be draped from the vessel to the shore to prevent any product from getting into the water as the contaminated containers were offloaded from the vessel to the shore. Each of the visibly contaminated containers would be diapered (wrapped in plastic) and taken off the vessel and placed on a bomb cart lined with Visqueen and absorbent material. The containers were then transported to the decontamination area to be cleaned away from the waterway. The contaminated containers were removed from bays 53 and 60 of the ship. In addition to these two bays, bays 22 and 26, within cargo hold #4, required cleaning.

CLAIMANT

Claimant, NRC Environmental Services Inc. (NRCES), is an oil spill response organization contracted by the vessel interests to clean up oil that leaked on the deck of the vessel TENG HE and some of its cargo while it was taking on bunkers in China. The TENG HE was owned by COSCO Container Lines Co. Ltd. (COSCO).

CLAIM

On December 5, 2011, NRCES initially claimed \$535,217.23 from the Oil Spill Liability Trust Fund (OSLTF) for costs associated with cleaning the vessel holds, and offloading and cleaning several

¹ CG Sector LA/LB facts, as related to the NPFC by AUX LaBorde via telephone conversation with Eric Bunin, Claims Manager, and via emails dated January 5, 2012 and January 10, 2012.

² See Note of Sea Report issued by the Master of the TENG HE, Chang Zheng.

³ See IAP for the designated Container Transport Group prepared May 21, 2011.

contaminated containers that were located in the vessel's cargo holds. On January 17, 2012, the Claimant sent an email to the NPFC attaching a letter dated December 13, 2011, which reduced its claim to the OSLTF to \$66,000. NRCES reduced its claim because on December 9, 2011, NRCES received a partial payment from COSCO, leaving a disputed sum unpaid that is the subject of this claim.⁴

CLAIMANT'S ALLEGED FACTS:

According to NRCES, the container vessel TENG HE experienced oil leaking onto the deck, into/on shipping containers and into the water at Long Beach, CA. Claimant alleges that it was called out for "pollution spill response which began on May 18th 2011." Claimant states that the incident involved a spill of a petroleum product of a reportable quantity that produced a sheen and emulsion in a navigable water of the United States. With its claim submission, Claimant provided the Hazardous Materials Spill Report from the California Emergency Management Agency.⁵ The report, based on information from a call from O'Brien's Response Management,⁶ states that, "The spill was on the deck of the ship and there are no reports of any of the unknown material reaching the water."

On the same day, May 18, 2011, NRCES executed a contract for services with COSCO. The description of the services to be provided was "Clean up services for MV Teng He."⁷ NRCES states that it responded to the spill as requested and directed, by the USCG, state and local agencies, and the responsible party's designated representatives, to contain, recover, remove and dispose of spilled product from the water, vessel, shore and containment equipment.

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 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.

⁴ It has not been made clear how the Claimant arrived at its amended claim amount of \$66,000.

⁵ See report dated 5/20/11, control #11-3097.

⁶ O'Brien's Response Management is a sister company to Claimant, NRCES. In this instance, O'Brien's acted as the Qualified Individual (QI) for the operation.

⁷ NRCES contract with COSCO Container Lines executed May 18, 2011.

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:

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 alleges that the TENG HE leaked oil into the water and that the incident involved a spill of a petroleum product of a reportable quantity that produced a sheen and emulsion in a navigable water of the United States and that it was called out for a pollution removal response on May 18, 2011, there is no evidence in the administrative record to support these allegations.

When the TENG HE entered the port at Long Beach the oil was contained on the vessel, in the cargo hold and on several containers located within that hold. There was no evidence of oil in the water or oil that posed a substantial threat of discharge into the water. The Qualified Individual (QI) for the Vessel, who was an employee of the Claimant’s sister company, notified the California Emergency Management Agency that the spill was on the deck of the ship and there were no reports of any of the material reaching the water. Further, Gregg Siebenkittel of O’Brien’s reported to the National Response Center that containers were damaged during bunkering and there was a spill of an unknown material onto the deck of the vessel.⁸ He made no mention of oil in the water or threatening the water. Also, the Coast Guard personnel stated that no oil from the vessel reached the water in the U.S. Neither the Incident Action Plans nor NRCES’ own daily field activity logs mention oil in the water. The only discussions of cleaning oil in these documents involve cleaning the inside of the vessel and cleaning the containers themselves.

⁸ See NRC report #976857

The Coast Guard was notified on May 13, 2011 that the vessel was due in Long Beach on May 19, 2011⁹ and that oil had spilled on board the vessel, into the cargo hold, and on some cargo containers during bunkering activities in Ningbo, China on May 4, 2011.¹⁰ The CG scheduled a meeting on May 18, 2011 in anticipation of the vessel's arrival, to plan for the vessel's entry into Long Beach. The CG required certain actions be taken as a condition of entry of the vessel into Long Beach, including devising a plan for offload and decontamination of the oiled containers and decontamination of the cargo hold.

The offload of the contaminated containers was scheduled with CG-ordered precautions in place: ship-to-shore plastic-sheeting was draped from the vessel to the shore and the visibly contaminated containers were wrapped in plastic and removed from the vessel. The containers were to be decontaminated on shore in a decontamination area. These precautionary offload activities began at 1745 on May 19th and were completed by 1600 on May 20th after all the contaminated containers had been offloaded and the plastic removed.¹¹

The NRCES contract with COSCO was to conduct "cleanup services for the Teng He." The Claimant's daily reports only describe cleanup activities in the vessel's cargo hold, preparing the contaminated containers for offloading, offloading the containers and moving them to the decontamination area and decontaminating them.

The oil was fully contained on the vessel. Once the vessel was at berth, cargo transfer precautions were put into place. Visqueen was placed from the vessel to the shore and some of the containers were wrapped in plastic as they were off loaded from the vessel and moved to the shore and placed on carts to be moved to the decontamination area.

Offloading oil from a vessel is not an incident under OPA. The precautionary activities conducted on the TENG HE are analogous to the standard precautions taken during bunkering, lightering or other oil transfer operations on or near the water such as placing boom around a vessel; those situations are not incidents under OPA. Thus, the non-emergency condition presented by the TENG HE's internal contamination and the activities related to the cleaning of its holds and the offload of its oil-contaminated cargo with precautionary measures do not pose a substantial threat of a discharge and do not create an incident under OPA. Without an OPA incident, the Fund is not available to pay the Claimant.

Even if NRCES did demonstrate that it responded to an OPA incident, the only oil removal activities to prevent a discharge of oil would have been conducted as the containers briefly passed over the water as they were offloaded from the ship and placed on shore. According to the administrative record these activities occurred between 1745 on May 19, 2011 and 1600 on May 20, 2011. The costs associated with these activities would only be compensable if supported by dailies and detailed invoices evidencing that they were actions conducted to mitigate, remove or prevent the discharge of oil resulting from the substantial threat of a discharge *and* the Claimant has not been reimbursed for these activities.

By its own admission Claimant was compensated \$469,217.23 by the vessel owners for costs associated with offloading cargo and cleaning the vessel and the containers. It seeks uncompensated removal costs of \$66,000 from the Fund but has not provided detailed documentation of the costs for

⁹ See email from AUX Curt LaBorde to NPFC on January 12, 2012.

¹⁰ See Note of Sea Protest dated May 19, 2011, issued by Chang Zheng, master of the TENG HE, to the USCG.

¹¹ See NRCES Field Activity Daily logs for 5/19/11 and 5/20/11.

which it has already received compensation and the documentation to evidence that costs that it now claims as unpaid were associated with the activities from 1745 on May 19, 2011 to 1600 on May 20, 2011. Based on the information provided by the Claimant it is not possible for the NPFC to determine if the \$66,000 in uncompensated claimed costs were associated with these activities.

For the reasons s



Claim Supervisor

Date of Supervisor's review: 7/03/2012

Supervisor Action: *Denied approved.*

Supervisor's Comments: