

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/09/2009
Claim Number	: N08057-010
Claimant	: Oil Mop, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$875,822.91

### **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 (RP) under the Oil Pollution Act (OPA).

### **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 ACL.<sup>1</sup> On February 23, 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 \$875,822.91 for various dates during the time period of August 18, 2008 through August 30, 2008<sup>2</sup>.

The NPFC sent the Responsible Party (RP) notification letter, dated March 4, 2009 to Ms. ██████████, ACL – General Counsel and Mr. ██████████ of Nicoletti, Horning & Sweeney, ACL – External Counsel.<sup>3</sup> The invoices which are the subject of this claim were presented to the responsible party for payment on or about August 28, 2008 and September 20, 2008, respectively.<sup>4</sup> ACL has made payments to OMI in the amount of \$2,241,977.98 dated September 9, 2008 and \$1,261,313.69 dated October 3, 2008.<sup>5</sup> ACL has acknowledged receipt of the two invoices that are subject of this claim by way of ACL's audit. (See Enclosure (2) – ACL audit). OMI has confirmed to the NPFC that all subcontractors have been paid for the services provided which are inclusive in OMI's invoices # N0808-187 and N0809-039.

### **IV. The Audits**

The Claimant provided response resources and services under its contract with ACL during this incident. 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

<sup>1</sup> See OMI Master Service Agreement dated July 23, 2002.

<sup>2</sup> See Optional OSLTF Claim Form, signed by Mr. ██████████, Accounting Manager for OMI on 2/23/09.

<sup>3</sup> See, NPFC letter to ACL, dated March 4, 2009.

<sup>4</sup> See, Enclosure (1) "Status of OMI Invoice Payments and Disputed Amounts" for OMI Invoices N0808-187, August 28, 2008 and Invoice N0809-036, September 20, 2008.

<sup>5</sup> See, *supra* note 4

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 this incident, a process was established between ACL and OMI 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.<sup>6</sup> 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 found that this process was not followed in accordance with the written agreement. We determined 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.<sup>7</sup> 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 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 33 CFR § 136.103 and 33 USC § 2713(a).

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 (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).

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<sup>6</sup> See, *supra* note 1.

<sup>7</sup> See, *supra* note 4.

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 FOSC coordination has been established under the Federal Project by way of Incident Action Plans (IAP) 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 some 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.<sup>8</sup>

#### **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.

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<sup>8</sup> See, Enclosure (2) – ACL audit which incorporates NPFC audit.

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, August 18, 2008 through August 30, 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 in the dailies provided by OMI 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 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 some claimed costs of OMI for lack of documentation, and approved some 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, the 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.<sup>9</sup>

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 August 18, 2008 through August 30, 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 \$828,039.75.

Column 2 lists the amounts which were adjudicated amounts as denied by the NPFC in the amount of \$47,783.16. Column 3 lists the amounts which were denied by ACL and

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<sup>9</sup> See, FOSC statement provided to the NPFC regarding restricted hours.

associated with some of the costs requested in this claim. The itemized breakdown of denied costs which is addressed in the attached ACL audit is 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 # N0808-187 – 8/18/08 – denied amount of	\$6,008.00
OMI Invoice # N0808-187 – 8/19/08 – denied amount of	\$8,941.25
OMI Invoice # N0808-187 – 8/20/08 – denied amount of	\$8,587.50
OMI Invoice # N0808-187 – 8/21/08 – denied amount of	\$9,975.00
OMI Invoice # N0808-187 – 8/22/08 – denied amount of	\$7,676.44
OMI Invoice # N0808-187 – 8/23/08 – denied amount of	\$600.00
OMI Invoice # N0808-187 – 8/24/08 – denied amount of	\$1,050.63
<u>Unidentified charge</u>	<u>\$1,854.37</u>

**Total amount:** **\$44,693.19**

OMI Invoice # N0809-039 –8/25/08 – denied amount of	\$1,210.00
OMI Invoice # N0809-039 –8/26/08 – denied amount of	\$816.00
OMI Invoice # N0809-039 –8/27/08 – denied amount of	\$684.00
OMI Invoice # N0809-039 –8/28/08 – denied amount of	\$0.00
OMI Invoice # N0809-039 –8/29/08 – denied amount of	\$0.00
OMI Invoice # N0809-039 –8/30/08 – denied amount of	\$0.00
ACL discrepancies – denied amount of	<u>\$379.97</u>

**Total amount:** **\$3,089.97**

Accordingly, the Claimant OMI's sum certain of \$ 875,822.91 minus the total amount the NPFC denied (Column 2 - \$47,783.16) equals the total uncompensated removal costs (Column 1 \$828,039.75) which is due to the Claimant OMI.

On this basis, the Claims Manager hereby determines that the Claimant did in fact incur \$828,039.75 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# N08057-010.

**C. *Determined Amount:***

The NPFC hereby determines that the OSLTF will pay **\$828,039.75** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-010. 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*