

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	: ██████████
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 \$731,872.13.¹ 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.²

On October 21, 2009, USES submitted to the NPFC an amended invoice of \$496,487.83 as uncompensated removal costs.³ On February 24, 2009, the NPFC sent the Responsible Party (RP) notification letter to Mr. ██████████, ACL – Vice President of Legal & Risk Management, Ms. ██████████, ACL – General Counsel, and Mr. ██████████ of Nicoletti, Horning & Sweeney, ACL – External Counsel.⁴ 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, 2009.⁵

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

¹ See, Claim Form, signed by Mr. ██████████, dated 1/26/09.

² See, Attachment E-Agreement to Conduct Emergency Response Services, signed by Mr. ██████████ on 7/29/08.

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

⁴ See, NPFC letter to ACL, dated February 24, 2009.

⁵ 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, 2008.⁶ 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)

⁶ 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 # 080140144.⁷

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

⁷ 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 ██████████ 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.⁸

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
Total Amount Denied:	\$1,397.34

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.⁹

⁸ See, FOOSC statement provided to the NPFC regarding restricted hours.

⁹ 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: [REDACTED]

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

Supervisor Action: *Approved*

Supervisor Comments: