

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/04/2010
Claim Number	: N08057-016
Claimant	: Oil Mop, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs - Reconsideration
Claim Manager	██████████
Amount Requested	: \$517,554.40

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, Oil Mop, LLC (Oil Mop or OMI), provided response services under contract with ACL.¹ On April 6, 2009, OMI submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of the response services, incurred by OMI, in the amount of \$517,554.40 for specified dates during the time period of August 8, 2008 through September 29, 2008 during which the Claimant worked as a subcontractor to Summit Contracting, LLC.²

Summit Contracting, LLC (Summit Contracting) is a civil engineering and environmental services provider that entered into a strategic partnership with ACL in May 2007. During this incident, Summit Contracting served as prime contractor of the central supply station for this incident and Oil Mop provided personnel and equipment to run the station.

On September 14, 2009, Mr. John Lane of Maritime Alliance Group, Inc. (MAGI) which is part of the ACL audit team, provided the NPFC with its audit of the OMI invoices which are subject of this claim, except that the OMI invoices were submitted to ACL via Summit Contracting as OMI's prime contractor for the services rendered under the OMI invoices for this claim submission.

The NPFC sent the Responsible Party (RP) notification letter, dated April 8, 2009, to Ms. ██████████, ACL – General Counsel and Mr. ██████████ of Nicoletti, Horning & Sweeney, ACL – External Counsel.³ The invoices which are the subject of this claim were presented to Summit Contracting as the prime contractor to OMI on or about August 18, 2008, August 28, 2008, September 11, 2008, and November 6, 2008.⁴ ACL has made payments to Summit Contracting for costs associated with two of the OMI invoices included in this claim in the

¹ See, Master Service Agreement between American Commercial Barge Line L.L.C, and Oil Mop, L.L.C., dated July 23, 2002. American Commercial Barge Line L.L.C, is a wholly owned subsidiary of ACL.

² See, Optional OSLTF Claim Form, signed by Mr. ██████████, Accounting Manager for OMI on April 2, 2009.

³ See, NPFC letter to ACL, dated April 8, 2009.

⁴ See, OMI Invoices N0808-099, N0808-188, N0809-028 and N0811-003.

amounts of \$86,357.32 on September 19, 2008 via check # 2067.⁵ ACL has acknowledged receipt of all four invoices that are subject of this claim by way of ACL's audit. (See Enclosure 1 – 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 # N0808-188, N0808-099, N0809-028 and N0811-003.

IV. The Audits

During the incident, the Claimant provided response resources and services as a subcontractor to Summit Contracting. The services provided by the Claimant were acknowledged by Summit Contracting representatives and the ACL designated Zone Managers, who acted as the Qualified Individual(s) (QI) representatives for ACL in various zones on given dates. The Zone Manager(s) approved the materials/equipment and labor identified on each daily by typically signing the document.

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 audit of OMI's invoices as a subset of Summit Contracting billing, ACL denied some of OMI's costs with little or no explanation, reason, or standard in support of the denied costs, and ACL also approved and paid Summit Contracting for some of the costs encompassed in this claim which the NPFC is denying because ACL has demonstrated payment was made to Summit Contracting which leaves OMI with an issue for non-payment by Summit. The NPFC provided OMI a copy of the ACL audit that had been provided to the NPFC which shows amounts approved, paid, and recommended for payment to Summit as the prime contractor to OMI.

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 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

⁵ See, ACL summary of payments made and recommended for Summit Invoice 21.

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 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. 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: (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.

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 8, 2008 through September 29, 2008 when OMI worked as a subcontractor to Summit Contracting. 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 confirmed in the ACL 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 the 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.

As detailed in Enclosure (1), 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 or because ACL had demonstrated that it paid the prime contractor,

Summit Contracting, for some of the costs claimed by OMI. In other instances, OMI had documented costs which were denied by ACL in its Financial Audit. Having reviewed such costs, the NPFC approved these costs over ACL's denial in the Financial Audit because some of the 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 was to confirm that the goods and services billed on a given day at a given location for a given time period had actually been provided and accounted for. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a contract between ACL and OMI 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 various 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.⁶

C. *Reconsideration Request and Analysis:*

On March 2, 2010, the NPFC made an offer to the claimant on this claim in the amount of \$223,829.65 based on the documentation provided and reviewed by the NPFC. On March 3, 2010, the claimant requested reconsideration via email to Ms. Donna Hellberg based on additional documentation the claimant sent under separate email cover.⁷ The claimant provided additional documentation on reconsideration which consisted of: payroll system printouts of hours for various people that had been previously denied; safety sign in sheets not previously provided; payroll records not previously provided; invoices not previously provided; and explanations to accompany the new documentation. In its review in Enclosure (1), the NPFC tabulated and approved the costs claimed as uncompensated removal costs in Column 1 for each day beginning on August 8, 2008 through September 29, 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 \$275,942.60.

Column 2 lists the adjudicated amounts which the NPFC denied in the amount of \$241,611.61. Column 3 lists the amounts which were denied by ACL and 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 (1).

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 # N0808-188 – 8/16/08 – denied amount of	\$ 110.00
OMI Invoice # N0808-188 – 8/17/08 – denied amount of	\$ 107.02
OMI Invoice # N0808-188 – 8/18/08 – denied amount of	\$ 667.00
OMI Invoice # N0808-188 – 8/19/08 – denied amount of	\$ 522.42
OMI Invoice # N0808-188 – 8/20/08 – denied amount of	\$ 614.00
OMI Invoice # N0808-188 – 8/21/08 – denied amount of	\$ 110.00
OMI Invoice # N0808-188 – 8/22/08 – denied amount of	\$ 109.00

⁶ See, FOOSC statement provided to the NPFC regarding restricted hours.

⁷ See, Email dated March 3, 2010 from Kyle Prest to Donna Hellberg

Amount paid by ACL to Summit for OMI costs \$86,357.32

Total denied amount for N0808-188: \$88,596.76

OMI Invoice # N0809-028 –8/28/08 – denied amount of \$.25
OMI Invoice # N0809-028 – rounding issue \$ (.03)

Total denied amount for N0809-028: \$.22

OMI Invoice # N0811-003 – 9/05/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/06/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/07/08 – denied amount of \$ 862.20
OMI Invoice # N0811-003 – 9/08/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/09/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/10/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/11/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/12/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/15/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/16/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/17/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/18/08 – denied amount of \$ 44.63
OMI Invoice # N0811-003 – 9/19/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/25/08 – denied amount of \$ 0.00
OMI Invoice # N0811-003 – 9/29/08 – denied amount of \$ 100.80
Rounding Offset \$ (.03)

Total denied amount for N0811-003: \$1,007.60

OMI Invoice # N0808-099 – 8/08/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/09/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/10/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/11/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/12/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/13/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/14/08 – denied amount of \$110.00
OMI Invoice # N0808-099 – 8/15/08 – denied amount of \$110.00
Amount paid by ACL to Summit for OMI approved costs \$151,127.03

Total denied amount for N0808-099: \$152,007.03

Accordingly, the Claimant OMI's sum certain of \$517,554.40 minus the total amount the NPFC denied (Column 2 - \$241,611.61) equals the total uncompensated removal costs (Column 1 \$275,942.79) which is due to the Claimant OMI.

On this basis, the Claims Manager hereby determines that the Claimant did in fact incur \$275,942.79 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# N08057-016.

Lastly, it is important to note that \$192,310.50 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.

Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$275,942.79** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-016. 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: