

CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/14/2010
Claim Number	: 910107-001
Claimant	: Miller Environmental Services, Inc.
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$10,014.41

FACTS:

1. Oil Spill Incident: On November 13, 2009, Miller Environmental Services, Inc. (Miller Environmental) responded to a spill incident of tar balls and tar mats discovered on the Padre Island National Seashore (PINS). PINS is located on the Gulf of Mexico, a navigable waterway of the United States. Initially, the tar balls and tar mats were suspected to be from the October 20, 2009 oil spill incident from the vessel *Krymsk*. The Texas General Land Office (TGLO), under the direction of ██████████, activated the Tar Ball Site Safety Plan from the vessel's Incident Action Plan (IAP). However, after an oil analysis, it was determined that the tar balls and tar mats were not from the vessel *Krymsk* incident therefore the suspected responsible party is unknown.

2. Description of Removal Activities for this Claim: As contracted under their Basic Ordering Agreement (BOA), O'Brien's Response Management (OOPS) provided on site management of the Tar Ball Plan and contacted Miller Environmental to clean up the tar balls on the beach, as directed by the Coast Guard. They worked to remove the tar balls on November 13, 2009 and November 14, 2009 and completed the clean-up on December 9, 2009 when disposal was performed.

A supervisor was deployed on the first day, as well as the second day, with nine technicians for the clean-up. One operator was deployed for the disposal operations.

3. The Claim: On May 24, 2010, the Claimant submitted a removal cost claim in the amount of \$10,014.41 to the National Pollution Funds Center (NPFC) for reimbursement for their uncompensated response costs.

The claim consists of the Miller Environmental incident billing summary, work invoice, dailies, BOA rate schedule agreed upon by United States Coast Guard MLCLANT and Miller Environmental, waste manifest, and invoices for the roll-off box rental.

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. Findings:

1. FOSC coordination has been established via the Federal project that was opened for this case..
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 and determined that the majority of the 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 as set forth below.
6. The review of the actual costs, invoices and dailies focused on the evaluation of whether such costs qualify as “Compensation Allowable” under 33 CFR§ 136.205.

B. Analysis:

The NPFC Claims Manager has reviewed the actual cost invoices and daily work documentation 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 Claim's Manager's review of the cost documentation revealed charges inconsistent with the rate schedule. The claimant will be compensated for removal costs based on the rate schedule provided with the rate submission. According the rate schedule (page 8 of 74), the “rate that results in the lowest aggregate amount shall apply” with regards to items that can be billed hourly, daily, weekly or monthly. On Friday, November 13, 2009, the truck was billed at \$150.00 for the 5.5 hours it was used that day. However, at the hourly rate of \$20.00 per hour, the cost of the truck would have been \$110.00. Claimant will be compensated at the \$20 per hour billing rate. The amount denied for the truck is \$40.00

According to the Claimant’s invoice for personnel hours worked on Saturday, November 14, 2009, Technician (Tech) David Simpson worked 9.5 hours of overtime at the rate of \$52.50 per hour. However, the rate schedule lists the overtime rate schedule for a technician working on an oil spill at \$45.00 per hour. The Claimant will be compensated for the 9.5 hours work of Tech Simpson at that rate for a total of \$427.50. Techs Daniel James, Jose Tinoco, Jaime Inocencio, Joel Sandoval, Paul Morales, Andrew Alvarado, Brian Clayton and John Deleon were also billed at the overtime rate of \$52.50 per hour for the 9.0 hours that each of them worked at the incident site. Based on the rate schedule, Claimant will be compensated for their work at the \$45.00 per hour overtime rate. The work for the eight techs will be compensated at \$405.00 each, for a total of \$3,240.00. The total amount denied for the overtime work of all technicians is \$611.25.

Claimant's invoice lists the price for the services of US Ecology Texas, Incorporated (US Ecology) for disposal at \$1,168.41. The US Ecology invoice lists the actual cost for services at \$1,016.01. The rate schedule provided does not allow for a 15% mark-up (\$152.40) for subcontractors by the Claimant. Therefore, the Claimant will be compensated in the amount of \$1,016.01. The \$152.40 for the mark-up is denied.

Based on the NPFC's review, the NPFC determines that the OSLTF will pay \$9,210.76 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim# 910107-001.

C. *Determined Amount:*

The NPFC determines that the OSLTF will pay \$9,210.76 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim# 910107-001.

AMOUNT: \$9,210.76

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *6/30/10*

Supervisor Action: *Approved*

Supervisor's Comments: