

CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/25/2011
Claim Number	: 911022-0001
Claimant	: State of California
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$7,090.10

FACTS:

1. Oil Spill Incident:

At 6:38 AM on January 23, 2006, the owner of the 67-foot, Commercial Fishing Vessel CHOVIE CLIPPER reported that it had capsized in high seas earlier that morning. The crew did not have time to send a distress call before they abandoned the vessel approximately five nautical miles northeast of Santa Catalina Island.¹ The vessel carried an estimated 1000 gallons of diesel and approximately 200 gallons discharged into the Pacific Ocean, within navigable waters of the U.S.²

That morning, USCG Air Station Los Angeles flight-crew located the vessel approximately 15-yards off Santa Catalina Island, with only its stern above water. The Coast Guard Pollution Investigators confirmed sheen coming from the vessel.³ On January 24, 2006 the salvage crew boomed the vessel.⁴

The vessel was determined to be a total loss and not salvageable. It was then decided that scuttling would be the best course of action. Prior to scuttling, the U.S. Environmental Protection Agency (USEPA) required removal of the diesel fuel from the vessel before it would grant a permit.⁵ On January 26, 2006 the salvage company, National Response Corporation, removed approximately 800 gallons of diesel from the fuel tanks.⁶ On January 27, 2006, the salvage company towed the vessel to a specific location away from Santa Catalina Island and scuttled it at 11:38 am.⁷ The salvage vessel was required to stay at the scuttle site several hours after the event. Captain [REDACTED] a witness for the attorneys who represented the marine insurance company, reported that there was no pollution or debris visible. The FOSCR confirmed his observation and the salvage vessel departed.⁸

2. Responsible Party:

The responsible party (RP) is the Southern California Bait Company of San Pedro, CA, which owns and operates the FV CHOVIE CLIPPER. The RP cooperated with the FOSC.

3. Claimant:

The claimant is the California Department of Fish and Game (DFG), Office of Oil Spill Prevention and Response (OSPR). DFG-OSPR has primary authority to direct removal, abatement, response, containment and cleanup efforts for any spill in State waters.

¹ See MISCLE Case Report 273254 Notice of Violation (Pollution)

² See POLREP #1

³ See MISCLE Case Report 273254 Notice of Violation (Pollution)

⁴ Id

⁵ See email dated March 14, 2011 from FOSCR Lt. [REDACTED] to NPFC

⁶ See POLREP #3 and final.

⁷ Id

⁸ See report dated 1/30/2006 to Arnold & Arnold written by Capt. [REDACTED] of Amergent Tech

3. Claim:

DFG-OSPR presents the cost of three consulting wildlife biologists who conducted an aerial survey of seabirds around Catalina Island.⁹ The aerial survey was taken on January 27, 2006 the day of the scuttling of the FV CHOVIE CLIPPER. The DFG-OSPR claim was received within the statute of limitations for removal claims under Oil Pollution Act of 1990 (OPA). The claimant seeks reimbursement of \$7,090.10.

4. Description of Removal Actions Performed:

The DFG-OSPR claim indicates removal actions were for an "Aerial Survey" and to "Monitor Clean Up"¹⁰ Included in its claim submission was a "preliminary survey report" entitled, "USCS Seabird Population Survey Program Trip Report: Marine Bird and Manual Aerial Survey: January 27, 2006."¹¹ The wildlife biologist reported their mission as follows: "This report summarizes the effort and results of the aerial survey conducted January 27, 2006 by the UCSC aerial survey team in response to a potential oil spill off Santa Catalina Island during the scuttling of the F/V CHOVIE CLIPPER."¹²

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].

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;

⁹ See NPFC standard claim form pg. 2 "Monitor Clean Up" and "Aerial Survey"

¹⁰ See NPFC's Standard Claim form, Page 1, #3 and Page 2, #11, #12

¹¹ See University of California Santa Clara, Seabird Population Survey Program Trip Report: (pg 2)

¹² See University of California Santa Clara, Seabird Population Survey Program Trip Report: (pg 1)

- (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].

A. Overview:

The Claims Manager contacted the FOSCR, Lt. [REDACTED] and on March 14, 2010 and focused on the following issues:

- (1) Whether the actions taken were compensable "removal actions" under OPA and its governing claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of eh incident).
- (2) Whether the costs incurred are a result of these actions.
- (3) Whether these actions were determined by the FOSC.
- (4) Whether the costs were adequately documented and reasonable.

B. Analysis:

On March 14, 2011, the Claims Manager phoned Lt. [REDACTED] the FOSC-Representative (FOSCR), to confirm the coordination for the aerial seabird survey. Lt. [REDACTED] related that he could not recall coordinating an aerial survey with DFG-OSPR. The Claims Manager sent the FOSCR a copy of the claim and a copy of the preliminary report from the UCSC, Aerial Survey Team.¹³ Lt. [REDACTED] followed up our conversation in an email with attachments. Again the FOSCR affirmed that his notes had no mention of the DFG-OSPR coordinating an aerial survey for seabirds.¹⁴ The Claims Manager then asked the FOSCR if he would approve of the UC Santa Clara aerial survey now and Lt. [REDACTED] replied that he would not and explained that one of the conditions required by the USEPA for a permit to scuttle the vessel was that the diesel fuel be removed from the vessel.

DFG-OSPR also indicated that it coordinated this aerial survey for marine wildlife with USEPA. On April 11, 2011 the Claims Manager emailed [REDACTED] Oceanographer EPA Region 9. Mr. [REDACTED] discussed his role with the Claims Manager in a phone conversation. Mr. [REDACTED] said that he coordinated the scuttling with the FOSCR and that he did coordinate an aerial survey of marine wildlife. Mr. [REDACTED] emailed the Claims Manager and indicated that he recalled some concern was mentioned regarding rafting seabirds. However, there is no documentation that DFG-OSPR coordinated this aerial survey of marine wildlife with the USEPA.¹⁵

DFG-OSPR indicated that it coordinated this aerial survey for marine wildlife with the Regional Response Team Leader, [REDACTED]. The Claims Manager emailed Ms. [REDACTED] requesting any information on the coordination of the aerial survey with her. Ms. [REDACTED] forwarded three POLREPs regarding the CHOVIE CLIPPER and wrote that meeting notes do not specifically mention the DFG-OSPR aerial seabird survey but there is discussion notes of nesting seabirds as a concern and that the USCG Pollution Investigator be on the look-out for rafting seabirds.¹⁶

DETERMINATION OF LOSS:

The NPFC finds that this removal claim is denied for the following reasons:

¹³ See March 14 2011 email FOSC-R, Lt. Marineau to NPFC

¹⁴ See attached MISCLE Case Report 273254

¹⁵ See email from EPA [REDACTED]

¹⁶ See referenced POLREP 2, January 26, 2006 Part 3 paragraph E

1. The NPFC finds that DFG-OSPR's costs are not compensable removal costs because the wildlife biologists were hired for the purpose of taking an aerial marine seabird population survey. The NPFC finds that the scuttling of this vessel was not a removal action but, a means of disposing of the vessel. The NPFC finds that the OPA compensable removal activity occurred when the salvage crew removed the diesel fuel from the vessel before it was scuttled on January 27. Removal of the diesel fuel was a pre-condition for the scuttling to be given a permit by USEPA. The administrative record reflects that the fuel was *removed* prior to January 27, 2006. The administrative record indicates that the scuttling event was not contingent on a report from the UCSC aerial survey of wildlife. The FOSCR has affirmed that he did not and would not authorize a removal action that involved an aerial survey of marine seabirds on the day of the scuttling. The NPFC concurs with the FOSCR that the scuttling event itself was not a removal action; rather, a means of disposing of the salvage.

The NPFC finds that the aerial survey conducted on January 27, 2006 by the three consulting marine wildlife biologists did not have DFG-OSPR, USCG or USEPA personnel onboard. Additionally, the NPFC finds that the marine seabird aerial survey team took place after the scuttling event. The consulting marine wildlife survey team members did not depart Ontario, California until 1200 noon on January 27, 2006 and the scuttle event was completed by 1138 that day. The NPFC finds that the scuttling event was not contingent on the findings from the biologist aerial survey.

USCG POLREP 1 shows that there was an over-flight on January 24, 2006 and POLREP 2 shows another fly-over took place on the morning of the scuttling event but, these flights did not involve biologists.

2. LT [REDACTED] USCG, has provided emails that show he was in constant communication with DFG-OSPR; however, there is no evidence of discussions with the FOSCR regarding wildlife issues.

AMOUNT: \$0

DETERMINATION:

The claimant has failed to demonstrate that the costs incurred were OPA compensable removal costs therefore this claim is denied.

Claim Supervisor: [REDACTED]
Date of Supervisor's review: 4/27/11
Supervisor Action: <i>Denial approved</i>
Supervisor's Comments: