CLAIM SUMMARY / DETERMINATION FORM

Date	:	5/28/2010
Claim Number	:	A08003-003
Claimant	:	Marine Pollution Control
Type of Claimant	:	OSRO
Type of Claim	:	Removal Costs
Claim Manager	:	[redacted]
Amount Requested	:	$103,872.37

FACTS:

1. ***Oil Spill Incident:*** At approximately 0748[1] on Wednesday, November 7, 2007, the container ship COSCO BUSAN cast off from Hanjin Terminal, Oakland Inner Harbor Berth 56, bound for sea. At 0830 the COSCO BUSAN allided with the fender system of the Delta Tower of the Bay Bridge, damaging the wood fender system and causing a breach in the port side shell, above the waterline, between frames 128 and 150. The breach was three meters in height and extended inboard to the longitudinal bulkhead, which was buckled and punctured in way of cargo hold # 2. The breach affected water ballast tank #2, fuel oil tank #3, and fuel oil tank #4. Fuel oil tank #4 discharged an estimated 53,653 gallons of intermediate fuel oil (IFO 380). The discharge ended when the fuel oil level dropped below the lower edge of the breach, which was later estimated to have taken approximately 10 seconds. The pilot reported the allision to the VTS immediately and anchored the vessel in Anchorage 7 at 0855. Due to relatively limited under keel clearance in this location, the COSCO BUSAN departed Anchorage 7 at 1020 and moved to Anchorage 9, where it anchored at 1105. As of 5 January 2008, approximately 22,836 gallons of oil had been recovered, including 17,788 gallons in liquid form and 5,048 gallons of solid waste.

2. ***The Claim:*** On May 7, 2009, Marine Pollution Control (MPC) submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of $103,872.37 for the services they provided as a subcontractor to Marine Spill Response Corporation (MSRC) from November 7, 2007 through November 30, 2007.

   This claim consists of daily field logs as subcontractor to MSRC, third party invoices, third party receipts, and correspondence from the Qualified Individual for the incident, internal emails and correspondence, surveyors report, and the RP submitted a complete copy of their audit and associated documentation for MPC's claimed costs. The review of the actual cost invoicing and dailies from the claimant 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.

[1] All times are Pacific Standard Time (PST) and based on a 24-hour clock.

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 FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports for the incident response.
2. The incident involved the discharge and continuing substantial threat of 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. Presentment of costs to the RP was never made by the Claimant MPC, prior to the submission of the claim. The NPFC did make presentment of costs to the RP and the RP has provided a complete copy of their Audit of costs presented.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that this claim is denied in part as the claimant has failed to meet its burden of proof in providing sufficient evidence to support the claim in accordance with 33 CFR §136.105(a) and 33 CFR §136.105(e)(6) as it pertains to the repairs to three vessels for which damages are claimed. Additionally, the claim is denied in part because the claimant has failed to make proper presentment to the RP for the following claimed costs: (1) lodging in the amount of $10,647.65; (2) food and meals in the amount of $3,636.44; (3)vehicle rental in the amount of $4,549.30; (4) fuel in the amount of $1,232.57; (5) damaged equipment that was replaced in the amount of $4,418.28 for lines, vests, and float jackets; (6) vessel fuel in the amount of $3,739.51 when the vessels were in dry dock and (7) gear box replacement for the Sponge in the amount of $9,300.00 for a total of $37,523.75 in costs not presented to the RP as required in accordance with 33 CFR §136.103(a) prior to submitting their claim to the NPFC.

B. *Analysis:*

The NPFC reviewed the actual cost invoice and executed purchase request form to confirm that the Claimant had incurred the costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA, and the claims regulations at 33 CFR Part 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 Claimant MPC stated that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident for the time period of November 7, 2007 through November 30, 2007 when MPC worked as a subcontractor to Marine Spill Response Corporation (MSRC). The Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

The NPFC Claims Manager has reviewed the claimant's documentation and determined that the claimant has failed to submit sufficient evidence to support its claim. The NPFC requested additional information from the claimant on September 3, 2009 and to date has never received a response to that request. Additionally, the NPFC notified the Responsible Party (RP) that the NPFC received a claim from MPC. On December 22, 2009, Hudson Marine Management, on behalf of the RP, submitted an audit to the NPFC regarding the claim submitted to the NPFC by MPC.

As detailed in Enclosure (1), the NPFC reviewed the detailed comments in the Financial Audit performed by the RP's auditor, Hudson, and has determined that the information obtained and provided to the NPFC in support of the RP auditor's denial of the MPC claim with respect to the $75,648.62 associated with repairs to the claimant's three vessels has merit. After the RP's auditor, Hudson, sent a marine surveyor to Bay Marine Boat Works on or about December 4, 2007, to survey the reported damages claimed by Marine Pollution Control.

Following the damage survey, the RP auditor contacted the Qualified Individual (QI), Mr. [redacted], The O'Brien's Group (TOG), in order to confirm whether or not the Unified Command had ordered beach landings which the claimant contends was the proximate cause of the damages sustained. TOG replied to Hudson's inquiry on March 6, 2008 and confirmed (1) [redacted] who was the Division Supervisor for TOG at the time of the response, had ordered the Master of the respective Landing Crafts to provide services within the capacity of the vessel(s) under his control; (2) when did the vessels actually beach themselves, the QI advised that they never beached themselves but rather were under the direct supervision of the Master on board and were used to offload equipment and personnel in support of shoreline operations throughout the operations plan ICS 204 located within the Incident Action Plan (IAP) for the work area assigned; (3) what operations were occurring and where as it pertains to the Landing Craft and the QI reported that it was during shoreline cleanup, per the tactical strategy as stated in the ICS 204 Field Assignment Sheet and it occurred in various points along the shoreline and at the sole discretion of the Landing Craft Master and not designated by the O'Brien's Division Supervisor; (4) the QI was asked what was said and by whom when the Landing Craft was asked to provide services and the QI said that the operational request was made by the O'Brien's Operational Supervisor either in person or over VHF radio; (5) the QI was asked did anyone see any of the claimed damages and he advised that no alleged damages were seen during the actual operations and/or in the decontamination phase of the vessels; (6) the QI was asked if there were any written protocols established by the Incident Command concerning the manner and place vessels were to be tied and he advised no, that it was the Master's responsibility for securing his vessels during both day and night operations.

Based on the foregoing information, the NPFC has determined that MPC has failed to meet its burden of proof by a preponderance of the evidence that the vessels sustained damage as a result of the oil spill. Based on the minimal information provided by MPC and the additional information gathered and provided for by the RP auditor in response to the NPFC claim submission, the NPFC has determined that MPC has not established that the damages were not (1) a result of the Masters' actions since the vessel(s) were under their control or (2) that the damages were not considered normal wear and tear based on the fact that the vessels had no reported damages during the decontamination phase and based on the surveys performed by the RP auditor's surveyor after the fact when compared to the damage repair estimates provided by MPC.

Finally, the claims regulation requires a claimant to present all costs and damages to the RP before they can be presented and paid by the NPFC. MPC has failed to present $28,223.75 of their costs to the RP first therefore those costs are denied.

<u>AMOUNT</u>: 0.00

Claim Supervisor: [redacted]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: