

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/26/2010
Claim Number	: N08057-019
Claimant	: United States Environmental Services, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$163,001.40

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision with M/T/TINTOMARA 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

Pursuant to a contract with ACL, Claimant, United States Environmental Services LLC (USES), provided emergency response services¹ from July 23-27, 2008, associated with ACL's discharge of oil to the Mississippi River. Claimant subsequently subcontracted with Lawson Environmental Service L.L.C. to provide additional response services. ACL made partial payments to USES for invoices in the amounts of \$1,524,284.60 and \$20,771.16², (See Enclosure 2); however, ACL did not pay all removal costs presented by Claimant.³ This claim represents the uncompensated removal costs not paid by ACL.

On April 22, 2009 USES submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the original amount of \$183,772.56 for the time period of July 23, 2008 through July 27, 2008. The NPFC sent the Responsible Party (RP) notification letter, dated April 27, 2009, to Ms. [REDACTED], ACL – General Counsel, and Mr. [REDACTED] of Nicoletti, Horning & Sweeney, ACL – External Counsel, advising that Claimant presented a claim to the NPFC for certain uncompensated removal costs.⁴ ACL acknowledged receipt of the invoices that are subject of this claim by way of ACL's Financial Audit. (See Enclosure 3—ACL Audit).

On July 24, 2009, Mr. [REDACTED] of USES requested that the NPFC revise the sum certain for their claim to \$163,001.40 in order to reflect payments made by ACL based on ACL's summary sheet, agreed upon adjustments entitled, "Summary of USES Revised Invoices

¹ See, Claim Form, signed by Mr. [REDACTED], dated April 22, 2009, Attachment E, Agreement to Conduct Emergency Response Services, signed by Mr. [REDACTED] on July 29, 2008.

² See, USES spreadsheet dated January 6, 2009 to the NPFC which identifies two payments made to USES by ACL.

³ See, USES Invoice No. 080140118A Summary for dates July 23 through July 27, 2008.

⁴ See, NPFC letter, to ACL, re: Claim No. N08057-019, dated April 27, 2009.

Submitted to the NPFC, dated July 24, 2009, and the removal of Lawson personnel and equipment per USES. (See Enclosure 1 – Summary of USES Revised Invoices).

During the incident, the Claimant provided response resources and services under its contract with ACL, Agreement to Conduct Emergency Response Services, dated July 23, 2008, and executed by ACL on July 29, 2008 (Agreement). Claimant provided its published rate schedule to ACL.⁵ 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 Managers approved the materials, equipment and labor identified on each daily by signing the document.⁶ Beneath each signature, the Zone Manager made the notation “subject to audit.”

Initially, USES submitted its invoices to ACL in accordance with the Agreement. All costs invoiced to ACL were consistent with the published rate schedule provided to ACL by the Claimant. The Agreement also provided that all invoices were payable 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, whichever is less.

IV. The Audits

ACL prepared a Financial Audit for USES invoices, providing line by line itemization for materials, equipment and personnel submitted for payment by USES and payments made to USES by ACL. Upon request by the NPFC, ACL provided the Audit to the Claims Manager. 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. Based on the invoices and the audit, it is clear the ACL did not pay their invoices within 30 days.

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 -

⁵ Standard USES Rate Schedule dated July 1, 2008, Version 4.01LA.

⁶ One responsibility of ACL Zone Managers was to confirm that the materials, equipment and services billed on each day for a certain period of time and at a given location have in fact been provided and accounted for.

- (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 removal actions were coordinated with the FOSC as evidenced by 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 that it has filed no suit in court for the claimed uncompensated removal costs.
4. The claim was timely submitted in accordance with OPA.
5. USES presented its removal costs to the RP more than 90 days prior to the submission of the claim to the NPFC. 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 3 – ACL audit which incorporates NPFC audit).

B. Analysis:

USES states in its claim that all costs claimed are for uncompensated removal costs incurred 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.

The NPFC Claims Manager reviewed the Claimant’s actual cost invoices and dailies to confirm that the Claimant had incurred all costs claimed and that the costs were adequately documented and reasonable. As noted above, ACL appointed Zone Managers who acted as Qualified Individual(s) (QI) representatives for ACL in various response zones on specific days. The NPFC Claims Manager determined, 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’s Audit.

The Claims Manager also confirmed that the removal costs 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) incurred as a result of these actions; (3) incurred for removal actions were determined by the FOSC to be consistent with the NCP or directed by the FOSC. The Claims Manager reviewed the Pollution Reports and Incident Action Plans (IAPs) to corroborate actions that were taking place in the field at any given point in time and were utilized as part of the adjudication process. 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 also reviewed the detailed comments in ACL's Financial Audit. The NPFC approved certain costs which were adequately documented by the Claimant, USES, yet 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. 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.⁷

At the time ACL performed their initial audit of the USES invoice, any amounts approved by ACL during their audit were compensated at 100% per line item. Upon review of USES' claim the Claims Manager determined that USES had only reimbursed their subcontractor, Lawson Environmental Service, at a 70% reimbursement rate. Thus, when the NPFC adjudicated this claim, the NPFC requested that USES identify all line items for Lawson Environmental resources that were part of the USES invoice. The NPFC denied 30% of all Lawson costs that the NPFC determined compensable because Claimant had not paid those costs to Lawson.

Any Lawson line item denied by ACL that the NPFC determined compensable, was approved at 70% of those costs as incurred by USES; the NPFC denied 30% as not uncompensated. To complete the administrative record in this claim and to clarify identification of the 30% overpayment of Lawson claims and the NPFC approval of uncompensated removal costs for which the Claimant is entitled, the NPFC created a column on the ACL audit labeled "NPFC identified overpayment by ACL for Lawson line items," and an "NPFC Approved" column.

As referenced in the columns, the unsubstantiated costs are as follows:

7/23/08 – labor denied in the amount of	\$ 1,621.40
7/23/08 – mat/equip denied in the amount of	\$ 4,754.60
7/24/08 – labor denied in the amount of	\$ 3,823.80
7/24/08 – mat/equip denied in the amount of	\$10,252.00
7/25/08 – labor denied in the amount of	\$ 610.80
7/25/08 – mat/equip denied in the amount of	\$ 7,950.00

⁷ NPFC's policy is if there is a written agreement between the two parties then we deem those costs reasonable and compensable.

7/26/08 – labor denied in the amount of	\$ 3,011.70
7/26/08 – mat/equip denied in the amount of	\$ 375.00
7/27/08 – labor denied in the amount of	\$ 7,081.80
7/27/08 – mat/equip denied in the amount of	\$ 0.00
Mark-Up on Lawson Environmental Services Unpaid	\$10,335.00
LES Unidentified amounts	\$ 999.90
Total denied amount for N08057-019:	\$50,816.60

During the NPFC’s adjudication, the NPFC identified two errors made by ACL during their audit which resulted in \$3,600.00 in additional costs due to USES. See the ACL audit summary sheet for identification and explanation of these two errors. In summary, the NPFC has approved \$115,784.80 in OPA compensable costs and has denied \$50,816.60 in costs. All amounts in excess of \$115,784.80 are deemed denied.

On this basis, the NPFC Claims Manager hereby determines that the Claimant did in fact incur \$115,784.80 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# N08057-019.

Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$115,784.80** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-019. 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: *6/9/10*

Supervisor Action: *Approved*

Supervisor’s Comments: