

CLAIM SUMMARY / DETERMINATION FORM

Date	: 8/31/2010
Claim Number	: 910121-001
Claimant	: Metropolitan Marine Solutions
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$5,005.00

FACTS:

- 1. Oil Spill Incident:** On September 20, 2009, the boat "Ski Supreme," belonging to Mr. [REDACTED], crashed into rocks in the Colorado River, on the Arizona side near Jack Smith Marina, a navigable waterway in the US. Mr. [REDACTED] with Metropolitan Marine Solutions (MMS) responded to recover the sunken vessel and to remove any oil, fuel and contaminants present in the water. The vessel was leaking pollutants, and had the potential to leak fuel. Mr. [REDACTED] was named as the Responsible Party (RP).
- 2. Description of removal actions performed:** The claimant, MMS, arrived on-site on September 20, 2009. Upon arrival, MMS deployed absorbent boom around the work area of the vessel to minimize any pollutants that escaped due to the moving of the vessel. MMS then worked to remove the vessel, transporting it successfully from the waterway.
- 3. The Claim:** On June 22, 2010, MMS submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$5,005.00 for the services provided on September 20, 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, State of California Notary Public Certificate of Acknowledgement forms, a copy of the Mohave Valley Sheriff's Report for this incident, a copy of the Vessel Assist incident report, 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 FOOSC, 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. An attempt was made to contact the Responsible Party by the NPFC but the letter was returned as undeliverable.

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 FOOSC, to be consistent with the NCP or directed by the FOOSC, and (4) whether the costs were adequately documented and reasonable.

The Claims Manager has been unable to confirm whether the costs claimed were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP). FOOSC oversight was not present during this response and the record does not support that the salvage response was an appropriate activity.

MMS claims a total of \$5,005.00 in uncompensated removal costs. However, there are some issues with this claim. First, while it could be argued that an OPA event occurred although the record does not demonstrate by a preponderance of the evidence that a substantial threat of discharge existed nor is there any evidence of how much fuel was aboard the vessel at the time of the incident. The claim documentation does not indicate whether any oil actually spilled although the Claimant has provided a disposal manifest for 1 drum which covers debris from more than one response as described by the Claimant to the NPFC. Additionally, disposal was not performed until July 22, 2010, some 10 months after the fact.

Second, the costs for the “Additional Divers,” at a rate of \$95.00 per hour, are not listed in rate schedule provided with the claim and it is not evident the additional personnel were needed. Third, the disposal manifest provided is for multiple jobs over the course of multiple years. The Claimant is unable to provide sufficient evidence that what was disposed of pertains to this particular response and waiting 10 months to perform disposal is not consistent with the NCP.

Finally, during a phone conversation the NPFC had with Mr. [REDACTED] on Thursday, July 24, 2010, Mr. [REDACTED] advised that his workers do not get paid until he gets paid therefore it is not clear that the Claimant has uncompensated removal costs associated with his response personnel without proof of payment to individuals. Based on the totality of the information, this claim is denied.

C. Determined Amount:

The NPFC hereby determines that the claim is denied for the following reasons: (1) no FOSC coordination in accordance with 33 CFR §136.203 & 205; (2) no evidence that the incident posed a substantial threat of discharge to navigable waters as determined by the FOSC; (3) insufficient evidence to support the claim in accordance with 33 CFR §136.105(e)(6); (4) proof all costs are uncompensated as the Claimant has failed to provide substantiation of payment to the response personnel associated with this response; and (5) claimant's documentation is lacking to support proper disposal in accordance with the NCP.

AMOUNT: \$0.00

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *9/7/10*

Supervisor Action: *Denial approved*

Supervisor's Comments: