

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/12/2009
Claim Number	: N08057-011
Claimant	: United States Environmental Services, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$120,453.50

### **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 this incident, United States Environmental Services, LLC (USES) provided removal services under contract with ACL.<sup>1</sup> On March 4, 2009, USES submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of the per diem expended by USES to their employees in the original amount of \$142,953.50.<sup>2</sup> These costs had been presented to ACL but had not been reimbursed.

On April 6, 2009 Mr. ██████████ of USES requested that the NPFC revise the sum certain to \$123,828.50 by submitting a letter to the NPFC with an explanation stating that after their review of ACL's audit, they are in agreement with the auditor's denial of 153 per diem charges at a price of \$125.00 each bringing the total reduction to \$19,125.00.<sup>3</sup>

On April 15, 2009 Mr. ██████████ of USES submitted another letter to the NPFC further amending the sum certain for this claim to the NPFC. They reviewed their invoicing for employees and realized that some employees had received per diem as compensation for long work days, including nights spent at hotels near the work site, rather than commute home, although they were assigned to service locations within 50 miles of the project making them ineligible for per diem in accordance with the published rate schedule in effect. USES credited 27 days of per diem at \$125.00 per day in the total amount of \$3,375.00.<sup>4</sup> The sum certain was amended to \$120,453.50<sup>5</sup>.

Upon receipt of this, the NPFC sent an RP notification letter dated March 4, 2009 to Ms. ██████████ ██████████, ACL—General Counsel, and Mr. ██████████ of Nicoletti, Hornig, & Sweeney, ACL—Counsel. The invoices, which are the subject of this claim, were presented to the

<sup>1</sup> See POLREPS One through Twenty-one.

<sup>2</sup> See Optional OSLTF Claim Form, signed by Mr. ██████████, President/CEO on 2/2/09.

<sup>3</sup> See letter from USES to Ms. ██████████ dated April 6, 2009, signed by Mr. ██████████

<sup>4</sup> See letter from USES to Ms. ██████████ dated April 15, 2009 identifying per diem

<sup>5</sup> *Id.*, pg 2

Responsible Party for payment on October 31, 2008.<sup>6</sup> ACL has made no payment to date on this invoice to USES however; ACL has acknowledged receipt of the invoice by way of ACL's audit (See Enclosure 1 – ACL audit). USES has confirmed in a letter dated April 6, 2009, that all subcontractors have been paid for the per diem charges included in invoice #080140171.<sup>7</sup>

This claim consists of copies of the claimant's invoice, a USES credit memo associated with the referenced invoice, National Response Center (NRC Report) # 878165, claimant dailies, contracted rate schedule, a copy of the contract between the claimant and ACL dated 7/29/08, internal email correspondence, the RP audit for August 18 – 29, 2008, Per Diem Log Sheets for: Master Vac, USES, USA Environmental, L.P., J 2 S, Miller Environmental Services, Environmental Restoration Group, LLC.

## **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].

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

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

1. FOSC coordination has been established through the Federal Project Number that was opened for this incident. Coast Guard Situation Reports and Incident Action Plans together validate the actions claimed.

<sup>6</sup> See USES invoice dated October 31, 2008

<sup>7</sup> See USES letter dated April 6, 2009 to Ms [REDACTED].

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 on time.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that 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 per diem costs focused on the evaluation whether such costs qualify as “Compensable Allowable” under 33 CFR § 136.205.

***B. Analysis:***

NPFC CA reviewed the actual cost invoice 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 FOOSC, to be consistent with the National Contingency Plan, 33 CFR Part 300 or as directed by the FOOSC, and (4) whether the costs were adequately documented and reasonable.

ACL contracted with United States Environmental Services, LLC (USES) for emergency response services beginning July 23, 2008, including personnel, equipment and materials. An agreement between ACL and USES was signed on July 29, 2008 by Mr. [REDACTED], Vice President of American Commercial Lines.<sup>8</sup> In order for USES to be able to respond with the appropriate amount of resources, USES subcontracted with Master Vac, USA Environmental, L.P., J 2 S, Miller Environmental Services, Environmental Restoration Group, LLC, and Lawson.

The Claims Manager confirmed that the response activities performed by the claimant were signed off by the appropriate Zone Managers for the work locations of the personnel associated in this claim submission. All response activities were to remove and to dispose of the oil that spilled into the Mississippi River and affected its adjoining shorelines. All actions were coordinated with the Unified Command (UC).

The Claims Manager confirmed that all per diem rates were billed in accordance with the published rate schedule USES had in place with ACL at the time the services were rendered. USES’ contract allows per diem at a rate of \$125 per person for any person traveling in excess of 50 miles from their home base to the spill site. Additionally, ACL’s audit sheet for these charges is attached for confirmation that ACL has acknowledged and agreed with the presence of the workers outside of the 153 they denied and which the claimant has also credited. (See Enclosure 1 – RP Audit Sheet).

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$120,453.50 of uncompensated removal costs and that that 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# N08057-011. The claimant states that all costs claimed are for uncompensated removal costs (per diem charges only) incurred

---

<sup>8</sup> See Signed Agreement to Conduct Emergency Response Services.

by the claimant for this incident for the time period of, August 18, 2008 through August 29, 2008. It has been determined after a careful review of the documentation presented by the claimant that these per diem costs are reasonable and compensable in accordance with the provisions of OPA 90, and its claims regulations.

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: