

CLAIM SUMMARY / DETERMINATION

Claim Number: 919007-0001
Claimant: MILLERS LAUNCH INC
Type of Claimant: OSRO
Type of Claim: Removal Costs
Claim Manager: [REDACTED]
Amount Requested: \$100,562.26

FACTS:

On July 6, 2018, the Bouchard Barge B-235 spilled asphalt on the deck. At the time, it was located at Buckeye Terminal in Perth Amboy, NJ. Coast Guard records¹ indicate that no waterway was impacted. The Coast Guard Incident Management Division did not respond because no waterway was affected.

CLAIMANT AND CLAIM:

The Claimant is Millers Launch Inc.(MLI). It is an Oil Spill Response Organization. MLI submitted this request for compensation totaling \$100,562.26 for its alleged uncompensated removal costs for the clean up of the asphalt.

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".

¹ NRC report 1217562, CG Sitrep covering July 6 through July 11, 2018, and QRC report dated July 6, 2018.

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;
- (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:

The claimant seeks compensation for costs related to cleaning up spilled asphalt aboard the Bouchard Barge B-235. The only documentation provided by the claimant is an invoice that was billed to the National Response Corporation.

For a claimant to recover costs under OPA, the costs must be the result of a discharge or substantial threat of a discharge of oil into or upon the navigable waters of the United States. In this case, the evidence indicates that no oil discharged or substantially threatened to discharge

into or upon the navigable waters of the U.S.² Based on the foregoing, this submission is not covered by OPA and cannot be paid.

In addition, even if this submission were covered by the OPA, the claimant could not be compensated until proper presentment of costs had been made to the OPA designated Responsible Party (RP). The record indicates that the claim was not properly presented to the responsible party (i.e. the owner and/or operate of the source of a discharge or substantial threat of a discharge of oil to a navigable water of the U.S.). The claimant submitted its invoice to National Response Corporation, who likely operated as the primary response contractor for the incident since they do not own or operate the barge at issue. Thus, the claim is not valid before the Oil Spill Liability Trust Fund.

Additionally, if the claimant should request reconsideration and could overcome the two threshold issues above, it would have to provide evidence that a Federal On Scene Coordinator (FOSC) either directed the response, or determined that the claimant's actions were performed in accordance with the National Contingency Plan (NCP). It would have to provide the contract or master service agreement under which it responded in accordance with, its rate schedule, daily work reports detailing labor, equipment and materials, disposal records including manifests and proof of payment for disposal, third party services and an identification of any and all subcontractors along with a full compliment of documentation supporting subcontractor invoicing.

Based on the foregoing, the claimed costs are denied.

Claim Supervisor:

[REDACTED]

Date of Supervisor's review: *11/28/18*

Supervisor Action: *Denial Approved*

Supervisor's Comments:

² USCG SITREP from Sector New York dated July 6, 2018.