

CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/10/2009
Claim Number	: 910038-001
Claimant	: Atlantic Response Inc
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: ██████████
Amount Requested	: \$75,000.00

FACTS:

- 1. Oil Spill Incident:** On or about May 10, 2007, an unknown source of oil was found migrating into the Whippany River, a navigable waterway of the US. The oil was causing a heavy sheen. Upon notification, New Jersey Bureau of Environmental Response (NJ BER) met with representatives from Morris County HazMat, Whippany Fire Department and Police, Morristown and Erie Railway, and Southern Marine Equipment.

The discharge was determined to have originated from the Morris and Erie Railroad Rail Yard located at 66 South Jefferson Street in Cedar Knolls, New Jersey. Investigation revealed that Southern Marine Equipment (company that was leasing the rail yard) had been dismantling diesel locomotives and their saddle tanks, as reported by a representative of Southern Marine Equipment, Mr. ██████████.

Four saddle tanks on site were reported to have additional fuel oil left in them which had discharged from the tanks to the gravel railroad sub base. The oil migrated from the site to the storm drain system which carried the diesel fuel//home heating oil mixture to the Whippany River. The Morris and Erie Railroad, owner of the property, was instructed to immediately hire a contractor to conduct cleanup operations. Morris and Erie Railroad complied with the order and hired Atlantic Response to conduct cleanup of the Whippany River and the affected railroad property.

- 2. The Claim:** Claimant, Atlantic Response Inc., now presents this claim to the National Pollution Funds Center (NPFC) for reimbursement from the Oil Spill Liability Trust Fund (OSTLF) for their uncompensated removal costs associated with their response to this incident. Claimant seeks \$75,000.00 in reimbursement of the remaining removal costs associated with this incident that remains unpaid to date. The Claimant has made several demands for payment of the remaining balance which Morristown & Erie Railroad has failed to pay.
- 3. Litigation:** As a result of Morristown & Erie Railroad's failure to pay the Claimant, on or about March 3, 2008, the Claimant filed an action in the Superior Court of New Jersey, Docket No. MID-1736-08, against Morristown & Erie Railroad, Inc and G.R. Fuller, individually for the balance owed on Atlantic Response's invoices in the amount of \$100,000.00.

Following the filing of the Claimant's lawsuit against Morristown & Erie Railroad (the firm that hired the Claimant to perform emergency response), a subsequent Third Party Complaint was filed on or about April 15, 2008 by Morristown & Erie Railroad

against Southern Marine Equipment Co., Inc. and Wholesale Power, Inc. via Docket No. L-1736-08. In the third party complaint it states that on or about March of 2007, Wholesale Power purchased certain railroad equipment and/or locomotives for decommissioning and salvage from Morristown & Erie Railroad. The salvage equipment and/or locomotives were located at a property owned and used by Morristown & Erie Railroad and was/is adjacent to the Whippany River.

The complaint further alleges that upon information and belief, on or about May of 2007, Wholesale Power hired and/or contracted with Southern Marine to reduce, decommission and salvage the subject equipment and/or locomotives, which remained located on Morristown & Erie Railroad's property. On May 9, 2007, in the course of their salvage operations, employees and/or agents and/or representatives and/or subcontractors of Southern Marine, on behalf of Wholesale Power, purged and discharged fuel tanks from the locomotive engines that contained residual fuel directly to the ground instead of containing the petroleum product.

The resulting liquid mixture of diesel fuel and water percolated directly into the subsurface of the ground. However, due to the volume of water utilized, some of the liquid mixture flowed across the ground surface, entered a storm drain, and was eventually discharged into the Whippany River. As a result of the incident, local and state authorities arrived onsite and investigated the matter and directed immediate environmental remediation of the area.

Morristown & Erie Railroad immediately requested Atlantic Response, Inc. to perform all remediation efforts and activities. Upon learning of the incident, Morristown & Erie Railroad contacted Southern Marine who verbally agreed to pay and/or reimburse Morristown & Erie Railroad for all remediation costs. Southern Marine did not pay and/or reimburse Morristown & Erie Railroad for all remediation costs. Southern Marine did however pay and/or reimburse Morristown & Erie Railroad for the first invoice from Atlantic Response, Inc. in the amount of \$26,329.53.

Thereafter, Southern Marine refused to pay and/or reimburse Morristown & Erie Railroad for the remaining remediation costs in the amount of \$228,897.94. Additionally, Morristown & Erie Railroad was required to reimburse the County of Morris the sum of \$1,825.32 for their hazardous response team's efforts.

As such, Morristown & Erie Railroad demands that judgment be entered in its favor against the Third Party Defendants Southern Marine Equipment Co. and Wholesale Power, Inc., jointly, severally and individually, in the amount of \$230,723.26.

On or about August 15, 2008, a Settlement Agreement and Release was made by and between the Claimant, Atlantic Response, Inc., Morristown & Erie Railroad, Inc., [REDACTED], Southern Marine Equipment Co., Inc., and Wholesale Power, Inc.

The terms of Settlement Agreement state that a twenty five thousand dollar (\$25,000) payment is due within thirty (30) days of the date of last execution of the Agreement; twenty five thousand (\$25,000) within sixty (60) days of the effective date; twenty five thousand (\$25,000) within ninety days of the effective date; and twelve thousand five hundred (\$12,500) within one hundred and twenty (120) days of the effective date.

In accordance with the above stated payment provisions, Southern Marine and Wholesale Power, jointly and/or severally, shall issue each payment made payable to Atlantic Response, Inc. and directed to Claimant Counsel. The Agreement further states that in the event that Southern Marine and Wholesale Power, jointly and/or severally, fail to timely make any of the payments listed above, and upon written notice thereafter given to Southern Marine and Wholesale Power, that they will jointly and/or severally, have a grace period of five (5) business days from the date of receipt of such notice to make the overdue payment.

If Southern Marine and Wholesale Power, jointly and/or severally, fail to make such payment within the five (5) business day's grace period, Atlantic Response, Inc. and/or Morristown & Erie Railroad shall be entitled to enter judgment by confession against Southern Marine and Wholesale Power.

The Settlement Agreement has a 'Dismissal' clause that states after receipt by Atlantic Response of the first payment as specified in the payment terms, and in reliance upon full compliance by the Parties with the terms of the Agreement, the Parties agree to file, in both the State Court Action and the Federal Court Action, Stipulations of Dismissal, with prejudice and without costs.

The Claimant has provided a copy of a Stipulation of Dismissal filed in the Superior Court of New Jersey, Docket No. L-1736-08, whereby Atlantic Response states the matter in difference having been amicably adjusted by and between the Plaintiff and the Defendants and the Third Party Plaintiff and Third Party Defendants, pursuant to the terms of a Settlement Agreement and Release, it is stipulated and agreed that the same be and is hereby dismissed, *with prejudice*, and without costs as against any party.

APPLICABLE LAW:

Under the Oil Pollution Act of 1990 (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. Removal costs are those "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, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC 9601) and which is subject to the provisions of that ACT".

The Oil Spill Liability Trust Fund (OSLTF) 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.

33 USC § 2712 (f), which is entitled "Rights of Subrogation," provides:

Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

33 USC § 2715, which is entitled “Subrogation” provides:

(a) In general

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

(c) Actions on behalf of Fund

At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this Act, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any responsible party or (subject to section 2716 of this title) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid. Such an action shall be commenced against the responsible foreign government or other responsible party to recover any removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit.

Under 33 USC §2713(a) all claims for removal costs or damages, with exceptions not applicable here, shall be presented first to the responsible party or guarantor of the source designated.

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), which state in pertinent part, “the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.”

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing 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.”

Moreover, 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].

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. This is a de novo review. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

DETERMINATION OF LOSS:

Preliminary Issue Resolution

1. FOSC coordination was made with SOSC, NJDEP
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 USC § 2701(23), to navigable waters. The discharge of fuel oil is confirmed in the SOSC Investigation Report – Case # 07-05-09-1950-14.
3. In accordance with 33 CFR § 136.103(a), presentation to the RP has been satisfied.
4. The claim was submitted within the statutory time limitation.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim.

Determination

The NPFC hereby determines that this claim should be denied for the following reasons:

1. Under 33 USC 2713(c), the claimant has ELECTED to pursue the responsible party(s) for compensation through a court of law. The claimant’s case was heard by the Court as evidenced by all court documents and covenants provided. The NPFC determines that the claimant chose to exercise its rights via civil action and therefore is ineligible for compensation by the Fund since compensation was awarded by way of a Settlement Agreement and Release. Section 2713(c) states that a claimant may commence an action in court against the RP **or** present his claim to the Fund. It does not say he may sue the RP **and** present his claim to the Fund.