

CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/15/2010
Claim Number	: 910118-001
Claimant	: Metropolitan Marine Solutions
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: Donna Hellberg
Amount Requested	: \$12,731.88

FACTS:

Oil Spill Incident: On or about noon on June 30, 2007, while Metropolitan Marine Solutions (MMS) was out on safety patrol, their River Captain discovered a sunken vessel in the Lower Colorado River. It was reported by the claimant, MMS that the vessel was upside down and pointed down river in the current. The vessel was located approximately seven miles south of Needles, CA. Mr. Greg Ewing of MMS was notified and he assembled a dive crew. The dive crew prepared to dive on the vessel in order to make an initial assessment as to the vessel's orientation and identification. The vessel's stern area was found to be partially covered by drifting sand on the river's bottom. MMS reported that the vessel appeared to have been submerged for an extended period of time due to the deterioration of the aluminum fuel system. MMS states that they could see that the vessel was intact and that the engine and fuel tanks were still in place. The vessel was reported as not discharging at the time of the assessment. MMS notified the Sheriff's Office Boating Enforcement Division.

Later in the day, MMS took Sheriff's Deputy Dave Smith to the site and showed him the submerged vessel. MMS reports that they informed Officer Smith of their concerns over the deteriorating fuel system and concern for a potential release. MMS stated that Officer Smith was to issue an "Order to remove" the following day.

Description of removal actions performed: The claimant, MMS, arrived on-site on July 2, 2007 (two days after their initial assessment). MMS dispatched two vessels to assist with the removal of the sunken vessel. Upon arrival to the vessel, Mr. Greg Ewing and Mr. Dirk of MMS completed the rigging assessment and re-boarded the vessel. They then dove to place lifting bags on the vessel and tied the response vessel off to the sunken vessel so that when it was raised, they could control it. Floating lines were then attached to the sunken vessel in preparation of its raising. With the air lines connected, surface air was supplied to the bags. Due to the strong current, the over pressure blow off valves on the bags were opening and therefore full lift capacity was not achieved so it was decided to pull the partially lifted vessel to shore. During the pulling efforts, the bow eye was ripped from the vessel. MMS sent divers back into the water where they completely re-rigged the vessel from the stern area and was able to manage a partial lift of the vessel.

With two response vessels now connected to the sunken vessel, they were able to get the vessel to a pre-determined location downstream near the shore and out of the traffic in a more workable current. Containment booms were placed around the vessel and the area was secured. Due to the amount of silt and sand in the now righted vessel, MMS was unable to achieve the lift of the vessel that was necessary to pump out the vessel. Therefore, MMS then called a four wheel drive truck with tow cables and a winch system

to the water's edge where they rigged the submerged vessel from the dashboard because of the bow eye being broken off in order to pull the vessel further onto the beach.

Once the vessel was on the beach, MMS reported that there was an odor of gasoline. MMS then reported that it was clear to see that the fuel system had dissolved and had allowed fuel to discharge into the Colorado River although the claim submission is absent any evidence of the use of sorbent materials to remove the alleged fuel from the waterway. Additionally, MMS reports that it eventually pumped water from the vessel before it pulled the vessel back into the water for transport to another location.

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 \$12,731.88 for the services provided July 2, 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, hazwoper certification, a detailed written summary of events, 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 NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and has determined that the claim should be denied as the claimant has failed to establish that actions taken were in accordance with 33 CFR 136.203 & 205.

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.

MMS claims a total of \$12,731.88 in uncompensated removal costs. However, there are some disparities in this claim. First, the Claimant has failed to provide evidence that an OPA event occurred since the Claimant has failed to establish that there was fuel aboard the vessel resulting in a discharge or a substantial threat of discharge; second, the claim documentation does not indicate what type of absorbent materials was used, if any and third, 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. Furthermore, disposal was not performed until July 22, 2010, some 3 years after the fact which the Claimant has not established that the associated disposal was for this particular incident nor did the claimant provide proof of disposal of the oily water mix it alleges to have pumped off the vessel when it was brought to the shore.

Lastly, the Claimant has failed to provide sufficient evidence of proof of payment for R. Dirk, J. Paaske, and B. Berken on the day of the response. Proof of payment for these people is pertinent in demonstrating uncompensated removal costs associated with their labor charges as Mr. Greg Ewing stated in a phone conversation with Donna Hellberg of the NPFC on July 22, 2010 that he does not pay his employees until he gets paid therefore without proof of payment, the record is not clear that there are uncompensated removal costs for these people.

C. Determined Amount:

The NPFC hereby determines that the claim is denied for the following reasons: (1) no FOOSC coordination in accordance with 33 CFR §136.203 & 205; (2) no evidence that the incident discharged oil to navigable waters or posed a substantial threat of discharge as determined by the FOOSC; (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:

Date of Supervisor’s review:

Supervisor Action:

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: A [REDACTED] di@uscg.mil
Fax: 202-493-6937

5890
10/18/2010

Via email: [REDACTED]t@yahoo.com

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

RE: Claim Number: 910118-001

Dear Mr. Ewing:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number 910118-001 involving the KONA jet boat. 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 910117-001.

Mail reconsideration requests to:

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

Sincerely,

Donna Hellberg
Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form