

CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/25/2009
Claim Number	: N08057-008
Claimant	: Oil Mop, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$394,548.93

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.

III. The Claimant and the Claim

As a result of the incident, Oil Mop, LLC (Oil Mop or OMI), provided response services under contract with ACL¹. On February 24, 2009, OMI submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their response services in the original amount of \$1,155,924.52 for the time period of July 23, 2008 through August 3, 2008².

On April 29, 2009, Mr. ██████████ of OMI requested that the NPFC revise the sum certain for their claim to \$394,548.93 in order to reflect payments made by ACL based on ACL's summary sheet entitled "Status of OMI Invoice Payments and Disputed Amounts" dated February 10, 2009. (See Enclosure 1 – ACL Summary sheet for OMI payments).

The NPFC sent an RP notification letter dated March 3, 2009 to Mr. ██████████, ACL – Vice President of Legal & Risk Management, Ms. ██████████, ACL – General Counsel, and Mr. ██████████ of Nicoletti, Horning & Sweeney, ACL – External Counsel. The invoices which are the subject of this claim were presented to the responsible party for payment on or about July 31, 2008 and August 7, 2008.³ ACL has made payments to OMI in the amount of \$1,424,407.69 dated August 11, 2008; \$314,040.16 dated January 23, 2009; \$2,885,274.64 dated August 18, 2008; and \$447,335.41 dated January 23, 2009⁴. ACL has acknowledged receipt of the invoices that are subject of this claim by way of ACL's audit. (See Enclosure 2 – ACL audit). OMI has confirmed verbally to the NPFC that all subcontractors have been paid for the services provided which are inclusive in OMI's invoices # N0807-191 and N0808-002.

¹ See OMI Master Service Agreement dated July 23, 2002.

² See Optional OSLTF Claim Form, signed by Mr. ██████████, Accounting Manager for OMI on 2/19/09.

³ See OMI invoices dated July 31, 2008 and August 7, 2008.

⁴ See Enclosure 1 - ACL Summary sheet for OMI payments.

IV. The Audits

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 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 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, a process was established for paying Oil Mop’s invoices. Initially, Oil Mop submitted its invoices to ACL and in accordance with the Master Service Agreement (MSA) that was in place between Oil Mop and ACL (See, Enclosure 3 – Master Service Agreement between Oil Mop and ACL dated 7/23/02), the MSA stated that all invoices are due fifteen (15) days from the date of the invoice, and in the event ACL disputes one or more items in an invoice, ACL shall, within ten (10) days of receipt of such invoice, notify Oil Mop *in writing* of the item or items under dispute and the reasons. The MSA stated that undisputed amounts will be paid within fifteen (15) days of ACL’s receipt. [Emphasis added].

Having reviewed the invoices, the NPFC determined that this process was not followed in accordance with the written agreement. We found that ACL and its auditors made initial payments on some invoices, denied amounts on some invoices, failed to provide in some instances, any detailed audit information to OMI for denied costs and also approved payment amounts on some invoices, which, to date, have still not been paid to Oil Mop by ACL as agreed to in the MSA. (See, Enclosure 1 - ACL Summary sheet for OMI payments). It is important to note that the NPFC received this summary sheet when the auditor for ACL responded to the NPFC’s RP notification letter(s) by way of submitting their audit results and accompanying documentation.

For the audit, the NPFC found that ACL auditors focused on whether the paperwork was complete as determined by their standards, whether the costs were properly supported in accordance with their standards, and whether the costs were operationally reasonable and necessary according to their standards. During the response, ACL held negotiation discussions with the response contractors including the Claimant OMI and requested special pricing reductions in exchange for a prompt payment. OMI initially verbally agreed to certain price reductions in exchange for prompt payment that ACL did not honor which resulted in the claimant presenting its claim to the NPFC. As a result of ACL not paying and/or resolving non-payment issues promptly, OMI revised its billing so that it was in accordance with the original MSA pricing schedule between OMI and ACL. All invoices reflecting the original pricing schedule were presented to ACL as required by regulation.

During the audit of OMI’s invoices, ACL denied OMI’s costs with little or no explanation, reason, or standard in support of the denied costs. The NPFC requested clarification of certain denial categories to understand the rationale used by ACL auditors but ACL did not respond.

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 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”. 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 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 FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports.
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 OMI, prior to the submission of the claim. The NPFC also made presentment of costs to the RP and the RP has provided a complete copy of their Audit of the response costs presented.
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 Summary of Vendors spreadsheet: (See, Enclosure 2 – ACL audit which incorporates NPFC audit).

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 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 Claimant OMI stated that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of, July 23, 2008 through August 3, 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 Claims Manager has confirmed that the response activities performed by the claimant were signed off by the designated Zone Managers in the dailies provided by OMI and by ACL with their audit. While the Incident Action Plans (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 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 Incident Action Plans (IAPs) provided general information about the activities which were taking place in the field at any given point in time. But the Claims Manager supplemented the IAP activity information with records from 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.

As detailed in Enclosure (2), the NPFC reviewed the detailed comments in the Financial Audit performed by ACL's auditor. The NPFC denied those claimed costs of OMI for lack of documentation, and approved those costs which were adequately documented by the Claimant OMI despite that the same costs 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 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, NPFC further finds that OMI 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 FOSC, CAPT [REDACTED] 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.⁵

In its review in Enclosure (2), the NPFC tabulated and approved the costs claimed as uncompensated removal costs in Column 1 for each day beginning on July 23, 2008 through

⁵ See FOSC statement provided to the NPFC regarding restricted hours

August 3, 2008. In addition, Column 1 includes the amount approved by ACL but, to date, is unpaid and constitutes uncompensated removal costs for a total in Column 1 of \$390,316.29.

Column 2 lists the amounts which are adjudicated amounts as denied by the NPFC in the amount of \$4,232.64. Column 2 also includes unidentified costs \$1,260.42 and deductions from the offsets which were tabulated and totals \$(13,463.90) in Column 5 as the difference between Columns 3, the daily totals ACL denied from its audit summary sheet, and Column 4, the daily totals ACL denied from its daily sheets. Other offsets due to discrepancies in ACL's daily sheets amounted to \$(2,473.17), \$(12.31), \$2.02, and \$(330.00) due to miscellaneous errors. The itemized breakdown of denied costs is addressed in the attached ACL audit identified as Enclosure 2.

The NPFC incorporated columns within the ACL audit so that a line by line comparison and determination could be made and easily identified. The overall denial summary from Column 2 is as follows:

OMI Invoice # N0807-191 – 7/23/08 – denied amount of	\$660.00
OMI Invoice # N0807-191 – 7/24/08 – denied amount of	\$872.50
OMI Invoice # N0807-191 – 7/25/08 – denied amount of	\$1,354.00
OMI Invoice # N0807-191 – 7/25/08 – offset amount of	\$(12.31)
OMI Invoice # N0807-191 – 7/25/08 – offset amount of	\$(330.00)
OMI Invoice # N0807-191 – 7/26/08 – denied amount of	\$622.10
OMI Invoice # N0807-191 – 7/27/08 – denied amount of	\$1,109.63
OMI Invoice # N0807-191 - Totals ACL denied in its audit summary minus its totals denied in its daily sheets.	\$(9,472.31)
OMI Invoice # N0808-002 – 7/28/08 – denied amount of	\$1,100.00
OMI Invoice # N0808-002 – 7/29/08 – denied amount of	\$110.00
OMI Invoice # N0808-002 – 7/30/08 – denied amount of	\$1,212.00
OMI Invoice # N0808-002 – 7/31/08 – denied amount of	\$250.00
OMI Invoice # N0808-002 – 8/01/08 – denied amount of	\$603.14
OMI Invoice # N0808-002 – 8/02/08 – denied amount of	\$602.40
OMI Invoice # N0808-002 – 8/03/08 – denied amount of	\$1,282.62
OMI Invoice # N0808-002 – unidentified costs	\$1,260.42
OMI Invoice # N0808-002 – totals ACL denied in its audit summary minus its totals denied in its daily sheets.	\$(3,991.59)
OMI Invoice # N0808-002 – NPFC offset due to ACL errors	<u>\$(2,473.17)</u>
Total amount:	\$4,232.64

Accordingly, the Claimant OMI's sum certain of \$394,548.93 minus the total amount the NPFC denied (Column 2 - \$4,232,64) equals the uncompensated removal costs (Column 1 \$390,316.29) which is due to the Claimant OMI.

On this basis, the Claims Manager hereby determines that the claimant did in fact incur \$390,316.29 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# N08057-008.

On this basis, the Claims Manager hereby determines that the claimant did in fact incur \$390,316.29 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# N08057-008.

Lastly, it is important to note that \$59,506.87 of the approved costs by ACL as corroborated in the Audit Summary Sheet provided by the Claimant OMI to the NPFC remains unpaid at the time of this determination and therefore has been incorporated in the sums approved by the NPFC as OPA compensable removal costs.

C. *Determined Amount:*

The NPFC hereby determines that the OSLTF will pay **\$390,316.29** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-008. 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: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: