

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/16/2009
Claim Number	: N08057-006
Claimant	: United States Environmental Services, L.L.C.
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: Donna Hellberg
Amount Requested	: \$496,487.83

### **I. Facts**

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.

### **II. Responsible Party**

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act (OPA).

### **III. The Claimant and the Claim**

On January 28, 2009, the United States Environmental Services, LLC (USES) submitted a removal cost claim to the National Pollution Fund Center (NPFC) in the amount of \$731,872.13.<sup>1</sup> This amount represented USES invoice # 80140144, which USES identified as the uncompensated removal costs incurred during the DM 932 oil spill incident which provided response services under contract with ACL.<sup>2</sup>

On October 21, 2009, USES submitted to the NPFC an amended invoice of \$496,487.83 as uncompensated removal costs.<sup>3</sup> On February 24, 2009, the NPFC sent the Responsible Party (RP) notification letter to Mr. Douglas Ruschman, ACL – Vice President of Legal & Risk Management, Ms. Dawn Landry, ACL – General Counsel, and Mr. John A.V. Nicoletti of Nicoletti, Horning & Sweeney, ACL – External Counsel.<sup>4</sup> The invoice which is the subject of this claim was presented to the responsible party for payment on or about October 21, 2008. Thereafter, ACL has made a payment to USES in the amount of \$161,245.70. ACL has acknowledged receipt of the Invoice # 80140144 that is subject of this claim in its audit, “ACL DM 932,” dated July 24, 2009.<sup>5</sup>

### **IV. The RP Audit**

During the incident, the Claimant provided response resources and services under its contract with ACL. The services provided by the Claimant were acknowledged by ACL as designated Zone Managers, who acted as the Qualified Individual(s) (QI) representatives for ACL in various zones on given dates. Specifically, the Claimant submitted daily sheets to the respective Zone

<sup>1</sup> See, Claim Form, signed by Mr. Barry J. Thibodeaux, dated 1/26/09.

<sup>2</sup> See, Attachment E-Agreement to Conduct Emergency Response Services, signed by Mr. Sam George on 7/29/08.

<sup>3</sup> See, USES Invoice 080140144 w/ Attachments, dated 10/21/09.

<sup>4</sup> See, NPFC letter to ACL, dated February 24, 2009.

<sup>5</sup> See, *supra*, note 3..

Manager(s) which listed the labor and materials/equipment provided by the Claimant for each day of the response in a specific zone location. The Zone Manager(s) approved the materials/equipment and labor identified on each daily by signing the document. Beneath each signature, the Zone Manager made the notation “subject to audit.”

During the response, USES submitted its invoices to ACL and in accordance with the Agreement to Conduct Emergency Response Services between USES and ACL, dated July 29, 2008.<sup>6</sup> The Agreement for this incident stated that all invoices were due thirty (30) days from the date of the invoice. Otherwise, USES would be allowed to assess a late charge of one percent per month or the maximum rate permitted by law, whichever is less. Having reviewed the invoices, the NPFC determined that this process was not followed in accordance with this agreement.

For the audit, the NPFC found that ACL auditors focused on whether the paperwork was complete as determined by its standards, whether the costs were properly supported in accordance with their standards, and whether the costs were operationally reasonable and necessary according to its standards.

## **V. APPLICABLE LAW**

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 (NCP) 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 such an incident”. 33 USC § 2701(31).

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 Part 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 [Federal On-Scene Coordinator] to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR. § 136.205, “[t]he 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)

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<sup>6</sup> See, “Agreement to Conduct Emergency Response Services,” dated 7/29/08, *supra* note 2.

## **VI. DETERMINATION OF UNCOMPENSATED REMOVAL COSTS:**

### ***A. Overview:***

1. FOSC's coordination has been established under the Federal Project by way of Incident Action Plans (IAPs) and United States Coast Guard (USCG) Pollution Reports under Federal Project Number N08057.
2. The incident involved the discharge and continuing substantial threat of 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 was made by the Claimant USES, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded with a copy of its complete audit for this Claimant.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of 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 with the exception of denied costs itemized in the attached ACL Audit Report for Invoice # 080140144.<sup>7</sup>

### ***B. Analysis:***

The NPFC 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 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.

USES stated that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident for the time period of August 25, 2008 through August 28, 2008. The Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

The NPFC Claims Manager has confirmed that the response activities performed by the Claimant were signed off by the designated Zone Managers on the dailies provided by USES and by ACL with their audit. While the IAPs are helpful in corroborating actions that were taking place in the field at any given point in time and were utilized as part of the adjudication process, it is important to note that every action taken during response is not fully captured in IAPs or Pollution Reports. The NPFC Claims Manager also cross referenced claim submission information to the USCG's database of files that were associated with this oil spill incident and provided to the NPFC by USCG Sector New Orleans via tape.

The NPFC reviewed the detailed comments in the Financial Audit performed by ACL's auditor. The NPFC approved costs which were adequately documented by the Claimant, USES, despite costs that were denied by ACL in its Financial Audit. Such costs were approved over ACL's denial in the Financial Audit because these costs had been approved by

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<sup>7</sup> See, Enclosure (1) – ACL audit which incorporates the NPFC audit..

designated Zone Manager(s) for ACL when these representative(s) signed the Claimant's daily sheets. One of the main purposes of a Spill Management Team such as the appointed Zone Managers for ACL is to confirm that the goods and services billed on a given day at a given location for a given time period have actually been provided and accounted for. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a contract with specified rates, the NPFC further finds that USES has satisfied its burden of showing that the amounts claimed were reasonable and necessary. As a result, NPFC finds and approves that these costs are eligible for payment under OPA.

Despite the numerous amounts denied by ACL's auditors for personnel who worked in excess of restricted hours, the NPFC has approved those costs from the daily sheets that were signed by the ACL designated Zone Manager(s). Moreover, the NPFC obtained a statement from the FOOSC, CAPT Lincoln Stroh which clarified that the restricted hours were "suggested" for the purpose of heat stress and safety concerns, but the monitoring and determination of actual work hours resided with the Zone Manager(s) and their sign offs on the dailies.<sup>8</sup>

In its review of Enclosure (1), the NPFC tabulated and approved the costs claimed as uncompensated removal costs in the "NPFC Approved" column for each day beginning on September 1, 2008 through September 30, 2008 and constitutes uncompensated removal costs for a total of \$495,442.95.

The "NPFC Denied" column reflects costs that are denied by the NPFC in the amount of \$1,397.34. The itemized breakdown of denied costs which are addressed in the attached ACL audit is identified as Enclosure (1).

The overall denial summary is as follows:

Master Vac inv # 083108CON – denied amount of	\$1,085.00
USES Invoice # 080140144, Fill A Sack inv #61449 – denied amount of	\$ 110.69
USES Invoice # 080140144, Fill A Sack inv #61516 – denied amount of	\$ 113.10
USES Invoice # 080140144, Fill A Sack inv #61582 – denied amount of	\$ 88.55
<b>Total Amount Denied:</b>	<b>\$1,397.34</b>

Accordingly, the NPFC has determined that the Claimant USES has \$495,442.95 in uncompensated removal costs for this claim. The NPFC arrived at that amount as follows:

The Claimant USES submitted this claim to the NPFC with an invoice total amount of \$731,872.13. The RP, ACL paid USES \$161,245.70 of these costs, leaving an outstanding balance of \$570,626.43. After receiving the ACL audit, the Claimant USES agreed to additional deductions in the amount of \$74,138.60 leaving an outstanding balance of \$496,487.83. The outstanding balance \$496,487.83 less the total NPFC denied amount of \$1,397.34 leaves an outstanding balance of \$495,090.49.

The NPFC has determined that the total amount payable to the claimant is \$495,442.95. This includes the amount denied by the NPFC, \$464,967.79, plus \$30,475.16, the amount which the ACL approved but was not paid to USES.<sup>9</sup>

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<sup>8</sup> See, FOOSC statement provided to the NPFC regarding restricted hours.

<sup>9</sup> See, Enclosures (1) and (2) audit spreadsheets for details.

On this basis, the NPFC Claims Manager has found that the Claimant did incur \$495,442.95 of uncompensated removal costs and that this 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 # N08057-006 in accordance with 33 CFR 136.203 and 136.205.

**C. *Determined Amount:***

The NPFC hereby determines that the OSLTF will pay **\$495,442.95** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-006. 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.

Claim Supervisor: *Thomas S. Morrison*

Date of Supervisor's review: *1/13/10*

Supervisor Action: *Approved*

Supervisor Comments:

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd. Suite 1000  
Arlington, VA 20598-7100  
Staff Symbol: (CA)  
Phone: [REDACTED]  
E-mail: [REDACTED]@uscg.mil  
Fax: 202-493-6937

5890  
1/13/2010

VIA EMAIL: [REDACTED]@usesgroup.com

United States Environmental Services, L.L.C.  
ATTN: Mr. Dennis Schenck  
365 Canal Street  
Suite 2500  
New Orleans, LA 70130

Re: Claim Number N08057-006

Dear Mr. Schenck:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$495,442.95 is full compensation for OPA claim number N08057-006.

This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

All costs that are not determined as compensable are considered denied. 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 claims. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration 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 corresponding claim number.

Mail reconsideration request to:

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

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to the above address.

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Central Contractor Registration (CCR) record prior to payment. If you do not, you may register free of charge at

[www.ccr.gov](http://www.ccr.gov). Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Form.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at [REDACTED]

Sincerely,

Donna Hellberg  
Claims Manager

ENCL: Claim Summary / Determination Form  
Acceptance/Release Form  
(1) ACL Audit

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd. Suite 1000  
Arlington, VA 20598-7100  
Staff Symbol: (CA)  
Phone: [REDACTED]  
E-mail: [REDACTED]@uscg.mil  
Fax: 202-493-6937

Claim Number: N08057-006	Claimant Name: United States Environmental Services, L.L.C. ATTN: Mr. Justin Plant 365 Canal Street Suite 2500 New Orleans, LA 70130
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I, the undersigned, ACCEPT the determination of \$495,442.95 as full compensation for the removal costs and damages paid or incurred by Claimant for services provided by the Claimant listed in the Spreadsheets of Costs (attached hereto and incorporated by reference as if fully set forth herein), and claimed to the Oil Spill Liability Trust Fund (Fund) under Claim Number N08057-006 and excluding any and all Lawson charges during this time period. These costs resulted from the below described incident.

Date: 23 July 2008  
Location: Mississippi River  
Subject: DM932 Oil Spill Incident.

This determination represents full and final release and satisfaction of all removal costs and damages paid or incurred by Claimant for services provided by the Claimant and listed in the Spreadsheets of Costs (attached hereto and incorporated by reference as if fully set forth herein), and claimed to the Oil Spill Liability Trust Fund (Fund) under Claim Number N08057-006 under the Oil Pollution Act of 1990 (33 U.S.C. 2712(a)(4) and excluding any all Lawson charges during this time period associated with the above referenced claim. This determination is not an admission of liability by any party. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the loss. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from the incident. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for costs which are the subject of the claim against the Oil Spill Liability Trust Fund (Fund).

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. 287 and 1001).

_____	_____
Title of Person Signing	Date of Signature
_____	_____
Typed or Printed Name of Claimant or Name of Authorized Representative	Signature

_____	_____
Title of Witness	Date of Signature
_____	_____
Typed or Printed Name of Witness	Signature

_____	_____	_____
DUNS	Bank Routing Number	Bank Account Number