

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 01/14/2010
Claim Number	: N08057-054
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	: \$33,353.27

### **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. N08057-054, the subject of this claim, was opened by the NPFC to capture Invoice # 5-1590 (binder 10) with the Claimant's requested sum certain of \$33,353.27.<sup>5</sup>

In its December 4, 2008 transmittal letter, ES&H had presented all ten invoices, including the tenth invoice (5-1590) 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. Douglas Ruschman, ACL – Vice President of Legal & Risk Management and to Mr. John A. V. Nicoletti of Nicoletti, Horning &

<sup>1</sup> See, Claim Form, signed by Mr. Lawrence X. Boucvalt III, 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. Dawn Landry, ACL – Counsel, to Mr. John A.V. Nicoletti of Nicoletti, Horning & Sweeney, ACL – External Counsel, and to Mr. Terry Stoltz, 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 tenth invoice (5-1590) 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 # 5-1590.<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. However, no payment was ever received from ACL by ES&H on this invoice. 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>13</sup>

Having reviewed the invoices of the RP audit, the NPFC found that ACL and its auditors 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.

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<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 Donna Hellberg dated March 23, 2009.

<sup>10</sup> See, email from Nancy Gudonis to Donna Hellberg dated April 29, 2009.

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

<sup>12</sup> See, email from Davian Ploger of ES&H to Brian Grosheider *et al.* of ACL dated August 4, 2008 (ES&H Bates 002481).

<sup>13</sup> See, *supra* note 11.

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>14</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>15</sup> On September 21, 2009, Mr. John Lane sent the RP audit for this invoice.<sup>16</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.

The ACL auditors used the reduced negotiated rates based upon prompt payment provisions. However, because ACL did not make payment on Invoice 5-1590, 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>17</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].

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

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

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<sup>14</sup> See, email from Mr. John Lane dated September 1, 2009.

<sup>15</sup> See, ES&H letter to ACL dated December 4, 2008.

<sup>16</sup> See, email from Mr. John Lane dated September 21, 2009.

<sup>17</sup> See, email from ES&H dated April 30, 2009.

1. FOOSC'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 # 5-1590: (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 FOOSC, to be consistent with the NCP or directed by the FOOSC, 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 from August 4, 2008 through August 5, 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 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



The NPFC hereby determines that the OSLTF will pay **\$21,885.77** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-054. 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: