

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 1/12/2009
Claim Number	: N08057-053
Claimant	: Environmental Safety and Health Consulting Services, Inc.
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: <u>Robert Rioux</u>
Amount Requested	: \$46,900.00

### **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 this incident, ACL utilized Environmental Safety and Health Consulting Services, Inc. (ES&H) to provide removal services.<sup>1</sup> In an email dated April 28, 2009, Nancy Gudonis, Finance Manager of Gallagher Marine Systems, who was contracted by ACL, confirms there was no written contract between ACL and ES&H.<sup>2</sup> December 15, 2008, ES&H submitted a removal cost claim to the National Pollution Fund Center (NPFC), in the amount of \$4,245,686.64.<sup>3</sup> This total amount represents ten invoices documenting unpaid removal costs incurred by ES&H during the DM 932 oil spill incident. These costs had been presented to ACL, but had not been reimbursed following the ACL audit.

On July 29, 2009, Lawrence Boucvalt III of ES&H submitted a letter to the NPFC requesting that the first invoice 1-18216, in the unpaid amount of \$110,392.98, be separated into a new claim with a new sum certain. The NPFC complied, identifying the new sum certain of \$110,392.98 in claim number N08057-003 and moved the remaining unpaid balance of \$4,135,293.66 into claim number N08057-046 as of August 5, 2009. On August 13, 2009, Lawrence Boucvalt submitted an additional letter to the NPFC requesting that the remaining nine invoices totaling \$4,135,293.66 be separated into nine separate claims, allowing each invoice total to become the new sum certain for each claim.<sup>4</sup> The NPFC complied, identifying claim numbers N08057-046 through N08057-054 as claim numbers for the remaining nine invoices. Claim number N08057-053, the subject of this claim, was created by the NPFC to capture Invoice # 1-18721 (binder 9) with a Claimant requested sum certain of \$46,900.00.

The NPFC sent an RP notification letter dated December 22, 2008, to Mr. Douglas Ruschman, ACL – Vice President of Legal & Risk Management and Mr. John A.V. Nicoletti of Nicoletti, Horning & Sweeney, ACL – External Counsel. The NPFC sent another RP notification letter

<sup>1</sup> See POLREPs One through Twenty-one.

<sup>2</sup> See email from Nancy Gudonis to Donna Hellberg dated April 28, 2009.

<sup>3</sup> See Claim Form, signed by Mr. Lawrence X. Boucvalt III, Owner/President on 12/12/08.

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

dated September 1, 2009 to Ms. Dawn Landry, ACL – Counsel, Mr. John A.V. Nicoletti of Nicoletti, Horning & Sweeney, ACL – External Counsel and Mr. Terry Stoltz, ACL – External Counsel. This second RP notification letter outlines the fact that ES&H requested all ten invoices submitted in their original claim be separated into individual claims. The ninth invoice (1-18721), which is the subject of this claim, was presented with all updated invoices to the responsible party for payment in a letter dated December 4, 2008.<sup>5</sup> ES&H confirmed this by way of a letter to the NPFC dated July 29, 2009.<sup>6</sup> ACL has acknowledged receipt of the invoice that is the subject of this claim by way of ACL’s audit. (See Enclosure 1 – ACL audit).

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

The RP did not submit an audit for this invoice until questioned by the NPFC on September 18, 2009. The RP audit representative, Mr. John Lane stated in an email dated September 1, 2009 that he did not have a record of this invoice.<sup>7</sup> However, as noted above, the Claimant verified that all invoices had been sent to the RP for payment in a letter dated December 4, 2008.<sup>8</sup> On September 21, 2009, Mr. John Lane sent the RP audit for this invoice.<sup>9</sup> Having reviewed the invoices and the RP audit, the NPFC found that ACL’s auditor approved payment on most of the costs, which to date have still not been paid to ES&H.

#### **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 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).

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

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<sup>5</sup> See ES&H letter to ACL dated December 4, 2008.

<sup>6</sup> See ES&H letter to NPFC dated July 29, 2009.

<sup>7</sup> See email from NPFC dated September 18, 2009.

<sup>8</sup> See ES&H letter to ACL dated December 4, 2008.

<sup>9</sup> See email from Mr. John Lane dated September 21, 2009.

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. FOSC coordination has been established under the Federal Project by way of Incident Action Plans 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 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 ES&H, 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 their complete audit for this 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 (See, Enclosure 1 – ACL audit which incorporates the NPFC audit).

### **B. Analysis:**

NPFC CA reviewed the actual signed damaged containment boom tracking logs and boom release forms 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 23, 2008 through August 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 Claims Manager has confirmed that the response activities performed by the claimant were signed off by a designated Manager on behalf of the RP.

As detailed in Enclosure (1), the NPFC reviewed the detailed comments in the Financial Audit performed by ACL’s auditor. The NPFC approved costs which were adequately documented by the Claimant on the signed reports, despite the fact that the same costs were 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 Manager(s) for ACL when these representative(s) signed the claimant’s damaged containment boom and boom

release forms. 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.

ACL's audit denied 1100 feet of boom at a rate of \$7.00 per foot totaling \$7,700.00 of deductions. The auditors note states the signed release document by ES&H representative states 1,100 feet received in acceptable condition. The NPFC found this deduction to be in error. The boom release form dated August 19, 2008 clearly shows "damaged not repairable" on the line "owner ES&H". This form differs from some of the other forms, which have a separate line for noting "damaged beyond repair" boom, but nonetheless, it is clearly noted that this boom was damaged and not repairable. All other boom was approved by the RP in the audit.

During the review of Enclosure (1), the NPFC created "NPFC Denied" and "NPFC Approved" columns within the ACL audit summary page so that a line by line comparison and determination could be made and easily identified. The first column, labeled "NPFC Denied", includes the total denied costs for each line item, which is then computed 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 are adjudicated and determined as approved by the NPFC.

The NPFC requested that the Claimant ES&H provide the age of the boom deemed "damaged beyond repair" in this invoice. This was required since the booms age needed to be established in order to determine its depreciated value.

The Claimant ES&H provided a letter dated October 27, 2009, concerning the 13,900 feet of 18 inch containment boom Rhodes Environmental sold to ES&H. The letter states the expected shelf life of new containment boom provided by Rhodes Environmental is three to five years if stored in a warehouse and two to three years if stored outdoors.<sup>10</sup> An additional letter dated January 4, 2010 was provided concerning the 11,800 feet of 18 inch containment boom Complete Environmental Products, Inc. sold to ES&H. This letter states the expected shelf life of new containment boom provided by Complete Environmental Products, Inc. is three to five years if stored in a warehouse and two years if stored outdoors.<sup>11</sup>

In an email dated December 4, 2009, ES&H attached invoices for new boom purchased from Rhodes Environmental and Complete Environmental Products, Inc. totaling 25,700 feet of 18 inch boom. The email states that this boom was bought and utilized for response activities during the DM 932 incident.<sup>12</sup>

On December 18, 2009, Kevin Lormand, Vice President of ES&H, provided an email in response to several questions the NPFC asked in an email dated December 4, 2009.<sup>13</sup> The responses to this email show that there is no accurate way to determine the exact age of the boom ES&H provided for this incident. Records were not kept as to how long the 25,700 feet of new boom was stored in warehouses at the purchasing site, or how old the 56,500 feet of boom provided by day two of the incident was.

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<sup>10</sup> See, ES&H letter dated October 27, 2009.

<sup>11</sup> See, ES&H letter dated January 4, 2010.

<sup>12</sup> See, ES&H email dated December 4, 2009.

<sup>13</sup> See, ES&H email dated December 18, 2009.

However, upon review of the “Damaged Containment Boom Tracking Log” provided in the claim, the NPFC found that 3,300 feet of the 6700 feet of claimed boom “damaged beyond repair” was signed off by an ACL Zone Manager as being in Venice (Zone S). This, coupled with the July 25-26, 2009 signed dailies showing shipments of containment boom arriving in Zone A and then large increases in boom quantities down river (while Zone A quantities remained the same), lead the NPFC to find it reasonable that the 25,700 feet of new boom purchased for this incident was deployed or in standby in zones downriver from Zone A. The NPFC further finds it reasonable that 3,300 feet of the 6700 feet of claimed boom “damaged beyond repair” was the new boom purchased for this incident. The NPFC took into account the expected shelf life of this boom as provided by both manufacturers as being three to five years if stored in a warehouse. Additionally, the NPFC contacted Mr. **Jim Rhodes** of Rhodes Environmental and Mr. **Mike Phelan** of Complete Environmental Products, Inc. to obtain general stock rotation time for warehouse stored boom. Mr. **Rhodes** and Mr. **Phelan** both stated that all new boom was warehouse stored and depending on demand, was rotated immediately or at the latest by one year. Taking all this into account, the NPFC finds it reasonable that 3,300 feet of the claimed 6700 feet of boom was bought new and stored one year or less at the warehouse. The NPFC depreciates this amount of boom 25% or \$5,775.00. The NPFC came to this depreciation by taking the average warehouse shelf life of three to five years – in this case four years and deducting one year (assuming maximum storage in the warehouse before rotation took place). No other depreciation was deducted since the boom was utilized immediately. The NPFC therefore approves **\$17,325.00** in depreciated boom costs for this 3,300 feet of the claimed 6700 feet of boom ( $3300 \times 7.00 \text{ a foot} = \$23,100.00 / .75 = \$17,325.00$ ).

For the remaining 3400 feet of boom, the NPFC applies a 50% depreciation or \$11,900.00. The NPFC came to this depreciation by looking at a combination of this boom being bought new, being stored outdoors or already used in the water on other spills. Because there is no identified way to determine how old this boom is, the NPFC finds it reasonable that this boom was in serviceable condition when being deployed for service in this incident. At that point, if it was all new, we would apply a maximum 25% depreciation for maximum warehouse shelf time (considering rotation as discussed above). Additionally, at the other extreme, if the boom was used in service on several spills, the NPFC would depreciate the boom at a much higher rate. Because it is unknown what the booms age was, the NPFC finds 50% depreciation reasonable. The NPFC therefore approves **\$11,900.00** in depreciated boom costs for this 3,400 feet of the claimed 6700 feet of boom ( $3400 \times 7.00 \text{ a foot} = \$23,800.00 / .50 = \$11,900.00$ ).

Accordingly, the NPFC has determined that the Claimant ES&H has \$29,225.00 in uncompensated removal costs for this claim ( $\$17,325.00 + \$11,900.00$ ).

On this basis, the Claims Manager hereby determines that the claimant did in fact incur \$29,225.00 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 # N08057-053 in accordance with 33 CFR 136.203 & 205.

**C. *Determined Amount:***

The NPFC hereby determines that the OSLTF will pay **\$29,225.00** as full compensation for reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-053. 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: Donna Hellberg

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: