

CLAIM SUMMARY / DETERMINATION FORM

Date : 9/14/2009
Claim Number : 909109-001
Claimant : McDonough Marine Service
Type of Claimant : Corporate
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$6389.78

FACTS:

- 1. Oil Spill Incident:** The United States Coast Guard Sector New Orleans Case # 472582,¹ reports that on May 18, 2009, a 10' by 65' oil sheen, black in color, was discovered in the Harvey Canal in the vicinity of (IVO) Hero's Cut at Mile Marker 5.5, a navigable waterway of the US. The source of the sheen is unknown.

The incident was reported to the National Response Center (NRC) on May 18, 2009 at approximately 11:10 a.m. CST via report # 905928 by Mr. [REDACTED] of Environmental Safety and Health Services, Inc. (ES&H), the Oil Spill Response Organization (OSRO) for McDonough Marine Service (McDonough). The report described the incident as a 15-gallon discharge of unknown oil from an unknown source.² USCG PO [REDACTED] of Coast Guard Sector New Orleans' Pollution Investigative (SEC NOLA PI) Team, issued McDonough a Notice of Federal Interest (NOFI) to clean up the spill.³ SEC NOLA PI team stated that the source of this discharge was unknown. They further stated that McDonough hired ES&H to conduct cleanup operations in the affected area.⁴

- 1. Description of removal actions performed:** The claimant, McDonough Marine Service (McDonough), discovered a 10' by 65' sheen of unknown oil near the bank at their barge repair facility in Harvey Canal. To protect their property and the property of others, McDonough deployed boom to in order to contain the released oil. They then reported the sheen to their OSRO, ES&H, who reported it to the NRC and other authorities.⁵

The claimant and the USCG agreed that ES&H would continue to clean up the site. ES&H places sorbent boom at the site until May 21, 2009, after getting approval from the USCG on May 20, 2009 to remove it. ES&H recovered ten 55-gallon drums of sorbent pads and sorbent boom which was used to remove the unknown oil and debris. Upon completion of the project, ES&H disposed of the contaminated materials and it was determined that the spill was mitigated.⁶

- 3. The Claim:** On July 16, 2009, McDonough Marine Service (McDonough) submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$6,389.78 for the services provided on May 18, 2009 and May 21, 2009. This claim is for removal costs based on the rate schedule in place at the

¹ See Sector New Orleans' Coast Guard Case # 472582 opened 9/14/2009

² See, NRC report # 905928, dated May 18, 2009

³ See Claim submission forms, submitted by McDonough Marine Service to the NPFC on 7/16/2009.

⁴ See Sector New Orleans' Coast Guard Case # 472582 opened 9/14/2009

⁵ See Claim submission forms, submitted by McDonough Marine Service to the NPFC on 7/16/2009.

⁶ See Claim submission forms, submitted by McDonough Marine Service to the NPFC on 7/16/2009.

time services were provided. A copy of the vendor rate schedule is provided in the claim submission.

This claim consists of copies of the invoicing and associated dailies, contracted rate schedule, NRC report #905928, ES&H Spill Response Notification Form, State of Louisiana Department of Safety & Corrections Unknown Responsible Party letter, a copy of the USCG Case # 472582, the Notice of Federal Interest (NOFI) as issued by the USCG, and internal email correspondence.

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;
- (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. The FOSC coordination has been established via USCG Case # 472582 along with email sent to Ms. [REDACTED] NPFC Claims Manager, from MST2 [REDACTED] dated 9/14/ 2009.⁷
2. The incident involved the 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 on time.
5. A Responsible Party could not be determined.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The Claims Manager confirmed that the claimant did in fact perform a joint site assessment with the USCG on May 18, 2009. The Claims Manager validated the costs incurred and determined they were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

⁷ See, Email dated September 14, 2009 from MST2 [REDACTED] NPFC

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$6,389.78 of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #909109-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of October 6, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$6,389.78 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #909109-001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

AMOUNT: \$6,389.78

Claim Supervisor:  

Date of Supervisor's review: 9/22/09

Supervisor Action: *Approved*

Supervisor's Comments: