

CLAIM SUMMARY / DETERMINATION FORM

Date : 10/13/2010
Claim Number : 910072-001
Claimant : National Response Corporation (NRC)
Type of Claimant : OSRO
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$52,336.03

FACTS:

- 1. Oil Spill Incident:** On Saturday, November 15, 2008, No.6 fuel oil in the amount of 80 gallons was discharged at the Caribbean Petroleum Refining, L.P. (CAPECO) at their waterfront port facility in Bayamon, Puerto Rico. This incident was reported to the National Response Center (NRC).¹ The spill incident occurred when the dock sump pump overflowed, discharging oil into the San Juan Bay, at the Luchetti Industrial Park. The San Juan Bay is a navigable waterway of the United States. A rainbow sheen that measured 50' long by 30' wide was detected at the incident site. [REDACTED], the refinery manager for CAPECO, was determined to be the responsible party (RP) for the spill.² CAPECO hired the National Response Corporation (NRCC) for the clean-up. It is important to note that the RP, CAPECO, filed a Chapter 11 Bankruptcy on August 12, 2010 although in the list of creditors, NRC is listed for their \$6,000,000.00 response costs associated with a response they performed at the RP's location during a different time period (10/23/09) therefore the costs associated with this claim are not part of the Bankruptcy List of Creditors at the time this claim was adjudicated.
- 2. Description of Removal Activities for this Claim:** On November 15, 2008, [REDACTED] signed the NRCC "Authorization To Proceed" agreement to clean up the oil spill. NRCC hired subcontractor Gamma Oil Services, Incorporated (GSI) for the clean-up activities, under their oversight of NRCC Project Manager [REDACTED]. GSI began work that day and continued through Tuesday, November 19, 2008. GSI deployed a supervisor, a foreperson, laborers, a boat operator and deckhands for the clean-up, as well as three trucks and a 19 foot boat. NRCC managed the work and provided the oil boom that was used for the clean-up.
- 3. The Claim:** On February 16, 2010, NRCC submitted a removal cost claim to the NPFC, for reimbursement of their uncompensated removal costs in the amount of \$76,970.43. However, on February 25, 2010, the reimbursement amount was amended to \$52, 336.03 by the Claimant. This was done by an e-mail from NRCC Collections Analyst [REDACTED] to [REDACTED]. Ms. [REDACTED] informed that NRCC "recently received a payment of \$24, 634.40" from CAPECO "that is to be applied towards this claim."³

The claim consists of the signed Authorization To Proceed agreement; daily work sheets signed by [REDACTED] GSI rate schedule; the NRCC rate schedule; and proof of payment to GSI by NRCC. Also included in the claim, a September 9, 2009 letter from

¹ See NRC Report #890136.

² See MISLE Activity #3365266.

³ [REDACTED] e-mail to author, February 25, 2010.

NRCC to [REDACTED] of CAPECO, requesting installment payments for their services; and documentation of CAPECO payments made to NRCC on November 2, 2009 in the amount of \$47,414.51 and on February 11, 2010 in the amount of \$24,634.40.

The NPFC's review of the actual cost invoices and dailies focused on: (1) whether the actions taken were compensable "disposal 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 are determined to be consistent with the National Contingency Plan (NCP) or directed by the (Federal On-Site Coordinator) FOSC; and (4) whether the costs were adequately documented and reasonable.

On September 9, 2009 the Claimant e-mailed and mailed a letter to [REDACTED] of CAPECO, requesting payment of \$124,384.94 for their services performed at the spill site.⁴ NRCC billed a total of \$113,993.68 for the work performed by subcontractor GSI. This amount consisted of GSI Invoice # GSI-08-8191 for \$101,582.95, with a 10 percent NRCC mark-up for a total of \$111,741.25; GSI Invoice # GSI-08-8192 for \$2,047.66, with a 10 percent NRCC mark-up for a total of \$2,252.43. They also billed CAPECO \$91.26 for the daily mileage of David Aviles, the NRCC Project Manager; \$5,350.00 for the daily labor of Mr. Aviles; and \$4,950.00 for daily use of a truck, cellular phone and boom.

NRCC paid invoice #GSI-08-8191 for \$101,582.95 in two installments of \$50,791.48 on November 26, 2008 and \$50,791.47 on July 7, 2009. They paid invoice #GSI-08-8192 for \$2047.66 on September 18, 2009.

CAPECO made a payment of \$47,414.51 to NRCC on November 2, 2009 and a second on February 11, 2010 in the amount of \$24,634.40. On March 1, 2010, the NPFC RP Notification Letter was mailed to [REDACTED] regarding the remaining balance of \$52,336.03. To date, the NPFC has not received a response from Mr. [REDACTED] or any other CAPECO representative regarding this claim.

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

⁴ [REDACTED], "Agreement for Spill Payments," letter to CAPECO, September 9, 2009.

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 NPFC has determined that the actions undertaken by the claimant are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the National Contingency Plan (NCP) for the payment of uncompensated removal cost claims under section 1012(a)(4),

Oil Pollution Act of 1990. (See, Delegation of Authority from COMDT ltr 5760/3 of 27 July 1992).

2. The incident involved the 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 within the six year statute of limitations.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of the 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 as set forth below.
6. The review of the actual costs, invoices and dailies focused on the evaluation of whether such costs qualify as "Compensation Allowable" under 33 CFR§ 136.205.

B. *Analysis:*

The NPFC Claims Manager has 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, and (4) whether the costs were adequately documented and reasonable.

The Claims Manager also reviewed additional documentation retrieved from the MISLE Coast Guard database.

Based on the review of all documentation, the Claims Manager hereby determines that there are discrepancies with regards to GSI personnel work hours and out-of pocket expenses.⁵

For Saturday, November 15, 2008, GSI billed \$6,885.00 for personnel to the Claimant. Each employee was noted on the daily worksheet as working 8.5 hours for the supervisor, foreperson, laborers, deck hands and boat operator. The time noted on the daily worksheet was 16:30 to 24:00, which is equivalent to 7.5 hours. The Claimant will be reimbursed \$600.00 for the supervisor time; \$750.00 for the foreperson; \$450.00 each for the five laborers; \$750.00 each for both deckhands; and \$975.00 for the boat operator. Therefore, the NPFC has adjusted the amount payable for personnel on November 15, 2008 to \$6,075.00, for a total amount denied of \$810.00.

According to the daily worksheet, on Sunday, November 16, 2008, GSI Supervisor Osvaldo de Leon worked from 06:30 to 15:00 for a total of 9.5 hours. Claimant requested reimbursement of \$960.00 for 9.5 hours worked at the \$80.00 per hour rate. However, from 06:30 to 15:00 is 8.5 hours and Claimant will be reimbursed \$880.00 at the \$80.00 per hour rate. The NPFC has adjusted the amount payable for Mr. de Leon on November 16, 2008 to \$880.00, for a total amount denied of \$80.00.

⁵ See attached spreadsheets.

The Claimant requested reimbursement of \$2,252.43 for the out-of-pocket expenses of GSI, plus NRC's ten percent mark-up. There was no cost documentation for \$320.62 of those expenses. The NPFC denies reimbursement for \$320.62 of those expenses.

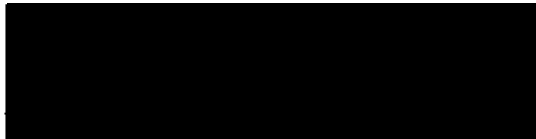
Based on the NPFC's denial of \$1,210.62, the NPFC determines that the OSLTF will pay \$51,125.41 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim #910072-001.

C. *Determined Amount:*

The NPFC determines that the OSLTF will pay \$51,125.41 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 910072-001. 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 Claimant.

AMOUNT: \$51,125.41

Claim Supervisor:



Date of Supervisor's review: *10/19/10*

Supervisor Action: *Approved*

Supervisor's Comments: