

CLAIM SUMMARY / DETERMINATION FORM

Date	: 1/04/2010
Claim Number	: N08057-018
Claimant	: United States Environmental Services, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$38,606.00

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 the incident, United States Environmental Services LLC, (USES), provided response services under contract with ACL.¹ On April 28, 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 \$419,150.50 for the time period of July 23, 2008 through July 27, 2008².

On July 24, 2009, Mr. ██████████ of USES requested that the National Pollution Funds Center (NPFC) revised the sum certain for their claim to \$38,606.00 in order to reflect payments made by ACL based on ACL's summary sheet and agreed upon adjustments entitled, "Summary of USES Revised Invoices Submitted to the NPFC, dated July 24, 2009. (See Enclosure 1 – Summary of USES Revised Invoices).

The NPFC sent the Responsible Party (RP) notification letter, dated April 22, 2009 to Ms. ██████████, ACL – General Counsel, and Mr. ██████████ of Nicoletti, Horning & Sweeney, ACL – External Counsel. The invoices which are the subject of this claim were presented to the responsible party for payment on or about July 23, 2008.³ It is unclear, in this particular claim, as to whether or not Lawson charges were removed from the original claim submission. ACL has acknowledged receipt of the invoices that are subject of this claim by way of ACL's audit, (See Enclosure 2—ACL Audit). USES has confirmed in writing to the NPFC that all subcontractors for invoice# 080140121 have been paid in full.

IV. The Audits

¹ See USES Agreement to Conduct Emergency Response Services, signed by Mr. ██████████ on July 29, 2008.

² See Optional OSLTF Claim Form, signed by Mr. ██████████, dtd 4/21/09.

³ See USES invoices dated July 23 through July 27, 2008.

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 (1) – 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. During the response, ACL held negotiation discussions with the response contractors including the Claimant USES and requested special pricing reductions in exchange for a prompt payment. USES initially verbally 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, USES revised its billing so that it was in accordance with the original published rate schedule between USES and ACL⁴. All invoices reflecting the original pricing schedule were presented to ACL as required by regulation.

V. The Request for Reconsideration

In a letter dated November 4, 2009, USES requested reconsideration of the NPFC’s original offer of \$2,238.00. The Claimant reduced the amount of their claim to \$25,613.00 which consists of \$23,375.00 in uncompensated per diem costs plus the original \$2,238.00 originally offered by the NPFC during the original offer process bringing the requested sum certain on reconsideration to \$25,613.00. On reconsideration, the claimant produced a per diem summary sheet by day which showed the total number of people per diem was being requested for and the summary further broke down the number of people by USES invoice.

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).

⁴ Standard USES Rate Schedule, dtd July 1, 2008, Version 4.01LA

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).

DETERMINATION OF LOSS:

A. Overview:

1. The FOSC coordination has been established under the Federal Project by way of Incident Action Plans 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 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. Original Determination 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, July 23, 2008 through July 27, 2008. The

Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

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 Incident Action Plans (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.

In its review of Enclosure (2), the NPFC tabulated and approved the costs claimed as uncompensated removal costs in the "NPFC Approved" column for each day beginning on July 23, 2008 through July 27, 2008 and constitutes uncompensated removal costs for a total of \$2,238.00.

The "NPFC Denied" column reflects costs that are denied by the NPFC in the amount of \$41,106.00. The itemized breakdown of denied costs which are addressed in the attached ACL audit is identified as Enclosure (2).

The overall denial summary is as follows:

USES Invoice # 080140121, 7/23/08 – denied amount of	\$750.00
USES Invoice # 080140121, 7/24/08 – denied amount of	\$10,500.00
USES Invoice # 080140121, 7/25/08 – denied amount of	\$7,512.00
USES Invoice # 080140121, 7/26/08 – denied amount of	\$5,824.00
USES Invoice # 080140121, 7/27/08—denied amount of	<u>\$16,520.00</u>
Total Amount:	\$41,106.00

Accordingly, the Claimant's sum certain of \$38,606.00 is less than the audited amount of \$43,344.00. The audited amount of \$43,344.00 less the total amount the NPFC denied (Column 2 - \$41,106.00) equals the uncompensated removal costs (Column 1 - \$2,238.00) which is due to the Claimant, USES.

The NPFC has denied \$41,106.00 because the claimant has failed to meet their burden in providing sufficient evidence to support payment of the individual costs. See the individual line items in the attached audit for details.

On this basis, the Claims Manager hereby determines that the Claimant incurred \$2,238.00 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# N08057-018.

C. Reconsideration Determination Analysis:

The NPFC reviewed the actual cost invoices and dailies to confirm that the Claimant had incurred all costs claimed. The NPFC also reviewed copies of per diem sign in sheets and signed payroll sheets for personnel where a per diem sign in sheet may have been lacking,

and the NPFC cross referenced the documents provided by the Claimant against the documents the auditor for the RP possessed in support of the requested charges.

The NPFC has identified the ACL audit page number accordingly on the attached spreadsheet(s) by line item for easy reference. The reconsideration 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 NCP or directed by the FOOSC, 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, July 23, 2008 through July 27, 2008. The NPFC created a spreadsheet by day, by USES invoice #, and by name, which demonstrates the names of the people the Claimant has requested per diem for and for which the NPFC has in turn determined to be sufficiently documented and therefore payable by the OSLTF as a removal cost.

Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$21,363.00** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted on reconsideration to the NPFC under claim # N08057-018. 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: