

CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/23/2010
Claim Number	: J07008-001
Claimant	: Homeward Bound Charters
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$54,847.50

FACTS:

- 1. Oil Spill Incident:** The United States Coast Guard Sector Anchorage Case # 341722,¹ reports that on March 18, 2007, the F/V Exodus Explorer grounded and sank in approximately 6 fathoms of water at Gannet Rocks in Kuluk Bay, while transiting back into Adak Harbor, both which are navigable waterways in the US. The vessel was carrying 2500 to 3000 gallons of diesel fuel. There was a visible oil sheen emitting from the semi-submerged vessel, which was upside down and approximately 100 yards from shore. A local bow picker retrieved all passengers from the vessel's raft and brought them back into Adak.²

The incident was reported to the National Response Center (NRC) on March 18, 2007 at approximately 11:25 AM local time via report # 829533 by Mr. ██████████ of B and N Fisheries (B & N), the named responsible party (RP).³ Hudson Marine Management Services—hired by the insurer of the RP-- hired the claimant, Homeward Bound Charters (HBC) to observe and respond as necessary to the spill-site.⁴

The USCG Sector Anchorage issued a Notice of Federal Interest to B & N, advising it was the RP.⁵ HBC did present their costs to Hudson before submitting their claim to the NPFC; however, Hudson informed HBC that they did not agree with the invoicing for the spill cleanup. To date, the RP has not produced any evidence that it (or its insurer/P & I Club) paid either the contractor, Hudson, or the sub-contractor, HBC.

- 2. Description of removal actions performed:** HBC arrived on-scene to provide assistance in pollution mitigation and logistical support for the salvage efforts led by T & T Marine Salvage, Inc. HBC was compensated for its efforts by T & T Marine Salvage, Inc. from March 20 through April 7, 2007. Beginning April 8, 2007, HBC was under direct contract with Hudson Marine Management Services, the Spill Management Team (SMT) for the RP. According to written documents submitted by Mr. ██████████ to CAPT ██████████,⁶ Hudson sub-contracted the M/V Homeward Bound to perform waterborne surveys of the wreck and adjacent area several times a week, with the

¹ See Sector Anchorage's Coast Guard Case # 341722 opened 3/18/2007

² See ADEC SITREP # 1, dated 3/19/2007

³ See NRC report # 829533, dated 3/18/2007

⁴ See letter from Mr. ██████████, Hudson, to CAPT ██████████, USCG COTP, dated 4/11/2007

⁵ See NOFI, signed by MST1 ██████████ (Then, MST3), issued 3/18/2007

⁶ See letter from Mr. ██████████, Hudson, to CAPT ██████████, USCG COTP, dated 4/11/2007

observed conditions recorded. HBC was also to perform additional runs as the situation warranted.

- 3. *The Claim:*** On April 28, 2010, Homeward Bound Charters submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$54,847.50 for the services provided from April 8, through May 24, 2007. 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 MISLE Case # 341722, a copy of NRC Report # 829533, copies of POLREPS # 1-4, copies of the State of Alaska SITREPS # 1-5, a copy of the NOFI issued to B&N Fisheries Company, a copy of the witness statement written by Capt. [REDACTED] of B&N, 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 FOSC coordination has been established via Sector Anchorage’s Case Report # 341722.⁷
2. The incident involved the report of a 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’s representatives (Hudson) was made by the claimant, prior to the submission of the claim. The NPFC also notified the RP of the claim submission to the NPFC and, to date, the NPFC has received no response.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that all 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.

⁷ See Sector Anchorage’s Coast Guard Case # 341722 opened 3/18/2007

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 confirmed that all action (as shown in the invoicing and service records) performed by the claimant were in keeping with the rate sheets provided at the time they were hired by Hudson. The Claims Manager also validated the costs incurred and determined they were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

In a letter to the NPFC from Hudson, dated June 4, 2010, Hudson claims that the claimant, HBC, has already been paid. Hudson believes that, after its own internal audit, that HBC was only entitled to \$27,000.00 of the claimed \$54,847.50 because they believe the \$15,000.00 charged for 20 days of standby were not reasonable or necessary and exceeded what other contractors charged.⁸ What Hudson fails to realize, however, is that HBC’s standby hours were most certainly necessary due to the fact that Hudson’s written plan to the USCG COTP CAPT ██████ stated that the vessel would be available as needed therefore the claimant charged the reduced rate of standby while the claimant was unable to utilize the obligated equipment elsewhere.⁹ Additionally, invoices signed by Mr. ██████, indicated that HBC was charging for standby time and acknowledged. The invoices were based off of the published rate schedule of \$1500.00 per day. Hudson’s issuing of a check for \$27,000.00 does not constitute payment if HBC did not accept the amount and returned the check, which was the case here.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$54,847.50 of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim #J07008-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident from April 8 through May 24, 2007. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

C. Determined Amount: \$54,847.50

The NPFC hereby determines that the OSLTF will pay \$54,847.50 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim J07008-001. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

⁸ See Hudson letter to Ms. ██████, NPFC, dated 6/04/2010

⁹ See letter from Mr. ██████, Hudson, to CAPT ██████, USCG COTP, dated 4/11/2007

Claim Supervisor: [REDACTED]

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

Supervisor Action: *Approved*

Supervisor's Comments: