

CLAIM SUMMARY / DETERMINATION FORM

Date	: 9/01/2010
Claim Number	: 910115-001
Claimant	: Metropolitan Marine Solutions
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$8,832.50

FACTS:

Oil Spill Incident: On April 19, 2009, an 18-foot yellow Sanger, belonging to Mr. Jim Rich, sank due to a mechanical failure. The National Response Center (NRC) Case # 903261¹ reports that the incident occurred in the Colorado River, north of Avi Casino, a navigable waterway in the US. The vessel was fully submerged. Ms. Karen Varga with the Nevada Department of Wildlife (NDOW) contacted Mr. Greg Ewing with Metropolitan Marine Solutions (MMS) to recover the sunken vessel and to remove any oil, fuel and contaminants present in the water.² The vessel was leaking pollutants, and had the potential to leak approximately 10 gallons of fuel.³ Mr. Rich was named as the Responsible Party (RP).

Description of removal actions performed: After receiving the “order to remove” from NDOW, the claimant, MMS, arrived on-site on April 19, 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.

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 \$8,832.50 for the services provided April 19, 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 NRC Report # 903261, copy of the State of Nevada DOW Boat Accident Report, copies of USPS Confirmation Receipts, copy of letters from Mr. Ray Lundberg to Mr. Greg Ewing, State of California Notary Public Certificate of Acknowledgement forms, photographs, news articles 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.

¹ See NRC Case #903261, opened 4/17/2009.

² See NDOW Case #209-0068, dated 4/19/2009.

³ See NRC Case #903261, opened 4/17/2009.

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.
4. An attempt was made to contact the Responsible Party by the NPFC but the letter was returned as undeliverable.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the claim should be denied.

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 been unable to confirm whether the costs claimed were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP). FOSC 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 \$8,832.50 in uncompensated removal costs. However, there are some issues with this claim. First, while it could be argued that an OPA event occurred, the record does not demonstrate by a preponderance of the evidence that a discharge occurred 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 what type of absorbent materials were used, if any, or in what quantity. 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 15 months after the fact.

Second, the “Environmental Spill Response,” at \$125.00 per hour, is not listed in the provided rate schedule. Additionally, the “Containment, Dive Equipment Cleaning” (at \$85.00 per hour), the “Master Swift River Diver” (at \$125.00 per hour) and the “Support Swift Water Diver” (at \$125.00 per hour) are also not listed on the rate schedule provided by

the Claimant. 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 14 months to perform disposal is not consistent with the NCP. Finally, during a phone conversation the NPFC had with Mr. Greg Ewing on Thursday, July 24, 2010, Mr. Ewing 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 the 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 discharged oil 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: ***Donna Hellberg***

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

Supervisor Action: ***Denial approved***

Supervisor's Comments:

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100
E-mail: [REDACTED]@uscg.mil
Fax: 202-493-6937

5890
9/07/2010

Via email: [REDACTED]@yahoo.com

Metropolitan Marine Solutions
c/o Mr. Greg Ewing
10188 Honduras Road
Mohave Valley, AZ 86440

RE: Claim Number: 910115-001

Dear Mr. Ewing:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 910115-001 involving an 18-foot yellow Sanger. Please see the claim analysis for further details.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number 910115-001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,

Alyssa Lombardi
Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form