

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/20/2010
Claim Number	: N08057-031
Claimant	: United States Environmental Services, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$319,957.45

### **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.

### **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).

### **The Claimant and the Claim**

Claimant, United States Environmental Services LLC (USES), executed a cleanup contract with ACL to provide emergency response services<sup>1</sup> for removal of the discharged oil from the Mississippi River. 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.<sup>2</sup> 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.<sup>3</sup> Beneath each signature, the Zone Manager made the notation "subject to audit."

Claimant provided these emergency response services from August 11, 2008 through August 17, 2008. Claimant subsequently subcontracted with Lawson Environmental Service L.L.C. (Lawson) to provide additional response services. Claimant has submitted weekly claims for its uncompensated removal actions and the NPFC has adjudicated and paid each claim as a separate claim. This claim, N08057-031, represents Claimant's uncompensated removal actions incurred from August 11-17, 2008.

Claimant's invoice to ACL for this claim originally totaled \$3,286,314.18. ACL made two payments to USES on the invoice which is subject of this claim. The ACL payments made were

<sup>1</sup> See, Claim Form, signed by Mr. ██████████, dated May 26, 2009, Attachment E, Agreement to Conduct Emergency Response Services, signed by Mr. ██████████ on July 29, 2008.

<sup>2</sup> Standard USES Rate Schedule dated July 1, 2008, Version 4.01LA.

<sup>3</sup> 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.

in the amounts of \$2,629,051.34 and \$50,931.91, respectively. USES also had agreed-to-reductions which totaled \$135,485.68 identified as claimant's attachment B(2) leaving an unsettled balance of \$470,845.25.

It is important to note that the original USES invoice referenced above included subcontractor costs identified as Lawson Environmental Services (LES) in the total invoiced amount of \$685,166.00. When USES reviewed the Lawson invoice, they determined \$54,662.00 of the costs should be denied leaving an outstanding amount of \$630,504.00. At the time the claim was submitted to the NPFC, the claimant had only incurred \$479,616.20 of the Lawson invoice therefore the claimant's sum certain is represented as follows:

USES invoice	\$3,286,314.18
ACL Payment 1	- \$2,629,051.34
ACL Payment 2	-\$ 50,931.91
Agreed-to-adjustments	-\$ 135,485.68
<u>Unpaid amt of Lawson invoice</u>	<u>-\$ 150,887.80</u>

Claimant's sum certain \$ 319,957.45

USES presented their claim to the Responsible Party (RP) on August 23, 2008. On May 26, 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 \$369,889.36 for the time period of August 11-17, 2008.<sup>4</sup> The NPFC sent the RP a notification letter, dated May 26, 2009, to Ms. [REDACTED], ACL –General Counsel, and Mr. [REDACTED] of Nicoletti, Horning & Sweeney, ACL – External Counsel, advising that the Claimant presented a claim to the NPFC for certain uncompensated removal costs.<sup>5</sup>

### **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.

### **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).

<sup>4</sup> As noted above this sum certain was amended to \$319,957.45.

<sup>5</sup> See, USES letter to ACL re: Claim No. N08057-031, dated May 26, 2009

The Claims Regulations at 33 CFR § 136.105(b) provide that each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. Claimant bears the burden of providing all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a). In addition, 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 [Federal On-Scene Coordinator] 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].

Claims for uncompensated removal costs must be presented to the Fund within six years after the date of completion of all removal actions for that incident. 33 USC § 2712(h).

### **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 certified that it has filed no suit in court for the claimed uncompensated removal costs.
4. The claim was submitted within six years after the date of completion of all removal actions for this incident.
5. USES presented its claim for removal costs for the invoice dated August 11-17, 2008, to the RP more than 90 days prior to the submission of the claim to the NPFC. The NPFC notified the RP that Claimant submitted this claim to the NPFC. The RP provided a complete copy of their Audit of the USES response costs for this incident. .
6. The NPFC Claims Manager 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 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:***

USES states in its claim that all costs claimed are for uncompensated removal costs incurred for this incident for the time period of August 11-17, 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, that the costs were uncompensated, 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 Manger 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 Claimants daily sheets. Because the services and material/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.<sup>6</sup>

Upon review of USES' claim the Claims Manager determined that USES had only reimbursed its subcontractor, Lawson Environmental Service, at a 76% 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.

Any Lawson line item denied by ACL that the NPFC determined compensable, was approved at 76% of those costs as incurred by USES; the NPFC denied 24% as not uncompensated. To complete the administrative record in this claim and to clarify identification of the 24% overpayment of Lawson costs made by ACL at the time of their audit and to identify 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.

USES agreed to certain reductions, therefore the NPFC reviewed Claimant's Attachment (B) (2), which reflects adjustments agreed to by the RP and the Claimant. The NPFC took no action for the 'agreed to adjustment' line items as these were already denied by ACL.<sup>7</sup>

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<sup>6</sup> NPFC policy provides that a written agreement between the responsible party and the cleanup contractor for removal actions evidences that the removal costs and resources incurred pursuant to that agreement are deemed reasonable and compensable.

<sup>7</sup> ATT B 2.

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

8/11/2008 – Labor denied in the amount of	\$612.00
8/13/2008 – Labor denied in the amount of	\$396.00
LES denied costs by USES which were paid by ACL	\$54,662.00
LES unpaid markup	\$37,721.95
<u>Unidentified costs</u>	<u>\$5,121.88</u>

**Total denied amount for N08057-031** **\$98,513.83**

In summary, the NPFC has approved \$221,443.62 in OPA compensable costs. On this basis, the NPFC Claims Manager hereby determines that the Claimant did incur \$221,443.62 of uncompensated removal costs that are supported by the record and that this amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim# N08057-031.

**Determined Amount:**

The NPFC hereby determines that the OSLTF will pay **\$221,443.62** as full compensation for reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-031. 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: *11/24/10*

Supervisor Action: *Approved*

Supervisor's Comments: