

CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/15/2010
Claim Number	: 910119-001
Claimant	: Metropolitan Marine Solutions
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$36,610.00

FACTS:

Oil Spill Incident: On the evening of December 7, 2009 at approximately 9:45pm, Metropolitan Marine Solutions (MMS) was notified by Security Officer ██████████ at Lake Mohave Resort reporting a house boat that was sinking. MMS responded to make an initial assessment. MMS discovered a 46 foot houseboat that was actively sinking at the time of assessment. MMS reported that the smell of gasoline was very strong and surface sheen was observed. The Assistant General Manager of the Mohave Resort, Mr. ██████████, tried to secure the boat to the dock in order to slow the sinking.

MMS secured the vessel the best they could during initial assessment and then spoke with a neighbor who reported that they had seen someone in the boat at about 8:00pm. After speaking with the neighbor for only a few moments, MMS advised Mr. ██████████ that they would return first thing in the morning to at least deploy containment boom. MMS then went to the mooring office in order to obtain owner information since each vessel typically has insurance and a slip contract with the marina. MMS received the information on the vessel owner and after they left the office, Mr. ██████████ called the vessel owner and left a message. After an unsuccessful attempt at reaching the vessel owner, Mr. ██████████ called the insurance company to advise of the vessel's current situation. MMS felt confident that the vessel had insurance therefore they returned to their office and prepared to dispatch a response crew the following morning.

Description of removal actions performed: The claimant, MMS, arrived on-site on December 8, 2009. MMS called the vessel owner again at 630am on December 8, 2009 prior to their arrival at the incident scene and Mr. ██████████ advised MMS that he was a school teacher and could not be on scene until later that day. Mr. ██████████ informed MMS that he had insurance with Progressive. Upon arrival, MMS discovered that the vessel sank further and had rolled to its port side. MMS reported that fuel and oil products were everywhere in the water so MMS immediately deployed 24" boom. Divers began gearing up for an underwater assessment while Mr. ██████████ tried contacting Progressive Insurance.

Upon initial notification to Progressive Insurance, MMS was told by the claims department that "nothing is authorized at this time". MMS began to remove underwater ropes, snags, and diver safety hazards in preparation of stabilizing the vessel. MMS called the NRC to report the incident and received report # 925553. Later in the day, Progressive Insurance's adjuster called Mr. ██████████ and advised there was no coverage on the vessel due to the fact that Mr. ██████████ did not buy the policy until after the vessel had sunk at 8-9pm the previous evening. Progressive advised that the policy was purchased online at about 11pm the previous evening.

Upon MMS' receipt of this information regarding insurance coverage, Mr. ██████ called Mr. ██████ who advised he could not pay for the response. MMS reported that while speaking to Mr. ██████ he admitted to being on the vessel the night before. MMS then contacted United States Environmental Protection Agency (USEPA) Region 9 at 415-947-8000. MMS spoke with ██████ who referred them to the Arizona Department of Environmental Quality. Later in the day, Law Enforcement Rangers came back to the scene to check on the progress of the response. MMS advised of the payment scenario so the Rangers advised that they would issue an "Order to Remove" in the morning and since MMS had stabilized the vessel, they departed the scene for the evening.

By the morning of December 9, 2009 when MMS arrived back to the scene, they found the vessel had absorbed water up the walls, in the carpets, drywall, and insulation and had over weighted the stabilizer bags MMS set the previous day. By midday, the MMS crew was making headway as the vessel was steady and no product had been released from the vessel. MMS then reports they heard a loud noise and the vessel began to list as one of the steel airbag clips gave way. MMS rigged the vessel again and added several more lift bags and the vessel was again stable. By mid to late day, MMS was able to tow the vessel with boom over to a preplanned removal area where the vessel was moved onto a concrete ramp.

With the vessel sitting right next to the dock, MMS could see fuel spilling out of the fuel tank on the rear of the vessel. MMS called Park Service Dispatch and requested a Ranger to respond. Officer ██████ arrived and MMS pointed out the fuel that was leaking out the tank. Contact was made with Mr. ██████ n who later agreed to pay the bill despite his insurance dilemma. MMS departed the scene for the evening.

On December 10, 2009, the Resort General Manager Mr. ██████ brought down a transport trailer and a fork lift. The process of moving the flooded vessel onto dry land was burdensome but completed. The vessel was rusty and broken and fell into pieces as it was being removed from the water. The resort crew raised the vessel, cribbed it and got it on a trailer. The vessel was moved to a storage area where it presently sits.

MMS' crew performed cleanup after the vessel was gone. MMS reported that the containment area was choked down and product was picked up with absorbent booms.

The Claim: On June 22, 2010, MMS submitted a removal cost claim to the National Pollution Funds Center (NPFCC), for reimbursement of removal costs in the amount of \$36,610.00 for the services provided from December 7 – 10, 2009. This claim is for removal costs based on the rate schedule in place at the 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, a copy of revised invoices and dailies, a copy of NRC Report # 925553, a detailed description of activities performed, field notes, a copy of the insurance letters and documents, photographs and internal email correspondence.

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.

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 incident involved the report of a discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
2. 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.
3. The claim was submitted within the 6 year statute of limitations for removal costs.
4. The claimant has presented costs to the Responsible Party which to date have not been paid.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that some 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.

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 has reviewed the documentation submitted with the initial claim and the additional information submitted later by the Claimant. It is important to note that the Claimant originally requested \$36,610.00 but when he submitted additional information in support of his claim, the invoice and associated daily costs were revised which the Claimant has failed to establish whether the increased costs and revised invoices were ever properly presented to the RP as required by 33 CFR § 136.103(c)(2). Since the Claimant has failed to establish that the revised invoices were properly presented to the RP, the NPFC is adjudicating this claim based on the original invoiced amounts.

On July 20, 2010, Ms. [REDACTED] of the NPFC had a phone conversation with Mr. [REDACTED] of MMS (Claimant) whereby Mr. [REDACTED] stated that his personnel have not been paid for the services they have provided. He informed the NPFC that he has an agreement with his workers that they get paid when he gets paid therefore without proof of payment from Mr. [REDACTED] for the personnel he has invoiced, payment is denied as an unsupported uncompensated removal cost although the daily labor charge for Mr. [REDACTED] is approved as he

is the owner of the business and has billed his time in accordance with the rate schedule provided.

Daily breakdown of costs:

12/7/09

Mr. [REDACTED] labor charge on 12/7/09 approved is \$243.75 and Mr. [REDACTED]'s labor charge for 12/7/09 is denied as no proof of payment for his services has been provided therefore \$243.75 for Mr. [REDACTED] is denied.

12/8/09

Mr. [REDACTED] labor charge on 12/8/09 in the amount of \$997.50 per the original invoice presented to the RP is approved and the labor charge for Mr. [REDACTED] as master diver in the amount of \$997.50 and the labor charge for Mr. [REDACTED] as technician in the amount of \$682.50 are denied as no proof of payment for their services has been provided.

The NPFC has determined that the claimant has properly billed and itemized the cost of the utility truck and trailer in the amount of \$472.50. The claimant has bulk billed the following items on 12/8/09 which are not properly documented when compared to the description of activities provided by the claimant therefore these costs are denied: (1) environmental spill response billed at 46 ft times \$165.00 hr = \$7,590.00; (2) environmental recovery/source removal billed at 46 ft times \$175.00 = \$8,050.00 for a total denied of \$15,640.00; the recovery vessel run time billed at 10.5 hrs @ \$185.00 hr = \$1,942.50; and the tow vessel run time at 10.5 hrs @ \$185.00 = \$1,942.50 are approved.

12/9/09

Mr. [REDACTED]'s labor charge on 12/9/09 in the amount of \$950.00 per the original invoice presented to the RP is approved and the labor charges for [REDACTED] as master diver in the amount of \$950.00 is denied for no proof of payment; the labor charge for [REDACTED] as support diver in the amount of \$950.00 is denied for no proof of payment; and the labor charge for [REDACTED] as technician in the amount of \$650.00 is denied for no proof of payment therefore the total labor denied is \$2,550.00.

The NPFC has determined that the charges for the recovery vessel run time at 10 hrs @ \$185.00 hr = \$1,850.00 and the tow vessel run time @ 10 hrs @ \$185.00 hr = \$1,850.00 are billed in accordance with the rate schedule on a portal to portal basis and approved for the total amount of \$3,700.00.

12/10/09

Mr. [REDACTED]'s labor charge of \$712.50 per the original invoice presented to the RP is approved and the labor charges for [REDACTED] as master diver in the amount of \$712.50 is denied for no proof of payment; the labor charge for [REDACTED] as support diver is denied for no proof of payment; and the labor charge for [REDACTED] as technician in the amount of \$487.50 is also denied as no proof of payment. The total denied in labor charges = \$1,912.50.

The NPFC has determined that the charges for the recovery vessel run time at 7.5 hrs @ \$185.00 hr = \$1,387.50 and the tow vessel run time @ 7.5 hrs @ \$185.00 hr = \$1,387.50 are billed in accordance with the rate schedule on a portal to portal basis and approved. The

utility truck and boom trailer are properly documented and billed in accordance with the rate schedule therefore the charge of \$337.50 is approved. The charges for dive equipment cleaning in the total amount of \$510.00 is denied as there is no documentation to support the charge and the charge is not listed as part of the rate schedule.

C. Determined Amount:

The NPFC determines that the OSLTF will pay \$14,073.75 as full compensation for the OPA compensable reimbursable removal costs incurred by the Claimant and submitted to the NPFC under Claim Number 910119-001.

AMOUNT: \$14,073.75

Claim Supervisor:

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: