

CLAIM SUMMARY / DETERMINATION FORM

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| Date | : 3/22/2010 |
| Claim Number | : N08057-065 |
| Claimant | : Oil Mop, LLC |
| Type of Claimant | : Corporate (US) |
| Type of Claim | : Removal Costs |
| Claim Manager | : <u>Donna Hellberg</u> |
| Amount Requested | : \$168,856.05 |

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 (OPA).

III. The Claimant and the Claim

As a result of the incident, Oil Mop, LLC (Oil Mop or OMI), provided response services under contract with ACL.¹ The invoices which are the subject of this claim were presented to ACL on or about June 15, 2009.² On October 22, 2009, OMI submitted a removal cost claim to the National Pollution Funds Center (NPFC) for reimbursement of their transportation charges, equipment rental and washout charges, incurred by OMI, in the amount of \$168,856.05 for specified dates during the time period of July 2008 through December 2008.³

The NPFC sent the Responsible Party (RP) notification letter, dated October 26, 2009, to Ms. Dawn Landry, ACL – General Counsel and Mr. John A.V. Nicoletti of Nicoletti, Horning & Sweeney, ACL – External Counsel.⁴

On March 18, 2010, Mr. John Lane of Maritime Alliance Group, Inc. (MAGI), which is part of the ACL audit team, provided the NPFC with its Financial Audit of the OMI invoices which are the subject of this claim.⁵ ACL acknowledged receipt of the OMI invoices because they are included in the ACL Financial Audit. (See Enclosure 1 – ACL Financial Audit).

IV. The Audits

During the removal actions resulting from the incident, the Claimant provided response resources to ACL. For the audit, the NPFC found that ACL auditors focused on whether the paperwork was complete as determined by their standards, whether the costs were properly

¹ See, Master Service Agreement between American Commercial Barge Line L.L.C, and Oil Mop, L.L.C., dated July 23, 2002. American Commercial Barge Line L.L.C, is a wholly owned subsidiary of ACL.

² See, OMI Invoice N0906-109.

³ See, NPFC Claim Form dated October 12, 2009.

⁴ See, NPFC letter to ACL, dated October 26, 2009.

⁵ See, ACL audit spreadsheets

supported in accordance with their standards, and whether the costs were operationally reasonable and necessary according to their standards. During the audit of OMI's invoice and a review of the ACL Financial Audit, it became evident that ACL denied the majority of OMI's costs based on the rationale that OMI should have charged a 15% markup on third party services vice the 20% OMI charged. ACL also denied six line items for lack of supporting documentation or receipts.

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 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).

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, "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).

DETERMINATION OF LOSS:

A. Overview:

1. The FOSC coordination has been established under the Federal Project by way of Incident Action Plans (IAP) and United States Coast Guard (USCG) Pollution Reports.
2. The incident involved the discharge and continuing substantial threat of the 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 OMI, prior to the submission of the claim. The NPFC also made presentment of costs to the RP and the RP has provided a complete copy of their Audit of some of the response costs presented.
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 Summary of Vendors spreadsheet: (See, Enclosure 1 – ACL audit which incorporates NPFC audit).

B. Analysis:

The Claimant OMI stated that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident for the time period of July 2008 through December 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 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 NPFC Claims Manager has confirmed that the activities performed by the Claimant were in accordance with response actions that were undertaken by OMI and were signed off by the designated Zone Managers in the dailies provided by OMI in previous claim submissions and confirmed in the ACL audit. While the Incident Action Plans (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 response is not fully captured in IAPs or the 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 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 some claimed costs of OMI for lack of documentation. In other instances, OMI had documented costs which were denied by ACL in its Financial Audit. Having reviewed such costs, the NPFC approved these costs over ACL’s denial in the Financial Audit because the OMI contracted rate schedule with ACL specifies a markup of 20% for third costs/services which is what the denied costs represent. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a contract between ACL and OMI with specified rates, NPFC further finds that OMI 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.

In its review in Enclosure (1), the NPFC tabulated and approved the costs claimed as uncompensated removal costs for each day beginning July 2008 through December 2008. In addition, the NPFC includes the amount approved by ACL but, to date, is unpaid and constitutes uncompensated removal costs for a total in approved costs of \$156,486.83.

The NPFC also lists the adjudicated amounts which the NPFC has denied in the amount of \$901.74. The itemized breakdown of denied costs which is addressed in the attached ACL audit is identified as Enclosure (1).

The NPFC incorporated columns within the ACL audit so that a line-by-line comparison and determination could be made and easily identified. The overall denial summary from the NPFC audit is as follows:

OMI Invoice # 1391 – denied amount of \$ 674.60

OMI Invoice # 1395 – denied amount of \$ 227.14

Total denied amount for N0906-109: \$ 901.74

Accordingly, the Claimant OMI's sum certain of \$168,856.05 minus the total amount the NPFC denied (\$901.74) equals the total uncompensated removal costs (\$167,954.31) which is due to the Claimant OMI.

On this basis, the Claims Manager hereby determines that the Claimant did in fact incur \$167,954.31 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# N08057-065.

Lastly, it is important to note that \$156,486.63 of the approved costs by ACL as corroborated in the Audit Summary Sheet provided by ACL to the NPFC remains unpaid at the time of this determination and therefore has been incorporated in the sums approved by the NPFC as OPA compensable removal costs.

Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$167,954.31** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-065. 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: Thomas Morrison

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: