CLAIM SUMMARY / DETERMINATION FORM

Date	:	2/18/2009
Claim Number	:	A08003-002
Claimant	:	National Response Corporation (NRC)
Type of Claimant	:	Private (US)
Type of Claim	:	Removal Costs
Claim Manager	:	[redacted]
Amount Requested	:	$1,815,199.13

FACTS:

1. Oil Spill Incident: At approximately 0748[1] on Wednesday, November 7, 2007, the container ship COSCO BUSAN cast off from Hanjin Terminal, Oakland Inner Harbor Berth 56, bound for sea. A San Francisco Bar Pilot was directing the movement of the vessel. The master, third officer, and an able seaman were on the bridge with the pilot. The third officer was operating the engine order telegraph and the able seaman was at the helm. The chief officer and the boatswain were on the bow, serving as lookout and prepared to drop the anchor. The master, as the senior person on the bridge, retained full authority for the safety of his vessel. Visibility at departure was less than one-quarter mile in fog, with reports from other vessels of heavy fog and restricted visibility in and around the Bay area. The visibility decreased when the vessel cleared the estuary[2] and entered the Bay. The tug REVOLUTION assisted the undocking, and at the direction of the pilot, put a line aboard the COSCO BUSAN through a center stern chock, where it remained until after the casualty and the COSCO BUSAN was anchored in Anchorage 7. As the vessel exited the estuary and proceeded outbound, the pilot ordered increases in engine RPM's until the vessel reached a speed of more than 11 knots. At 0827, a watchstander at Vessel Traffic Service (VTS) San Francisco contacted the pilot, Captain [redacted] because he noted the vessel's Automated Identification System (AIS) heading was about 235 degrees True, which is approximately parallel to the bridge, and was setting up to pass well southwest of the intended track. The watchstander asked the pilot to confirm his intention to use the Delta-Echo span of the San Francisco-Oakland Bay Bridge (Bay Bridge), and the pilot replied he was "…coming around. I'm steering 280 right now."

At 0830 the COSCO BUSAN, which was near its peak speed of 11.4 knots, allided with the fender system of the Delta Tower of the Bay Bridge, damaging the wood fender system and causing a breach in the port side shell, above the waterline, between frames 128 and 150. The breach was three meters in height and extended inboard to the longitudinal bulkhead, which was buckled and punctured in way of cargo hold #2. The breach affected water ballast tank #2, fuel oil tank #3, and fuel oil tank #4. Fuel oil tank #4 discharged an estimated 53,653 gallons of intermediate fuel oil (IFO 380). The discharge ended when the fuel oil level dropped below the lower edge of the breach, which was later estimated to have taken approximately 10 seconds. The pilot reported the allision to the VTS immediately and anchored the vessel in Anchorage 7 at 0855. Due to relatively limited under keel clearance in this location, the COSCO BUSAN departed Anchorage 7 at 1020 and moved to Anchorage 9, where it anchored at 1105. As

[1] All times are Pacific Standard Time (PST) and based on a 24-hour clock.
[2] "Estuary" refers to the Inner harbor Entrance Channel, ending approximately at Lighted Buoys "5" and "6".

of 5 January 2008 approximately 22,836 gallons of oil had been recovered, including 17,788 gallons in liquid form and 5,048 gallons of solid waste.

2. Description of removal actions performed: The claimant provided over 18 binders of invoices and supporting documentation to support the $1.8M in response costs claimed. The NPFC claims manager reviewed each and every submitted invoice as well as every “daily” sheet submitted to substantiate the invoices. The review of the actual costs, invoices and dailies focused on (1) whether the actions were taken to prevent, minimize or 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. The claims manager reviewed the payment record against the claimed costs for each contractor/subcontractor. See Enclosure (1) for the summary spreadsheet of vendors that make up this determination and amount allowed for each invoice submitted.

The COSCO BUSAN incident utilized several contractors (one being the claimant) as well as many subcontractors that worked under the main contractors. The claimant had contracted rate schedules in place at the time the services were rendered and the claimant billed costs in accordance with those published rate schedules. The claimant performed response activities for the responsible party from November 7, 2007 through June 3, 2008. It is important to note that the FOSC issued Polrep 56 and Final stating the incident was deemed completed on October 24, 2008.

3. The Audits: During the incident, the claimant provided response resources and services under its contract with Fleet Management, Ltd. The services provided by the claimant were acknowledged by the O’Brien’s Group (TOG), who acted as the Qualified Individual (“QI”) for the Responsible Parties. Specifically, the claimant submitted daily sheets to the QI that listed the labor and materials provided by the claimant for each day of the response. The QI approved the materials and labor identified on each daily by signing the document. Underneath each signature, the QI made the notation “subject to audit”.

During the response, a process was established for paying NRC’s invoices. Initially, NRC submitted its invoices to TOG. After the QI reviewed the invoice and was satisfied with the costs, the QI forwarded the invoice to Hudson Marine Management Service (“HMMS”) with a request that 80% of the invoice be paid after another review for mathematical errors or other significant errors. After paying 80% of the invoice, HMMS withheld the remaining 20% of the invoice pending a comprehensive audit. The comprehensive audit included both a Financial Audit and an Operations Audit. For the Financial Audit, HMMS focused on whether the paperwork was complete and the costs were properly supported. For the Operations Audit, HMMS focused on whether the costs were operationally reasonable and necessary.

If invoiced costs failed to meet the audits’ standards, then HMMS deducted those costs from the amounts previously withheld. Before any deductions were finalized, HMMS gave NRC an opportunity to dispute the initial findings. After the audit process was finalized, HMMS authorized some additional cost payments, but continued to deny more than $1.6 million in costs billed by NRC. Based on the Financial Audit, HMMS refused to pay $391,598.12 of the costs claimed by NRC. Relying on the Operations Audit, HMMS also denied $1,208,669 of NRC’s costs.

HMMS gave three different justifications for its denials of NRC's costs resulting from the Financial Audit. For Category A denials, HMMS reasoned that items had been invoiced without documentation. For Category B denials, HMMS concluded that the items were incorrectly invoiced or disputed. Category C denials included items that would be allowed upon submission of proper backup documentation.

With respect to the Operations Audit, HMMS denied costs determined to be unreasonable or unnecessary. The Operations Audit also denied costs determined by HMMS to be unverified or unconfirmed. In particular, the Operations Audit criticized NRC's costs for personal protective equipment (PPE), decontamination, and items of dispute that were categorized as "in decontamination" which references items that were moved to decontamination stations awaiting cleaning. HMMS found that some of the containment boom costs were unreasonable because NRC charged more than other response contractors and some of NRC's charges for use of the boom exceeded its replacement cost. HMMS also refused to pay some of the charges for skimmers because their assignments could not be confirmed in an Incident Action Plan (IAP) or other documentation. HMMS denied charges for PPE under the theory that the number of PPE invoiced did not correlate to the number of NRC personnel in the field. HMMS also denied costs for disposable overboots as unnecessary and personnel costs because they did not match manning levels shown in the IAP.

4. The Claim: On July 16, 2008, National Response Corporation (NRC) submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of $1,815,199.13 for the services provided from November 7, 2007 through June 3, 2008. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of all pertinent vendor rate schedules is provided in the claim submission.

This claim consists of copies of the invoicing and associated dailies, disposal manifests; contracted rate schedules, NRC report, Incident Action Plans, internal email correspondence, USCG Pollution Reports, and the RP submitted a complete copy of their Audit associated with NRC's invoicing. The review of the actual cost invoicing and dailies 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 consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented.

<u>APPLICABLE LAW</u>:

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". 33 USC § 2701 (31).

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 under the Federal Project by way of Incident Action Plans and USCG Pollution Reports.
2. The incident involved the discharge and continuing substantial threat of 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. Presentment of costs to the RP was made by the claimant, prior to the submission of the claim. The NPFC also made presentment of costs to the RP and the RP has provided a complete copy of their Audit of the response costs presented.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of 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 with the exception of denied costs itemized in the attached Summary of Vendors spreadsheet: (See, Enclosure 1 – Summary of Vendors).

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 response activities performed by the claimant were signed off by the Spill Management Team, The O’Briens Group. While the Incident Action Plans (IAPs) are helpful in corroborating actions taking place in the field at a given point in time and were utilized as part of the adjudication process, it is important to note that every action taken during response is not fully captured in IAPs or Pollution Reports. The claims manager also used the *‘Incident Specific Preparedness Review (ISPR) M/V Cosco Busan Oil Spill in San Francisco Bay’* generated on January 11, 2008 and final report generated on May 7, 2008, as an additional means of obtaining corroboration for some of the actions performed by the responders.

The NPFC has determined $504,643.95 of costs is denied. The itemized breakdown of denied costs is addressed in the attached NRC – Cosco Busan Summary of Costs excel spreadsheet identified as Enclosure 1. The overall denial summary is as follows:

NRC07-0969-01 –	denied $7,496.25
NRC07-0969-02 –	denied $95,967.43
NRC07-0969-03 –	denied $10,885.00
NRC07-0969-04 –	denied $4,816.75
NRC07-0969-05 –	denied $7,625.75

NRC07-0969-06 –	denied $583.00
NRC07-0969-07 –	denied $168.00
NRC07-0969SUP-01 –	denied $66,068.75
NRC07-0969SUP03 –	denied $36.16
NRC07-0969-01B –	denied $1,916.91
NRC07-0969-04B –	denied $55,884.00
NRC07-0969TP-01 –	denied $50.00
Interest -	denied $253,145.95

With respect to the above, NRC's claim for interest is denied because that amount is not a removal cost or damage compensable under OPA. Also, as detailed in Enclosure (1), NPFC agreed with some of the conclusions in the Financial Audit performed by HMMS and some of NRC's claimed costs have been denied for lack of documentation. However, because some of the costs denied by the Financial Audit were adequately documented, NPFC allowed some of the costs denied by the Financial Audit. With respect to the costs denied by the Operational Audit, NPFC finds that the credibility of the evidence submitted by NRC in favor of paying these costs outweighs the evidence submitted by the responsible party as justification for their denial. The costs denied by the Operational Audit were approved by TOG when its employee signed the claimant's daily sheets. Based on those signatures, NPFC finds that NRC has carried its burden of proving that it provided the services and materials listed on the daily sheets. One of the main purposes of a Spill Management Team like TOG is to confirm that the goods and services billed on a given day at a given location have been actually provided. Moreover, because the services and materials listed on the daily sheets were provided pursuant to a contract with negotiated rates, NPFC further finds that NRC has carried its burden of showing that the amounts claimed were reasonable and necessary. As a result, NPFC finds that NRC has carried its burden of proving its entitlement under OPA to the costs denied by the Operational Audit and those costs are approved.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur $1,308,228.69 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# A08003-002. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of, November 7, 2007 through June 3, 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 $1,308,228.69 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # A08003-002. 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 Claimants.

AMOUNT: $1,308,228.69

Claim Supervisor: [redacted]

Date of Supervisor’s review:

Supervisor Action:

Supervisor’s Comments: