

CLAIM SUMMARY / DETERMINATION FORM

Date : 1/19/2012
Claim Number : 912004-0001
Claimant : Pacific Marine Salvage Inc
Type of Claimant : OSRO
Type of Claim : Removal Cost
Claim Manager :
Amount Requested : \$19,875.63

INCIDENT:

On March 25, 2011, United States Coast Guard (USCG) Sector San Francisco received a call from Santa Cruz Harbor Police informing them that there was a sunken vessel in Santa Cruz Harbor slip number U-24. Upon further investigation, MST [REDACTED] stated a discharge of approximately 10-gallons of gasoline had entered the Santa Cruz Harbor, a navigable waterway of the US.¹

The USCG reported that the owner of the vessel, Mr. [REDACTED] hired Vessel Assist (Pacific Marine Salvage, Inc.) to plug the vents, remove the vessel and have it destroyed. MST [REDACTED] of Sector San Francisco then contacted Station Monterey and requested CG personnel to document the incident via case in MISLE. On March 31, 2011, MST [REDACTED] of Sector San Francisco issued a Notice of Federal Interest (NOFI) to Mr. [REDACTED] and also issued an official written Warning in lieu of Civil Penalty.² The incident was reported to the National Response Center (NRC) via report # 971125 on March 25, 2011 at 08:20 local time.³

CLAIM AND CLAIMANT:

The Claimant, Pacific Marine Salvage Inc. (PMS or Claimant) provided removal support to the RP for this incident. On October 6, 2011, the Claimant presented a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of its uncompensated removal costs in the amount of \$19,875.63. The NPFC sent a RP notification letter, dated October 20, 2011, to Mr. [REDACTED] advising that the Claimant presented a claim to the NPFC for certain uncompensated removal costs.⁴

The Claimant submitted the following documents in support of its claim: Cover letter, a copy of NRC report # 969935 dated March 12, 2011 which is not the correct NRC report for this incident therefore the NPFC obtained the proper NRC report as mentioned previously, a copy of California Emergency Management Agency Hazardous Materials Spill Report dated March 25, 2011 at 0839 hours⁵, a copy of the invoice for costs incurred and billed, a copy of the PMS contract between the Claimant and Mr. [REDACTED] dated March 25, 2011 at 0900 hrs local time⁶, a copy of the PMS rate schedule, a copy of the Claimant's daily logs, a copy of a news article entitled "Harbor director plans post-tsunami town hall meeting: Another boat sinks, one nearly goes amid heavy rain", a copy of 12 color photos taken during response, copy of a two-page letter entitled "Salvage Master's Notes", a copy of "time track" which is a detailed

¹ See USCG witness Statement dated June 10, 2011 by [REDACTED]

² See Notice of Federal Interest and Warning letter dated March 31, 2011.

³ See NRC Report # 971125.

⁴ See NPFC RP Notification letter to Mr. [REDACTED] dated 10/20/2011.

⁵ See California Emergency Management Agency report dated March 25, 2011.

⁶ See PMS executed contract dated March 25, 2011.

description of duties performed by date and time, a copy of previous billings for other clients with proof of payment for two of them, a copy of the Claimant's Salvage Safety Standards, a copy of the Site Safety Plan dated March 25, 2011, a copy of a Google map and directions, a copy of Hazwoper training certificates for each employee involved on this response, a copy of disposal manifests for two drums and the associated disposal invoice, a copy of the FOSC Coordination letter from Captain [REDACTED] of Sector San Francisco dated November 23, 2011, a copy of a letter from the Claimant to Captain [REDACTED] requesting a written FOSC coordination statement dated December 16, 2010, and a copy of a letter from the Claimant to the RP, Mr. [REDACTED] dated April 14, 2011.

The NPFC relied on additional information found through USCG Station Monterey Case Number # 541845, USCG Sector San Francisco Activity Number # 3975893, and NRC Report # 971125 to adjudicate this claim.

The NPFC's review of the actual cost invoice and related documents focused on: (1) whether the actions taken were compensable removal actions under OPA and the claims regulations at 33 CFR Part 136 (e.g. whether the actions were taken to prevent, minimize, and mitigate the effects of the incident; (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken are determined to be consistent with the National Contingency Plan (NCP) or directed by the FOSC; (4) whether the costs were adequately documented and reasonable; and (5) whether the Claimant's submitted costs were uncompensated.

Mr. [REDACTED] (RP):

On November 10, 2011, the RP responded to the NPFC's RP Notification Letter dated October 20, 2011. The RP stated he feels he is not responsible for the oil spill and that the Santa Cruz Harbor and/or USCG should compensate him for the loss of his boat. The RP goes on to say that he is preparing a claim to this end although at the time of the writing of this determination, the NPFC has not received any such claim from him.⁷

The RP provided a two-page letter along with a copy of a handwritten notice posted by the USCG Captain of the Port indicating all north harbor waters closed to vessel traffic until further notice, a copy of 33 USC § 2703 whereby in his letter, he asserts that he feels the tsunami falls under the act of God defense and his inability to access his vessel falls under an act or omission of a third party. The NPFC has made no determination on the RP's third party defense and act of God defense since he has not formally presented such a defense claim to the NPFC. Additionally, any assertions made by the Claimant have no bearing on the NPFC's adjudication of this removal costs claim.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), a responsible party for a vessel or facility from which oil is discharged or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for removal costs and damages resulting from such incident.

"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".

⁷ See letter from Mr. [REDACTED] to the NPFC dated November 10, 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". 33 USC § 2701(31).

"Removal costs" referred to in 33 USC 2702(a) include any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan. 33 USC 2702(b)(1)(B).

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.

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party of the source designated under 2714(a). 33 U.S.C. § 2713(a). If the claim is not settled by any person by payment within 90 days after the date the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 U.S.C. §2713(c)(2).

"Claimant" means "any person or government who presents a claim for compensation under this subchapter." 33 USC § 2701(4).

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 136.203, the claimant bears the burden to prove the removal costs 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. FOSC coordination has been established via Captain [REDACTED] coordination letter dated November 23, 2011.⁸
2. The incident involved the report of a discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. Presentment of costs to the RP was made by the Claimant, prior to the submission of the claim to the Fund. 33 U.S.C. § 2701(32);
4. The claim was submitted within the six year period of limitations for removal costs claims to the Fund. 33 U.S.C. § 2712(h)(2);
5. 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;
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim as well as other information obtained during the course of the adjudication and determined what removal costs presented were for actions in accordance with the NCP, and if the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

B. NPFC Analysis:

PMS states in its claim that all costs claimed are for uncompensated removal costs incurred for this incident. The Claimant represents that all costs presented by the Claimant to the Fund are compensable removal costs, payable by the OSLTF.

The NPFC Claims Manager reviewed the Claimant's actual cost invoices and dailies to ensure that the Claimant had incurred all costs claimed and that the costs were adequately documented and reasonable. The NPFC Claims Manager determined that the response activities performed by the Claimant were coordinated with Captain [REDACTED] of Sector San Francisco who affirmed that the personnel, materials and equipment listed were reasonable and necessary based on the magnitude of the incident. The Claims Manager also confirmed that the removal costs adjudicated and approved by the NPFC were: compensable "removal actions" under OPA and the claims regulations at 33 CFR 136.203(a)-(c) (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) incurred as a result of these actions; (3) incurred for removal actions determined by the FOSC to be consistent with the NCP or directed by the FOSC.

The NPFC's adjudication is broken down into two (2) categories: Approved and Denied⁹. The itemization of the approved costs by the NPFC is as follows:

PMS Invoice # 69 – The NPFC has approved \$14,891.63 in personnel, materials and equipment;
PMS Invoice # 70 – The NPFC has approved \$3,748.00 in personnel, materials and equipment;
PMS Invoice # 71 – The NPFC has approved \$500.00 in personnel, materials and equipment;

Total NPFC approved uncompensated removal costs based on above invoices = \$19,139.63.

The itemization of the denied costs by the NPFC is as follows:

PMS Invoice # 69 – The NPFC has denied \$224.00
PMS Invoice # 70 – The NPFC has denied \$12.00
PMS Invoice # 71 – The NPFC has denied \$500.00

⁸ See Captain [REDACTED] letter dated November 23, 2011.

⁹ See Enclosure 1 – NPFC Summary of Costs spreadsheet.

Total NPFC denied removal costs based on the above invoices = \$736.00

The Claimant bears the burden of proving all elements of its claim to the Fund. 33 CFR §136.105(a). The Claimant has failed to provide sufficient evidence to support the denied amounts identified above¹⁰, and thus failed to prove its entitlement to reimbursement of uncompensated removal costs in the amount of \$736.00. 33 CFR §136.105(e)(6).

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$19,139.63** as full compensation for the reimbursable removal costs incurred by Claimant and submitted to the NPFC under claim # 912004-0001. All costs claimed are for charges paid for by the Claimant for removal as that term is defined in OPA and, are compensable costs, payable by the OSLTF as presented by the Claimant. The NPFC denies **\$736.00** in claimed removal costs. An audit of the claimed costs was performed and the Claims Manager discovered a billing discrepancy for disposable suits based on the rate schedule at the time services were provided and also determined that the Claimant billed excessive admin time associated with documentation and invoice preparation therefore the NPFC has reduced the number of allowable hours associated with office time and administrative tasks (See included NPFC Summary of Costs spreadsheet for a complete description of denied costs).

Lastly, it important to note that while the Claimant provided a copy of the disposal invoice from the disposal facility, the Claimant did not provide proof of payment for said invoicing so the NPFC independently verified that the invoice was in fact paid. In the future, the burden is on the Claimant to produce such evidence to demonstrate uncompensated removal costs.

AMOUNT: \$19,139.63

Claim Supervisor: 

Date of Supervisor's review: 1/19/12

Supervisor Action: *Approved*

Supervisor's Comments:

¹⁰ See Enclosure 1 – Summary of Costs spreadsheet