

CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/3/2010
Claim Number	: N08057-005
Claimant	: United States Environmental Services, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$435,701.72

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

As a result of the incident, United States Environmental Services LLC, (USES), provided response services under contract with ACL.¹ On January 13, 2009 USES submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their response services in the original amount of \$1,156,828.32 for the time period of August 25, 2008 through August 29, 2008.

On September 22, 2009, Mr. ██████████ of USES requested that the NPFC revise the sum certain for their claim to \$435,701.72 in order to reflect payments made by ACL based on ACL's summary sheet, agreed upon adjustments entitled, "Summary of USES Revised Invoices Submitted to the NPFC, dated January 6, 2009, and the removal of Lawson personnel and equipment per USES. (See Enclosure 1 – Summary of USES Revised Invoices).

The NPFC sent the Responsible Party (RP) notification letter, dated January 14, 2009, to Mr. ██████████, ACL – Vice President of Legal & Risk Management, Ms. ██████████, ACL – General Counsel, and Mr. ██████████ of Nicoletti, Horning & Sweeney, ACL – External Counsel.² The invoices which are the subject of this claim were presented to the responsible party for payment on or about August 25, 2008.³ ACL has made payments to USES

¹ See, Claim Form, signed by Mr. ██████████, dated January 6, 2009, Attachment E, Agreement to Conduct Emergency Response Services, signed by Mr. ██████████ on July 29, 2008.

² See, NPFC letter, to ACL, re: Claim No. N08057-005, dated January 14, 2009.

³ See, USES Invoice No. 080140136 Summary for dates August 25 through August 29, 2008.

in the amount of \$546,610.75⁴, (See Enclosure 2). Lawson charges were deducted from the original claim to the NPFC because USES did not pay Lawson's bills. Subsequently, Lawson submitted their unpaid charges to ACL for payment on or about September 29, 2008.⁵ ACL has acknowledged receipt of the invoices that are subject of this claim by way of ACL's audit, (See Enclosure 3—ACL Audit).

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 USES invoices. Initially, USES submitted its invoices to ACL and in accordance with the Agreement to Conduct Emergency Response Services agreement, (Agreement), that was in place between USES and ACL (See, Enclosure 4 – Agreement to Conduct Emergency Response Services signed 7/29/08), the Agreement states that all invoices are due thirty (30) days from the date of the invoice, otherwise USES will be allowed to assess a late charge of one percent per month or the maximum rate permitted by law, which ever is less. This agreement was made on July 23, 2008 and concerns emergency response. Having reviewed the invoices, the NPFC determined that this process was not followed in accordance with the written and signed agreement.

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.

For purposes of this claim, USES's billing was in accordance with the original published rate schedule between USES and ACL⁶. All invoices reflecting the original pricing schedule were presented to ACL as required by regulation.

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 of OPA 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

⁴ *Id.*

⁵ See, Enclosure 1 – Summary of USES Revised Invoices dated, dated January 6, 2009.

⁶ Standard USES Rate Schedule, dated July 1, 2008, Version 4.01LA

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, “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 NPFC has determined that the actions undertaken by the claimant are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the NCP for the payment of uncompensated removal cost claims and is consistent with the provisions of sections 1002(b)(1)(B) and 1012(a)(4) of OPA, 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4)..
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 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:

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 29, 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 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 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 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 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 FOSC, CAPT ██████████ 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.⁷

⁷ See FOSC statement provided to the NPFC regarding restricted hours.

In its review of Enclosure (3), the NPFC tabulated and approved the costs claimed as uncompensated removal costs in the "NPFC Approved" column for each day beginning on August 25, 2008 through August 29, 2008 and constitutes uncompensated removal costs for a total of \$400,811.51. It is important to note that all amounts in excess of the NPFC approved amount is deemed denied and unsubstantiated.

Accordingly, the Claimant's sum certain of \$435,701.72 minus the total amount the NPFC approved (Column NPFC Approved - \$400,811.51) equals \$34,890.21 in costs the NPFC has determined to be unsubstantiated or undocumented. (See, Enclosure 3 – which incorporates NPFC audit).

On this basis, the NPFC Claims Manager hereby determines that the Claimant did in fact incur \$400,811.51 of uncompensated removal costs that are properly supported by the record 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# N08057-005.

Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$400,811.51** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-005. 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: *2/25/10*

Supervisor Action: *Approved*

Supervisor's Comments: