

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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Arlington VA 20598-7100
Staff Symbol: Ca

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5890
March 13, 2013

via e-mail: [REDACTED]@hepaco.com

Mr. Robert May
HEPACO
2711 Burch Drive
Charlotte, NC 28269

Re: Claim Number: 913031-0001

Dear Mr. May:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on claim number 913031-0001 involving Pruitt Fish Barge Sp - 913031 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 913031-0001.

Mail reconsideration request to:

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

[REDACTED]
GINA STRANGE
Claims Manager
U.S. Coast Guard

CLAIM SUMMARY / DETERMINATION

Claim Number: 913031-0001
Claimant: HEPACO
Type of Claimant: Corporate - US
Type of Claim: Removal Costs
Claim Manager: Gina Strange
Amount Requested: \$13,178.00

FACTS:

On 5 June 2012, United States Coast Guard (USCG) Sector Baltimore received a call from the District 5 Command Center requesting information about a barge split in half leaking fuel at a pier in DC. Sector Baltimore dispatched a Pollution Response Team to the DC Fish Market for investigation. Upon arrival, it was determined that the DC Fire Department had the spill contained with boom. It was determined that the barge sank with approximately 100 – 500 gallons of diesel fuel on board. It was further determined that the owner was performing renovations which may have contributed to the incident. Investigation by USCG revealed the Responsible Party (RP) to be a barge owned and operated by Pruitt Seafood. The incident resulted in the spilling of oil into the waters of the Washington Channel, a navigable water of the United States. The RP hired Hepaco, response contractor, to handle the response actions.

CLAIMANT

The Claimant, HEPACO, was contacted by Pruitt Seafood, the Responsible Party (RP) regarding an emergency response to this discharge on 5 June 2012. The Claimant responded. The Claimant met with the U.S. Coast Guard and was allowed to begin clean-up. They placed absorbent pads in the water and sweep under the barges to collect free product.

On the second day of the incident, it was determined that the RP did not have the financial resources to continue to pay for the response, so the incident would be federalized. A Notice of Federal Assumption was issued to Mr. kim Sung as the RP.

CLAIM

The Claimant seeks to recover its uncompensated removal costs associated with their emergency response to the diesel spill in the amount of \$13,178.00. The claim was presented to the Oil Spill Liability Trust Fund (OSLTF) via the National Pollution Funds Center (NPFC) on 8 February 2013.

The NPFC reviewed the claim submission which contained a “Blanket Rapid Services Agreement”, dated and signed on 5 June 2012 between HEPACO and Pruitt Seafood. This contract contained an arbitration provision that requires as follows: “all claims, disputes and other matters or questions arising out of or relating to this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American

Arbitration Association unless the parties mutually agree otherwise.” Judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.¹

The initial submission did not include evidence that the parties had submitted to arbitration or that they had mutually waived this requirement. On 13 February 2013, the NPFC requested this information from the Claimant via e-mail.² The NPFC requested a response by 27 February 2013. To date, the Claimant failed to respond. On 1 March 2013, the NPFC sent a follow-up e-mail to the Claimant again requesting this information. No response has ever been provided.

APPLICABLE LAW:

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. 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 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].

Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party. 33 U.S.C. 2712 (f).

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.

¹ Blanket Rapid Response Services Agreement, signed and dated 5 June 2012, page 3

² E-mail from NPFC to Claimant, dated 13 February 2013.

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:

A. Overview:

1. The USCG FOSC was notified of incident and was on site during the response.
2. The incident involved the report of a discharge or substantial threat of a discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), **to navigable waters**;
3. In accordance with 33 CFR § 136.105(e)(12), the Claimant has certified no suit has been filed in court for the claimed uncompensated removal costs;
4. The claim was submitted within the six-year period of limitations for claims. 33 U.S.C. § 2712(h)(1);
5. The Claimant presented its claim to the responsible party and has not been paid after the passing of 90 days, so it can present its claim directly to the Fund. 33 U.S.C. § 2713
6. The NPFC Claims Manager has thoroughly reviewed the documentation submitted with the claim and determined that the incident is an OPA incident.

B. Analysis:

In response to the incident, Hepaco and Pruitt Seafood executed Hepaco's Blanket Rapid Response Services Agreement. The rapid response services agreement is Hepaco's form document. The agreement includes an arbitration clause, which states, "All claims, disputes, and other matters or questions arising out of or relating to this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless the parties mutually agree otherwise."³ Hepaco did not provide evidence that it engaged in the arbitration nor did it provide evidence of the mutual agreement of the parties not to arbitrate the claimed costs. By email February 13, 2013, the NPFC notified

³ Hepaco's Blanket Rapid Response Services Agreement, Section II, number 8.

Hepaco that it had not provided evidence of compliance with this provision in the contract. By email of March 1, 2013, the NPFC again attempted follow up with the Claimant regarding the Arbitration clause contained in their service contract with the RP. NPFC has received no reply to date.

When presenting a claim to the Fund for reimbursement of removal costs and/or damages, a Claimant's rights must include all rights, including the right to file an action in court. If a Claimant does not retain all its rights, the Fund is not available to compensate the Claimant.

Therefore, the NPFC must determine whether the Claimant has retained all its rights in light of the arbitration clause in the contract. If Claimant has not retained all its rights, the NPFC cannot adjudicate and pay the claim because payment of the claim is subject to the United States Government acquiring by subrogation all rights of the claimant to recover from the responsible party.⁴ Further, if the Fund pays compensation under OPA to any claimant it shall be subrogated to all rights, claims, and causes of actions that the claimant has under any other law.⁵ Rich Franklin Corp. v. U.S. Department of Homeland Security, 2008 WL 337978 (D.Or.) (The plain language of Section 2712(f) uses the words "all rights" when describing what subrogation rights will be acquired by the government when a claimant is compensated by the Fund ... The statute clearly provides that a claimant must be able to supply the government with all of its subrogation rights against a responsible party. If the Fund pays a claim the government must have the ability to seek recourse against the responsible party.)

To be eligible to be paid from the Fund, Claimant must demonstrate that it retained all its rights to recover from Pruitt Seafood by any legal means. It has not shown that it did that. It could have complied with the Arbitration clause by obtaining an executed document showing that Claimant and Pruitt Seafood (Mr. Kim Sung) mutually agree that the claim does not have to be resolved through arbitration. The NPFC informed the Claimant of this via email, but to date Claimant has not provided such documentation.

Therefore, the NPFC must deny this claim on the grounds that Claimant has not established that it has retained the necessary subrogable rights to file an OPA liability action in court against the responsible party because it gave up those rights under the terms of the contract. At the very least Claimant has failed to establish that it has those rights under the terms of its contract with Pruitt Seafood. Additionally, Claimant has not met its burden to establish that the arbitration clause in the Contract is not valid, revocable or unenforceable nor has it established that Congress intended to preclude a waiver of the judicial remedies for OPA statutory rights.

DETERMINATION: 0.00

Claim Supervisor: 

Date of Supervisor's review: *13 March 2013*

Supervisor Action: *Denial Approved*

⁴ 33 U.S.C. § 2712(f).

⁵ 33 U.S.C. § 2715(a).