

CLAIM SUMMARY / DETERMINATION FORM

Date : 1/7/2010
Claim Number : 910037-001
Claimant : Kens Marine Service Inc
Type of Claimant : Corporate (US)
Type of Claim : Removal Costs
Claim Manager : XXXXXXXXXX
Amount Requested : \$23,773.28

FACTS:

1. Oil Spill Incident: On July 5, 2005, a fire occurred at Advance Foils, Incorporated (Advanced Foils) at 800 Bond Street, Elizabeth, New Jersey. The fire began in the foil etching machine area which contained approximately 3 gallons of a mixture that contained toluene, xylene, and a wax mixture. The Elizabeth Fire Department (EFD) requested the assistance of the New Jersey Department of Environmental Protection Bureau of Emergency Response Region 1 (NJDEP BER) due to the potential for airborne hazardous materials. The fire spread to near by combustibles and then to the roof of the building before being contained and extinguished by the EFD. NJDEP BER and the Union County HazMat team performed air monitoring to check the air for hazardous chemicals, which revealed the risk to the public was minimal and did not require the evacuation of residents. NJDEP BER also worked with Advance Foils to mitigate the discharge of solvents from the building due to the fire and the run-off from the firefighting activities.

2. Description of Removal Activities for this claimant: The NJDEP BER instructed Advance Foils to hire a contractor for clean-up. The claimant was contracted to clean up and contain the firewater run-off, as well as install a temporary plywood sheeting roof to prevent rain from entering the building and to prevent additional run-off from entering the street and storm sewers.

3. The Claim: On November 18, 2009, the claimant, Ken's Marine Service, Incorporated (Ken's Marine), submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their uncompensated removal costs of \$23,773.28. As noted on the invoices, claimant seeks reimbursement for labor and equipment to respond to a spill at 800 Bond Street, Elizabeth, NJ Fire Damage for the vacuuming of fire fighting liquid from inside the building; repair and patching of holes in the roof resulting from the fire; and clean up of contaminated debris.

According to Ken's Marine's claim submission, they received a check in the amount of \$1,500.00 from Advance Foils for waste disposal on or about July 21, 2009. The claim was also submitted to the Paladin Adjustment Group LLC of Morganville, New Jersey. The Paladin Adjustment Group LLC is the insurance carrier of the GK&P Associates, the landlord of the building that houses Advance Foils. The Paladin Adjustment Group LLC agreed to take responsibility for payment of the charges regarding the roof repairs and roof related debris disposal in correspondence to the claimant on August 24, 2005 and September 7, 2005. They requested that the claimant forward an estimate for the roof repairs and a receipt for the disposal.

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. FOSC coordination was not provided for this claim.
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. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim to determine if the removal costs presented were for actions in accordance with the NCP and that costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 as set forth below.

B. Analysis:

The NPFC Claims Manager has 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, and (4) whether the costs were adequately documented and reasonable.

The claimant seeks reimbursement of its uncompensated removal costs for the clean up of the fire at Advance Foils that started in a metal etching machine that contained approximately three gallons of a toluene, xylene and wax mixture. The information provided in the claim submission, to include the NJDEP Investigation Report Number 05-07-01-1027-15, indicates that the claimant was hired by Advance Foils to provide a vacuum truck and personnel to clean up the firewater run-off and to put a roof back on the building.

The NJDEP Report documents that prior to the claimant’s arrival to the site, NJDEP BER placed sorbent booms near Bond and Division Avenue at the impacted storm drain-box to collect the machine oils and petroleum-based liquids (solvents) discharging into the storm drain system. According to the Report, the storm drain system eventually drained into the Elizabeth River and a visible oil sheen was detected on the fire run-off water’s surface. Upon the claimant’s arrival, more sorbents were deployed at the site.

The NJDEP BER Report describes the scope of work for the claimant as containing and vacuuming up all the firewater and foam from the both the inside and outside of the building; repairing the roof to prevent rainwater from entering the building; and removing and disposing of any fire damaged debris contaminated with solvent odors. The Report later documents that on July 2, 2005 NJDEP BER continued to supervise the claimant during the removal of all firewater run off and foam; that the remaining debris that was saturated with solvents was placed in a roll off container and left on site; and the roof was partially repaired and covered with poly tarps.

Claimant's Invoice # 05-622 has the job description of "Labor & Equipment to Respond to Spill @ 800 Bond Street, Elizabeth, NJ 'Fire Damage' 7/1/05 Vacuuming of Fire Fighting Liquid from inside Facility, clean up contaminated debris." On a revised version of page three of the invoice, the description notes the "disposal charges on one roll-off" of wood, metal piping and fire debris. That same page of the invoice described the charge as "disposal charges on 3500 gallons of firefighting water from the fire department." The Non-Hazardous Waste Manifest #05-272 denotes the 3500 gallons of fire fighting water was composed of 97% water and 3% fire fighting foam.

In summary, the total amount claimed for removal costs incurred is \$23,773.28. The NPFC hereby determines that the claim is denied because (1) the claimant failed to establish that the actions taken were performed under FOSC coordination in accordance with the National Contingency Plan (NCP), as required under 33 CFR 136.203 and 33 CFR 136.205; and (2) the claimant failed to establish that the actions taken were associated with the mitigation of a substantial threat of discharge of "oil" into navigable waters.

AMOUNT: \$0.00

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comment [REDACTED]