

CLAIM SUMMARY / DETERMINATION FORM

Date : 8/23/2011
Claim Number : N08057-092
Claimant : AEP River Operations LLC
Type of Claimant : Corporation
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$111,484.89

FACTS

A. Oil Pollution Incident:

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States.

B. Claim History:

On January 20, 2011, the National Pollution Funds Center (NPFC) received a claim for \$921,585.47 from the Lemle & Kelleher law firm, representing AEP River Operations LLC, AEP Elmwood LLC and affiliates (collectively known as "AEP"), dated January 18, 2011.¹ The claim contained removal and loss of profit and earning capacity cost components. Two of the cost components were identified by the NPFC as being removal costs; Ancillary expenses for barge cleaning materials, equipment and standby charges in the amount of \$54,693.71 (later amended to **\$31,318.14**) and barge cleanings at IMT and Dockside Fleets totaling **\$66,930.00**. The Claimant also identified costs of \$49,563.00 (amended to **\$13,236.75**) due to tug utilization to move oiled barges to cleaning docks. Total removal costs identified equal **\$111,484.89**. The NPFC applied the remaining costs to AEP's loss of profit and earning capacity claim under N08057-0093.

In its June 1, 2011 determination to pay in part and deny in part NPFC reviewed all of the information received by both the Claimant and the RP. 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 NPFC determined that the Claimant AEP River Operations LLC had **\$31,650.39** in uncompensated removal costs for this claim (0.00 for barge cleanings + 31,144.14 in contractor, equipment and material costs + 506.25 for vessel costs).

C. Claim Reconsideration:

The Claimant did not accept the NPFC offer and requested reconsideration of their claim, which was received at the NPFC via mail on July 11, 2011.² In addition to this letter, the Claimant submitted the following documents in support of its reconsideration request:

¹ See Cover letter signed by [REDACTED] and Claim Form signed by [REDACTED] on 1/18/2011.

² See Lemle & Kelleher, LLP letter dated July 6, 2011.

1. Vessel Decontamination Logs.
2. Email from [REDACTED] dated August 12, 2008 with attached Algiers Shipyard report.
3. IMT Wash Dock Facility Log spreadsheet.
4. Dockside Facility Log spreadsheet.
5. IMT Facility Log.
6. Facility Log dated May 17, 2008 thru November 2, 2008.
7. Email from [REDACTED] dated August 7, 2008 listing barges cleared by the USCG on August 7, 2008.
8. Statement of [REDACTED].

AEP requests that the NPFC reconsider its initial claim determination, particularly the barge cleaning costs of \$66,930.00.³ The Claimant's assertions in support of reconsideration consist of the following:

1. FOSC Spreadsheet Flawed

The Claimant asserts that the Federal On-scene Coordinator (FOSC) spreadsheet is seriously flawed and is an unreliable basis for denial of the AEP barge cleanings.⁴ They provide the following as defects noted in their review:

- a. The majority of the AEP barges on the FOSC list for the Dockside Fleet indicate [REDACTED] as the point of contact. [REDACTED] is a dispatcher for Ingram Barge Company, not AEP. He has confirmed that he had nothing to do with AEP's barges at Dockside.
- b. Only a few of the Dockside Fleet barges in question are found on the FOSC list. Those that are on the list are indicated as cleared by "HSC Hoppe". In fact, the actual USCG Decontamination Logs cover these and many more of the barges at Dockside and are signed by USCG personnel MST1 [REDACTED] DC2 [REDACTED] and [REDACTED].
- c. Dockside barges that are found in the FOSC list are listed as cleaned by Clean Harbors. As indicated in Mr. [REDACTED]'s earlier statement submitted April 13, 2011, this is a physical impossibility because Clean Harbors had neither the equipment nor the permission to come into the Dockside Fleet and get access to the barges for proper cleaning. They could possibly have done some kind of work in the area of the fleet, but the full decontamination of the barges in question was done by AEP personnel at its wash dock.
- d. At IMT, the FOSC spreadsheet indicates that only 12 barges of any kind were present. This is inherently implausible because IMT was directly in the path of the spill, and its fleet contained four times that many barges.
- e. The FOSC spreadsheet for IMT indicates that USCG personnel [REDACTED] cleared one barge out of the group in question. To the contrary, IMT reports that Petty Officer [REDACTED] was present many days to inspect the barges. Mr. [REDACTED] does not recall the events but does recall that the initial USCG barge cleaning protocol was dispensed with early on and that people were told to go ahead and clean barges on their own. IMT records indicate USCG clearance of most of the relevant barges at IMT but neither IMT nor AEP were provided with any USCG record of those clearances.

³ See Lemle & Kelleher LLP letter dated July 6, 2011.

⁴ Id

2. Dockside Barge Decontamination

The Claimant provided a spreadsheet of the barges at Dockside which allegedly remain uncompensated. In support of the spreadsheet the Claimant submits the handwritten Dockside Facility Log and the log of the M/V LINDA FINN. They also attached the USCG Decontamination Log covering the whole fleet. The Claimant asserts that the Dockside Facility Logs show that AEP cleaned its own barges at its wash dock at Dockside in Algiers and that there should be no question these cleanings were in fact performed by AEP.

The USCG Decontamination Logs provided by the Claimant show that 26 of the relevant barges were in fact approved by USCG personnel [REDACTED] although only 11 of these barges appear to have made it onto the FOSC list. In addition, on August 11, 2008, USCG personnel [REDACTED] signed a Decontamination Log that cleared the whole fleet. This again is not reflected on the FOSC spreadsheet. [REDACTED]'s log is further supported by the attached August 12, 2008 email by AEP's facility manager [REDACTED] listing the specific barges approved by M [REDACTED]

3. IMT Barge Cleanings

A spreadsheet is attached providing the relevant uncompensated IMT barges taken from the list of "IMT Decon Cleanings" provided in Exhibit B-7 to AEP's original claim. In support of the spreadsheets, the Claimant attached a copy of the Facility Log for this wash dock which it asserts provides the contemporaneous record of AEP personnel's decontamination of each of the barges. AEP also attached an email from the fleet manager of IMT indicating that 11 of the barges had been cleared by the USCG as of August 7, 2008. IMT fleet manager [REDACTED] advised the Claimant that while Coast Guard was present for several days, no written documentation, logs or receipts were provided by the USCG in regard to "clearance" of the barges.

The Claimant asserts the FOSC spreadsheet reflects only a small fraction of the total barges decontaminated at IMT and of the barges in dispute, only one is indicated. This barge is indicated as being cleared by "[REDACTED]" which conflicts with IMT's record that Petty Officer [REDACTED] was the USCG person on site. The Facility Log provides clear proof that AEP decontaminated the barges in question. The Claimant also submits that it is also apparent that barges were being cleared by the USCG verbally at IMT and that the IMT email confirming the USCG clearance should be sufficient given the clear deficiencies of the FOSC spreadsheet and the absence of evidence conflicting with AEP's and IMT's contemporaneous records.

AEP asserts that since the FOSC spreadsheet is provably incomplete, the fact that barges are not listed on it does not demonstrate that they were not in fact cleaned and cleared by the USCG personnel on site.

APPLICABLE LAW:

Under 33 CFR § 136.115(d) The Director, NPFC, upon written request of the Claimant or of a person duly authorized to act on the Claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the Claimant or within 30 days after receipt of the denial by the Claimant, whichever date is earlier. Reconsideration may only be requested once for each claim denied. This written decision is final. The failure of the Director, NPFC, to make final disposition of a reconsideration within 90 days after it is

received shall, at the option of the Claimant any time thereafter, be deemed a final denial of the reconsideration.

The Fund shall be available to the President for the payment of claims in accordance with section 2713 for *uncompensated* removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. § 2712 (a)(4). (Emphasis added.)

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.”

NPFC RECONSIDERATION ANALYSIS:

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration.

Under 33 CFR 136.205 “Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC.” When the NPFC began receiving vessel removal costs claims for the DM 932 oil spill, it requested evidence from the FOSC that vessels oiled and decontaminated in the DM 932 oil spill incident were coordinated with the FOSC and that the decontamination was consistent with the National Contingency Plan (NCP). The FOSC provided two barge spreadsheets with vessels they identified during the spill incident. These spreadsheets contain the vessels name, date cleaned/cleared and FOSC representative (FOSCR) name. Thus, the NPFC relied on the FOSC spreadsheets to adjudicate this claim, to determine vessels that were contaminated, vessels that were cleaned in accordance with the NCP and who paid for the decontamination.

I. NPFC ANALYSIS

A. 46 Barge and Vessel Cleaning Costs - \$66,930.00

Claimant requests that the NPFC specifically reconsider the barge and vessel cleaning costs. These costs represent AEP’s alleged uncompensated labor costs to decontaminate its barges that were contaminated as a result of this oil spill incident. The NPFC’s original claim determination found the majority of the Claimant’s 46 uncompensated barge cleanings were not on the FOSC Decon spreadsheet. Of the barges that were found on this spreadsheet, none were cleaned by AEP, but by other contractors. Thus the NPFC offered the claimant \$0.00 on the grounds that none of the barge cleaning costs was uncompensated.

1. Claimant’s Assertion that the FOSC Spreadsheet was “Flawed”

In its reconsideration request Claimant argued that the FOSC spreadsheet was seriously flawed and an unreliable source as grounds for denial of AEP’s barge cleaning costs. For instance, Claimant states that a representative’s name was wrong on the FOSC spreadsheet and only a few of the Dockside Fleet barges were found on the FOSC spreadsheet and these were cleared by a Coast Guard member other than the person allegedly on-scene.

However, the fact that a representative’s name was wrong on the FOSC spreadsheet would not change whether the barge on that spreadsheet line item was cleared by the FOSC or not. In addition, the fact that only a few of the Dockside Fleet barges were

found on the FOSC spreadsheet and were cleared by a Coast Guard member other than the person allegedly on-scene does not constitute a "flawed" spreadsheet. During large clean up operations, it is not uncommon to have someone back at the office inputting data called in from persons in the field. The point here is that the barge was cleared by a Coast Guard FOSC representative and it was documented. Additionally, there is no proof by the Claimant that the FOSC intended to put every barge from all of the fleets on the FOSC Decon spreadsheet. The purpose of this document was to provide a list of cleaned and cleared barges.

The Claimant argues the same points for its IMT fleet, i.e., not all IMT fleet contaminated vessels were listed on the spreadsheets and that different Coast Guard members inspected and signed off on decontaminated vessels. Our statements above provide our analysis of AEP's arguments.

Additionally, AEP states that Petty Officer ██████ was present many days to inspect the barges at IMT. They go onto state that although Petty Officer ██████ states he does not recall the events, he does recall that the initial USCG barge cleaning protocol was dispensed with early on and that people were told to go ahead and clean barges on their own.⁵ The NPFC contacted Petty Officer (MK2) ██████. He would not verify the Claimant's statement. The NPFC also contacted other people in Petty Officer ██████'s chain of command. None of them confirmed that industry personnel were allowed to clean their own barges without FOSC coordination.

AEP asserts that Clean Harbors, who was a contractor cleaning barges during this spill incident, could not have cleaned the barges claimed because they did not have access to them at AEP's Dockside wash dock. The NPFC cannot compensate AEP for barges the FOSC has documented as being cleaned by Clean Harbors, unless the Claimant provided clearance of those same barges by the FOSC under a separate document, such as the Vessel Decontamination Logs provided upon reconsideration. In this case, no such documentation was provided.

Vessel Decontamination Logs

Upon reconsideration, the Claimant provided Vessel Decontamination Logs, which contained some highlighted barge names along with FOSC and vessel representative signatures. We compared these barge names to the barge cleaning spreadsheet we created in our original determination. Some of the barges listed on the Vessel Decontamination Logs were named a little differently (ie. PML 1309 vs. PML 1309B) than on the Claimant's original submittal. When we found this, we went into the Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) database to ensure there were not multiple names for these barges. This database contains every inspected and documented barge operating in the United States. As noted in the spreadsheet comments area, there was not more than one name for each of the barges found in the database. Of those that had "name changes" between the logs and the original claim submittal, we checked the FOSC Decon spreadsheet to see if they were listed under the different name. We found some of the barges that we originally denied for not being on the FOSC created spreadsheet were listed under the changed name. Some were shown to be cleaned by a contractor other than one hired by AEP. Those were denied by us. If barges were not found on the FOSC spreadsheet, but were on the Vessel Decontamination Logs signed by the FOSC, which were provided by the Claimant upon reconsideration, the NPFC finds it reasonable to credit the Claimant with cleaning the barges, since no proof could otherwise be found that they did not clean them or had them cleaned by another contractor other than one hired by them.

⁵ See, Lemle & Kelleher LLP letter dated July 6, 201, page 2, paragraph (e).

One of the Vessel Decontamination Log sheets provides a sign off by the FOSC for Elmwood Dockside and East Bank Fleet. The NPFC finds this document provides little help in proving AEP's claim. By signing off an entire fleeting area, the FOSC is stating that every barge in that fleet is clean, but it does not show who cleaned those barges or a listing of the barges in the fleet that needed to be cleaned, according to the FOSC. The documents that would be used to support this would be the FOSC Decon spreadsheet or the individual Vessel Decontamination Logs, as provided by the Claimant upon reconsideration.

Facility Logs, Spreadsheets, and Industry Emails

The Claimant provided facility logs and spreadsheets which provided barge cleaning information. However, these facility logs and spreadsheets were not signed off by an FOSC representative as clean and cleared. Therefore, we cannot use these logs to find barges compensable under OPA law or the Claims Regulations. Additionally, emails from industry or fleet managers stating that barges were cleared by the Coast Guard do not constitute FOSC coordination. The requirement that remains important here is that the barge cleanings were coordinated with the FOSC. If they could be proven, we provided compensation. If not, we could not provide compensation.

In our original claim, we found \$0.00 compensable utilizing the FOSC Decon spreadsheet. Upon reconsideration, with the Claimant supplied Vessel Decontamination Logs, MISLE and the FOSC Decon spreadsheet, we find the Claimant has provided sufficient documentation to support **\$26,190.00** (18 barges x \$1,455.00) in OPA compensable barge cleaning costs.

2. Contractor Equipment and Material Costs - \$31,318.14

The Claimant provided no new evidence upon reconsideration to address the \$174.00 we denied in our initial determination. Therefore, upon reconsideration our offer of \$31,144.14 for AEP contractor equipment and material costs remains the same.

3. Boat Downtime and Expense Costs - \$13,236.75

The Claimant provided no new evidence upon reconsideration to address the \$12,730.50 we denied in our initial determination. Therefore, upon reconsideration our offer of \$506.25 for AEP boat downtime and expense costs remains the same.

II. SUMMARY

The NPFC therefore finds total uncompensated costs for this claim on reconsideration are \$31,144.14 for AEP equipment and cleaning material costs, \$506.25 for barge shifting costs and \$26,190.00 for AEP barge cleaning costs, which all total \$57,840.39. NPFC offer to the Claimant upon this reconsideration claim is ~~\$57,840.39~~

Claim Supervisor: [REDACTED]

Date of Supervisor's Review: 8/23/01

Supervisor's Action: OFFER APPROVED

Supervisor Comments: