

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 01/05/2010
Claim Number	: N08057-046
Claimant	: Environmental Safety and Health Consulting Services, Inc.
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$608,965.68

### **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 (RP) under the Oil Pollution Act (OPA).

### **III. The Claimant and the Claim**

On December 12, 2008, the Environmental Safety and Health Consulting Services, Inc. (ES&H) submitted a removal cost claim to the National Pollution Fund Center (NPFC) in the amount of \$4,245,686.64.<sup>1</sup> This amount represented ten invoices, which ES&H asserted, document the unpaid removal costs incurred during the DM 932 oil spill incident. ACL had utilized ES&H to provide removal services during this incident.<sup>2</sup>

On July 29, 2009, ES&H requested and the NPFC agreed to separate the first invoice 1-18216, from the original claim with the sum certain of \$110,392.98 as Claim No. N08057-003.<sup>3</sup> In addition, the NPFC agreed to move the remaining unpaid balance of \$4,135,293.66 into Claim No. N08057-046 as of August 5, 2009. However, in its August 13, 2009 letter, ES&H confirmed our agreement that the NPFC would separate the remaining nine invoices totaling \$4,135,293.66 into nine separate claims, allowing each invoice total to become the new sum certain for each claim.<sup>4</sup> The NPFC has identified Claim Nos. N08057-046 through N08057-054 and designated them for the remaining nine invoices. Claim No. N08057-046, the subject of this claim, was opened by the NPFC to capture Invoice # 1-18172 (binder 2) with the Claimant's requested sum certain of \$608,965.68.<sup>5</sup>

In its December 4, 2008 transmittal letter, ES&H had presented all ten invoices, including the second invoice (1-18172) to ACL requesting payment on all unpaid balances by December 15, 2008, but ES&H received no further payment from ACL on the unpaid balance.<sup>6</sup> The NPFC sent ACL an RP notification letter dated December 22, 2008, to Mr. [REDACTED], ACL – Vice President of Legal & Risk Management and to Mr. [REDACTED] of Nicoletti, Horning &

<sup>1</sup> See, Claim Form, signed by Mr. [REDACTED] Owner/President on 12/12/08.

<sup>2</sup> See, POLREPs One through Twenty-one.

<sup>3</sup> See, ES&H letter to NPFC dated July 29, 2009.

<sup>4</sup> See, ES&H letter to NPFC dated August 13, 2009.

<sup>5</sup> *Id.*

<sup>6</sup> See, ES&H letter to ACL dated December 4, 2008.

Sweeney, ACL – External Counsel.<sup>7</sup> In addition, the NPFC sent the RP the notification letter, dated September 1, 2009, to Ms. [REDACTED], ACL – Counsel, to Mr. [REDACTED] of Nicoletti, Horning & Sweeney, ACL – External Counsel, and to Mr. [REDACTED] ACL – External Counsel. In this second RP notification letter, the NPFC informed ACL that it had agreed to separate all ten invoices of the original claim into individual claims.<sup>8</sup> ACL has acknowledged receipt of the second invoice (1-18172) and the other invoices from ES&H in the ACL audit. (See, Enclosure 1 – ACL audit). ES&H has confirmed to the NPFC that all subcontractors have been paid for the services provided which included ES&H’s invoice # 1-18172.<sup>9</sup>

#### **IV. The RP Audit**

The Claimant provided personnel and equipment response resources to ACL during this incident. The services provided by the Claimant were acknowledged by ACL as designated Zone Managers, who acted as the Qualified Individual(s) 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 most signatures, the Zone Manager made the notation “subject to audit.”

During this incident, a process was established between ACL and ES&H for paying ES&H’s invoices. Initially, ES&H submitted its invoices to ACL in accordance with its emergency response published rate schedule since ES&H was not under written contract with ACL. While there were no signed documents regarding price negotiations or cost reductions, an electronic record was retained which reflected that ACL and ES&H had negotiated price reductions in exchange for prompt payment.<sup>10</sup> ES&H provided its Emergency Response Rate Schedule, dated September 2007, for establishing the rates charged.<sup>11</sup> ES&H offered reduction in certain rates on boom and other costs “only if” payment for 80% of each invoice was received within 10 days of submittal and the remaining 20% audited and paid within 30 days of receipt. ES&H further stipulated that if payment were not received within these time periods, ES&H will not honor any discounts that have been offered and will modify any invoices back to ES&H’s published rate schedule.<sup>12</sup> The electronic record retained by the parties indicated that on August 7, 2008, ACL agreed to the rate reductions outlined in ES&H’s proposal, and on August 18, 2008 submitted the payment of \$2,381,665.50 to ES&H of the \$2,977,081.88 due on this invoice as the one and only payment.<sup>13</sup> ES&H accepted this partial payment. Thereafter, ES&H submitted all the invoices that are the subject of this claim to ACL at ES&H’s rate schedule prices for the balance due.<sup>14</sup>

Having reviewed the invoices of the RP audit, the NPFC found that ACL and its auditors made initial payments on some invoices, denied amounts on some invoices, and, in certain instances, failed to provide any detailed audit information to ES&H for denied costs. The auditors also approved payment amounts on some invoices, which, to date, have not been paid to ES&H by ACL as agreed by way of the Claimant’s published rate schedule. It is important to note that the

<sup>7</sup> See, NPFC letter to ACL dated December 22, 2008.

<sup>8</sup> See, NPFC letter to ACL dated September 1, 2009.

<sup>9</sup> See, email from [REDACTED] dated March 23, 2009.

<sup>10</sup> See, email from [REDACTED] to [REDACTED] & [REDACTED] dated April 29, 2009.

<sup>11</sup> See, ES&H Bates 002487 thru 002499.

<sup>12</sup> See, email from [REDACTED] of ES&H to [REDACTED] et al. of ACL dated August 4, 2008 (ES&H Bates 002481).

<sup>13</sup> See, email dated August 7, 2008, ES&H Bates number 002478 and Payment Authorization Form dated August 18, 2008, ES&H Bates number 003507.

<sup>14</sup> See, *supra* note 11.

NPFC received this audit when the auditor for ACL responded to the NPFC's first RP notification letter by way of submitting its audit results and the accompanying documentation.

For the audit, the NPFC found that ACL auditors focused on whether the paperwork was complete as determined by its standards, whether the costs were properly supported in accordance with its standards, and whether the costs were operationally reasonable and necessary according to its standards. The ACL auditors used the reduced negotiated rates based upon prompt payment provisions and provided ES&H a partial payment on August 18, 2008. (See above.) However, because ACL did not make full payment on Invoice 1-18172, the subject of this Claim, ES&H submitted its invoices to the NPFC in accordance with its published rate schedule. All revised invoices which reflected the original published rate schedule pricing had been presented to ACL as required by regulation.<sup>15</sup>

During the audit of ES&H's Invoice 1-18172, ACL denied ES&H's costs with little or no explanation, reason, or standard in support of the denied costs. The NPFC requested clarification of certain denial categories to understand the rationale used by ACL auditors, but ACL failed to provide an answer responsive to our questions.<sup>16</sup>

## **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, 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, "[t]he 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].

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<sup>15</sup> See, email from ES&H dated April 30, 2009.

<sup>16</sup> See, *supra* note 11.

## **VI. DETERMINATION OF UNCOMPENSATED REMOVAL COSTS:**

### ***A. Overview:***

1. FOSC's coordination has been established under the Federal Project by way of Incident Action Plans (IAP) and United States Coast Guard (USCG) Pollution Reports under Federal Project Number N08057.
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 ES&H 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 prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded with a copy of its complete audit for the Claimant.
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 ES&H Audit Report for Invoice # 1-18172: (See, Enclosure 1 – ACL audit which incorporates the 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 ES&H stated that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident for the time period of July 28, 2008 through August 2, 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 has confirmed that the response activities performed by the Claimant were signed off by the designated Zone Managers on behalf of the RP and the Unified Command in the dailies provided by ES&H and by ACL with its audit. While the 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 a response is not fully captured in IAP's or 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 were 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 ES&H claimed costs that lacked documentation. We approved costs which the Claimant adequately documented on the signed daily reports. 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. One of the main purposes of a Spill Management Team such as the appointed Zone Managers for ACL was to confirm the goods and services billed on a given day, at a given location, for a given time period, were provided and accounted for. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a published rate schedule, the NPFC further finds that ES&H 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 numerous costs denied by ACL's auditors for personnel who worked in excess of restricted hours, the NPFC approved all costs that were signed/approved by the ACL designated Zone Manager(s), unless reduced hours were noted on the signed daily. Moreover, the NPFC obtained a statement from the FOSC, CAPT [REDACTED] 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 its sign offs on the dailies.<sup>17</sup>

During the review of Enclosure (1), the NPFC created "NPFC Denied/Denial" and "NPFC Approved" columns within the ACL audit summary page and on each of the daily sheets of the spreadsheet so that we could make a easily identified line-by-line comparison and determination. The first column, labeled "NPFC Denied/Denial", includes the total denied costs for each line item, which is then totaled at the bottom of each daily sheet and carried forward to the summary spreadsheet totals. The second column, labeled "NPFC Approved" includes the amounts which were adjudicated and approved by the NPFC. The itemized breakdown of denied costs is addressed in the attached ACL audit identified as Enclosure 1.

The overall NPFC denial summary is as follows:

ES&H Invoice # 1-18172 – 7/28/08 – denied amount of \$	9,612.84
ES&H Invoice # 1-18172 – 7/29/08 – denied amount of \$	6,877.75
ES&H Invoice # 1-18172 – 7/30/08 – denied amount of \$	4,289.75
ES&H Invoice # 1-18172 – 7/31/08 – denied amount of \$	12,285.96
ES&H Invoice # 1-18172 – 8/01/08 – denied amount of \$	25,412.07
ES&H Invoice # 1-18172 – 8/02/08 – denied amount of \$	8,239.71

**Total denied amount: \$ 66,718.08**

The Claimant ES&H documented that ACL had paid them \$2,381,665.54. However, it is clearly documented that ACL sent a payment of \$2,381,665.50 to ES&H on August 18, 2008.<sup>18</sup>

Accordingly, the NPFC has determined that the Claimant ES&H has \$549,205.98 in uncompensated removal costs for this claim. The NPFC arrived at that amount as follows:

The Claimant ES&H submitted this claim to the NPFC with a revised invoice total (cost + 20% in some instances) of \$2,998,489.55. The RP, ACL paid \$2,381,665.50 of these costs, leaving an outstanding balance of \$616,824.05. ES&H came to the Fund for \$616,824.01, 0.04 less than the outstanding balance. This is because they erroneously listed the ACL paid amount as \$2,381,665.54. ES&H further reduced their sum certain to \$608,965.68 by

<sup>17</sup> See, FOSC Memorandum, Capt. [REDACTED] dated 07/23/08, Statement of FOSC regarding restricted hours.

<sup>18</sup> See, Bates ES&H 003507 Payment Authorization Form.

deducting \$7,858.33 in invoice costs. See the Enclosure (1) audit spreadsheet for details. The NPFC denied total costs of \$66,718.08. Breakdown for the denied costs are as follows: \$12,128.00 in total denied labor costs and \$54,590.08 in total equipment costs.

On this basis, the NPFC Claims Manager hereby determines that that the Claimant did incur \$350,437.58 (\$351,337.58 - \$900.00 worth of cane poles deducted by the Claimant, but not deducted in the audit) 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 # N08057-046 in accordance with 33 CFR 136.203 and 136.205.

Lastly, it is important to note that \$198,768.40 of the approved costs by ACL auditors as corroborated in the Audit by the RP to the NPFC remains unpaid as of the date of this determination and is therefore being added to the NPFC's uncompensated removal cost determination of \$350,437.58 giving the Claimant a total due of \$549,205.98.

**C. *Determined Amount:***

The NPFC hereby determines that the OSLTF will pay **\$549,205.98** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-046. 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: 01/05/10

Supervisor Action:

Supervisor Comments: