

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 5/21/2009
Claim Number	: 909061-001
Claimant	: United States Environmental Services, L.L.C.
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$143,454.19

### **FACTS:**

**1. Oil Spill Incident:** On the evening of May 19, 2008 a caller notified the National Response Center (NRC) that at 0800 local time there was a release of oil from a broken flange on an above ground oil storage tank located at the cross streets of Burbank Street and Nicholson Drive in Baton Rouge, Louisiana. The NRC assigned report # 871429. The oil was draining into a nearby canal, later identified as Bayou Fountain, a tributary of Bayou Manchac, a navigable waterway of the United States.

The National Pollution Funds Center (NPFC) notified the responsible party, Brechtel Energy Corporation via a letter dated April 6, 2009, advising them that a claim has been submitted for reimbursement and to provide any circumstances, explanations, or justifications they want considered before the adjudication is completed. To date, the responsible party has not responded to the notification letter.

**2. Description of removal activities:** Brechtel Energy Corporation, who owned the leaking tank, hired United States Environmental Services, LLC (USES) to handle the response activities associated with this incident the same day it was reported to the NRC. The contractor's response activities included, but were not limited to containment, removal and disposal of the oily substance leaking into Bayou Fountain. By May 20, 2008, 500 feet of 18 inch hard boom was in place along with eight inch sorbent boom. Wash pumps were utilized to push the oil towards the containment area, where vacuum trucks removed it from the water. Sorbent pads were used to remove the oil from areas that were not easily accessed. On May 22, 2008 five inch sorbent boom was added to the existing boom to contain the oil. Soiled five and eight inch boom were changed out on a regular basis to maintain the effectiveness of the cleanup. On May 25, 2008, the 18" hard boom was reduced to 400 feet and on May 28, 2008 it was reduced to 300 feet. Oiled vegetation along the canal bank was cut, raked and bagged for disposal. On May 29, 2008, the 300 feet of 18" hard boom was removed from the water and decontaminated. Five inch sorbent boom was utilized to maintain the containment area at this point. Over 18,350 gallons of oily water were removed from the canal during the spill clean up. A roll off box carried away all of the soiled sorbent boom and pads. Proper disposal of all waste was documented with disposal manifests signed by Gator Environmental.

**3. The Claim:** On February 2, 2009, USES submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$139,030.19 for the services provided to Brechtel Energy Corporation from May 19, 2008 through June 17, 2008. Upon initial and subsequent review of the claim, several spreadsheet calculation errors were identified by the Claims Manager along with improper standard/overtime hours billed as per the rate schedule. One invoice was also deleted because it was not presented to the responsible party as a cost. After the claimant corrected these

issues, the total claimed uncompensated removal costs came to \$143,454.19. This claim is for removal costs based on the rate schedule in place with USES at the time services were provided.

This claim consists of copies of the invoicing and associated dailies, disposal manifests, USES' rate schedule, and the NRC report. 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.

### **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(a), "all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source..."

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. MSTC [REDACTED] has provided FOSC coordination. A coordination letter has been attached to an email dated April 3, 2009 from MSTC [REDACTED]. (See Enclosure 1).
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 in an email dated March 3, 2009 from Mr. [REDACTED] that no suit has been filed in court for the claimed uncompensated removal costs. (See Enclosure 2).
4. The claim was submitted on time.
5. Presentment of costs to the RP was made on June 18, 2008, prior to the submission of the claim. The NPFC also made presentment of costs to the RP on April 6, 2009.
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 the following: (See, Enclosure 3 – Summary of Vendors and Spreadsheet of Costs)
  - a. 5/20/08 Non sparking hand tools; 7 on handwritten daily, 8 on computer daily. Deny \$20.00 for one extra hand tool invoiced on computer daily. Total Daily Deduction: \$20.00.
  - b. 5/21/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
    1. Polyethylene bags, 6 mil; 2 on handwritten daily, 3 on computer daily. Deny \$75.00.
    2. Wood stakes; 6 on handwritten daily, 12 on computer daily. Deny \$36.00.
    3. Duct tape; 3 on handwritten daily, 4 on computer daily. Deny \$9.00.
    4. Polyethylene sheeting, 4 mil; 0 on handwritten daily, 2 on computer daily. Deny \$150.00. Total Daily Deduction: \$270.00.

- c. 5/22/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
1. Polyethylene sheeting, 4 mil; 0 on handwritten daily, 2 on computer daily. Deny \$150.00. Total Daily Deduction: \$150.00.
- d. 5/26/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
1. Sorbent pads, petroleum; 0 on handwritten daily, 1 on computer daily. Deny \$55.00. Total Daily Deduction: \$55.00.
- e. 5/27/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
1. Sorbent pads, petroleum; 2 on handwritten daily, 3 on computer daily. Deny \$55.00. . Total Daily Deduction: \$55.00.
- f. 5/28/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
1. ██████████, recovery tech is not listed on handwritten daily, but is placed on computer generated daily. Deny \$567.00.
  2. Pickup truck, 2wd; 2 on handwritten daily, 3 on computer daily. Deny \$105.00.
  3. 20-27 foot response trailer; 0 on handwritten daily, 1 on computer daily. Deny \$250.00.
  4. Level D Modified gear; 8 on handwritten daily, 9 on computer daily. Deny \$60.00.
  5. Per Diem; 9 (persons) on handwritten daily, 10 on computer daily. Deny \$95.00. Total Daily Deduction: \$1,077.00.
- g. 5/29/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
1. ██████████, recovery tech is not listed on handwritten daily, but is placed on computer generated daily. Deny \$567.00.
  2. Pickup truck, 2wd; 2 on handwritten daily, 3 on computer daily. Deny \$105.00.
  3. Trash pump, 2" gas; 0 on handwritten daily, 2 on computer daily. Deny \$170.00.
  4. 18" containment boom; 0 on handwritten daily, 300 feet on computer daily. According to field notes, the 18" boom was picked up and decontaminated this day. Deny \$420.00.
  5. ██████████ chest; 0 on handwritten daily, 3 on computer daily. Deny \$105.00.
  6. Per Diem; 8 (persons) on handwritten daily, 9 on computer daily. Deny \$95.00. Total Daily Deduction: \$1462.00.
- h. 5/30/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:
1. ██████████, recovery tech is not listed on handwritten daily, but is placed on computer generated daily. Deny \$567.00.

2. 18" containment boom; 0 on handwritten daily, 300 feet on computer daily. Deny \$420.00.
3. Per Diem; 8 (persons) on handwritten daily, 9 on computer daily. Deny \$95.00. Total Daily Deduction: \$1462.00.

i. 6/2/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:

1. [REDACTED], foreman is not listed on handwritten daily, but is placed on computer generated daily. Deny 742.50.
2. [REDACTED], recovery tech is not listed on handwritten daily, but is placed on computer generated daily. Deny \$567.00.
3. 18" containment boom; 0 on handwritten daily, 300 feet on computer daily. Deny \$420.00.
4. Per Diem; 7 (persons) on handwritten daily, 9 on computer daily. Deny \$190.00.
5. Water/sports drinks; 7 persons on handwritten daily, 8 on computer daily. Deny \$10.00. Total Daily Deduction: \$1929.50.

j. 6/3/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:

1. [REDACTED], recovery tech is not listed on handwritten daily, but is placed on computer generated daily. Deny \$504.00.
2. 18" containment boom; 0 on handwritten daily, 300 feet on computer daily. Deny \$420.00.
3. Per Diem; 7 (persons) on handwritten daily, 8 on computer daily. Deny \$95.00. Total Daily Deduction: \$1019.00.

k. 6/4/08 handwritten field daily differs from the computer daily generated after the fact in the following instances:

1. [REDACTED], recovery tech is not listed on handwritten daily, but is placed on computer generated daily. Deny \$441.00.
2. 18" containment boom; 0 on handwritten daily, 300 feet on computer daily. Deny \$420.00. Total Daily Deduction: \$861.00.

1. 6/5/08-6/17/08 the computer generated daily shows 300 feet of 18" boom charged each day for a total of \$5460.00. Since 5/29/08, this boom was picked up and decontaminated. There is no mention in any of the handwritten field notes of its use or replacement after that date. Deny \$5,460.00. Total Daily Deduction: \$5460.00.

## 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.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$130,013.69 of uncompensated removal costs and that the 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# 909061-001. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of May 19, 2008 through June 17, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

During the adjudication process, the Claims Manager worked with the claimant and the Coast Guard (CG) FOSC in order to discuss the actions performed since the CG FOSC never actually went to the spill location. The Claims Manager spoke with the CG FOSC on several occasions to ensure that all actions performed were necessary to contain and remove the discharged oil and the actions were in keeping with the National Contingency Plan (NCP). The CG FOSC provided after the fact coordination through a letter sent by email. (See Enclosure 1).

*C. Determined Amount:*

The NPFC hereby determines that the OSLTF will pay \$130,013.69 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # 909061-001. 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 the Claimant.

**AMOUNT: \$130,013.69**

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *5/21/09*

Supervisor Action: *Approved*

Supervisor's Comments: