CLAIM SUMMARY / DETERMINATION FORM

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| Date | : | 7/19/2010 |
| Claim Number | : | N08057-024 |
| Claimant | : | United States Environmental Services, LLC |
| Type of Claimant | : | OSRO |
| Type of Claim | : | Removal Costs |
| Claim Manager | : | Dawn Unglesbee |
| Amount Requested | : | $460,924.78 |

## 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, the Claimant, United States Environmental Services LLC, (USES), provided response services[1] from August 4, 2008 through August 10, 2008,[2] associated with the DM 932 discharge of oil into the Mississippi River. The Claimant subsequently subcontracted with Lawson Environmental Service L.L.C. to provide additional response services. ACL made two payments to USES. The first payment in the amount of $3,491,357.40 and the second payment in the amount of $157,927.46;[3] however, ACL did not pay all removal costs presented by the Claimant.[4] This claim represents the uncompensated removal costs not paid by ACL.

On May 14, 2009 USES submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of $618,852.24 for the time period of August 4, 2008 through August 10, 2008. On January 12, 2010, USES updated their sum certain to $460,924.78 due to the $157,927.46 payment received by ACL.[5] The NPFC sent the Responsible Party (RP) a notification letter dated May 21, 2009, to Ms. Dawn Landry, ACL – General Counsel and Mr. John A.V. Nicoletti of Nicoletti, Hornig & Sweeney, ACL – External Counsel.[6] ACL acknowledged receipt of the invoices that are subject of this claim by way of ACL's financial Audit. (See Enclosure 1 – ACL Audit).

During the incident, the Claimant provided response resources and services under its contract with ACL, Agreement to Conduct Emergency Response Services, July 23, 2008, and executed

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[1] *See,* Claim Form, signed by Mr. Barry Thibodeaux, dated May 14, 2009, Attachment E, Agreement to Conduct Emergency Response Services, signed by Mr. Sam George on July 29, 2008.
[2] *See,* 33 CFR § 136.105(b).
[3] *See,* USES spreadsheet dated January 6, 2009 to the NPFC which identifies two payments made to USES by ACL.
[4] *See,* USES Invoices No. 080140123 Summary for dates August 4, 2008 through August 10, 2008.
[5] *See,* Footnote (3), spreadsheet dated January 6, 2009.
[6] *See,* NPFC letter, to ACL, re: Claim No. N08057-024.

by ACL on July 29, 2008 (Agreement). The Claimant provided its published rate schedule to ACL.[7]

The services provided by the Claimant were acknowledged by ACL's designated Zone Managers, who acted as the Qualified Individual (QI) representatives for ACL in various zones throughout the removal response. 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.[8] Beneath each signature, the Zone Manager made the notation "subject to audit."

## IV. Audit

ACL prepared a financial audit for USES invoices, providing a line by line itemization of materials, equipment, and personnel submitted for payment by USES and payments made to USES by ACL. Upon request, ACL provided a copy of this audit to the NPFC. The NPFC found that ACL's auditors focused on whether the costs were properly supported, operationally reasonable and necessary in accordance with ACL's standards. Based upon the invoices and the audit, it is clear that ACL did not pay the USES invoices within the 30 days timeframe set forth in the July 29, 2008 agreement.

## ***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 an incident". 33 USC § 2701(31).

"Oil" is defined in relevant part, at 33 U.S.C. § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil."

"Navigable waters" means "the waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21).

"Remove" or "removal" means "containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." 33 U.S.C. 2701(30).

[7] Standard USES Rate Schedule dated July 1, 2008, Version 4.01LA.
[8] 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.

"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 and incident." 33 U.S.C. 2701(31).

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 U.S.C §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

Under 33 CFR 136.101(a)(2), except as provided under section 1012(h)(3) of the Act (33 U.S.C. 2712(h)(3)) (minors and incompetents), the Fund will consider a claim only if presented in writing to the Director, NPFC, within the following time limits: (2) For removal costs, within six years after the date of completion of all removal actions for the incident. As used in this paragraph, "date of completion of all removal actions" is defined as the actual date of completion of all removal actions for the incident or the date the FOSC determines that the removal actions which form the basis for the costs being claimed are complete, whichever is earlier.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR §§ 136.105(b) and (e)(12) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident and the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs. In addition, under 33 CFR Part 136, the claimant bears the burden to prove that the removal actions were reasonable in response to the scope of the oil spill incident. 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).

## VI. DETERMINATION OF LOSS

### *A. Overview:*

1. The removal actions were coordinated with 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 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. In accordance with 33 CFR § 136.101(a)(2), the claim was submitted on time.
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 notified the RP of the claim submission and the RP has provided a copy of their audit of USES' response costs
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that the majority of removal costs presented were for actions in accordance with the NCP and reasonable and allowable under the OPA and 33 CFR § 136.203 & 205 with the exception of denied costs itemized in the attached spreadsheet: (See, Enclosure 2 – ACL audit which incorporates the results of the NPFC's adjudication).

***B. Analysis:***

USES claims that all claimed costs are for uncompensated removal costs incurred for this incident for the time period of August 4, 2008 through august 10, 2008 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 whether the Claimant had incurred these costs and whether these costs were adequately documented and reasonable. As noted above, ACL appointed Zone Managers who acted as Qualified Individual (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 acknowledged by the designated Zone Managers on the dailies provided by USES and by ACL's audit.

The Claims Manager reviewed the actual cost invoices and dailies to confirm that the Claimant had incurred the costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR Part136 (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 National Contingency Plan, 33 CFR Part 300 or as directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

During the adjudication, the Claims Manager reviewed the Pollution Reports and Incident Action Plans (IAPs) which corroborated that the claimed actions had taken place in the field. The NPFC also reviewed the comments contained in ACL's financial audit. Although ACL denied certain costs, the NPFC approved these costs where adequately documented by USES. Given that ACL's Zone Managers acknowledged and verified personnel, equipment and services rendered each day, as evidenced by their signed "dailies" and corroborated by other documentation, the NPFC determines that these actions were compensable removal actions under OPA. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a contract with specified rates, agreed upon in advance of the incident by the parties, the NPFC further finds that USES has satisfied its burden of showing that the approved amounts claimed were adequately documented and reasonable.

During review of USES' claim, the NPFC Claims Manager determined that USES had only reimbursed their subcontractor, Lawson Environmental, at a 70% of the invoiced amount. 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

then denied 30% of all Lawson costs that the NPFC determined to be OPA compensable because the Claimant had not paid those costs to Lawson thus they are not uncompensated costs under the OPA.

In order to address the discrepancies in this claim, the NPFC created a column within the ACL audit entitled "NPFC identified overpayment made by ACL on LES items". It is clear from the spreadsheet that when ACL performed its financial audit of the USES invoice, the Claimant failed to identify that it had not paid 100% of each Lawson item as invoiced. This resulted in an overpayment by ACL to USES for ACL approved Lawson charges.

NPFC denied the following costs as identified in the ACL audit:

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| 8/04/08 – Labor denied in the amount of | $ 66,709.10 |
| 8/04/08 – Mat/Equip denied in the amount of | $ 1,571.00 |
| 8/04/08 – Labor and Equipment Adjustment denied in the amount of | $ 0.00 |
| 8/05/08 – Labor denied in the amount of | $ 6,381.20 |
| 8/05/08 – Mat/Equip denied in the amount of | ($151.50) |
| 8/05/08 – Labor and Equipment Adjustment denied in the amount of | $ 0.00 |
| 8/06/08 – Labor denied in the amount of | $ 5,721.20 |
| 8/06/08 – Mat/Equip denied in the amount of | $ 2,590.50 |
| 8/06/08 – Labor and Equipment Adjustment denied in the amount of | $ 0.00 |
| 8/07/08 – Labor denied in the amount of | $ 9,360.00 |
| 8/07/08 – Mat/Equip denied in the amount of | $ 1,337.00 |
| 8/07/08 – Labor and Equipment Adjustment denied in the amount of | $ 1,908.00 |
| 8/08/08 – Labor denied in the amount of | $ 2,003.10 |
| 8/08/08 – Mat/Equip denied in the amount of | $ 9,052.50 |
| 8/08/08 – Labor and Equipment Adjustment denied in the amount of | $ 0.00 |
| 8/09/08 – Labor denied in the amount of | $ 1,620.00 |
| 8/09/08 – Mat/Equip denied in the amount of | $ 3,695.00 |
| 8/09/08 – Labor and Equipment Adjustment denied in the amount of | $ 293.75 |
| 8/10/08 –Labor denied in the amount of | $ 7,282.50 |
| 8/10/08 – Mat/Equip denied in the amount of | $ 3,722.00 |
| Unpaid portion of LES invoice #1240 | $314,811.71 |
| Mark-Up on unpaid LES | $ 6,150.88 |
| **Total Denied Amount for N08057-024:** | **$377,348.84** |

It is important to note that while the NPFC identified a 30% overpayment by ACL to USES on certain Lawson charges, the NPFC has not offset these payments against the documented but uncompensated amounts owed to the Claimant.[9]

[9] *See*, Enclosure 2 – ACL audit which incorporates the results of the NPFC's adjudication.

## VII. Determined Amount

The NPFC Claims Manager hereby determines that the Claimant incurred $83,575.94 of uncompensated OPA compensable removal costs that are supported by the evidence. This amount is payable of the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and adjudicated by the NPFC under Claim # N08057-024.

Claim Supervisor: ***Donna Hellberg***

Date of Supervisor's review: ***7/20/10***

Supervisor Action: ***Approved***

Supervisor's Comments: