

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	: Dawn Unglesbee
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 services¹ 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.² 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.³ 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

¹ See, Claim Form, signed by Mr. Barry Thibodeaux, dated May 26, 2009, Attachment E, Agreement to Conduct Emergency Response Services, signed by Mr. Sam George on July 29, 2008.

² Standard USES Rate Schedule dated July 1, 2008, Version 4.01LA.

³ 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, 2008.⁴ The NPFC sent the RP a notification letter, dated May 26, 2009, to Ms. Dawn Landry, ACL –General Counsel, and Mr. John A.V. Nicoletti of Nicoletti, Horning & Sweeney, ACL – External Counsel, advising that the Claimant presented a claim to the NPFC for certain uncompensated removal costs.⁵

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).

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

⁵ 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 FOOSC to be consistent with the NCP or directed by the FOOSC. 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.⁶

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.⁷

⁶ 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.

⁷ 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: *Donna Hellberg*

Date of Supervisor's review: *11/24/10*

Supervisor Action: *Approved*

Supervisor's Comments:

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone [REDACTED]
E-mail: [REDACTED]@uscg.mil
Fax: 202-493-6937

5890
11/24/2010

SENT VIA E-MAIL

[REDACTED]@usesgroup.com

United States Environmental Services, LLC
365 Canal Street
Suite 2500
New Orleans, LA 70130

Re: Claim Number N08057-031

Dear Mr. Schenck:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$221,443.62 is full compensation for OPA claim number N08057-031.

This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

All costs that are not determined as compensable are considered denied. You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claims. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include corresponding claim number.

Mail reconsideration request to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to the above address.

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Central Contractor Registration (CCR) record prior to payment. If you do not, you may register free of charge at

www.ccr.gov. Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Form.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at [REDACTED]

Sincerely,

Dawn Unglesbee
Claims Manager

ENCL: Claim Summary / Determination Form
Acceptance/Release Form
(1) Summary of USES Revised Invoices
(2) Email and spreadsheet from USES dated 1/12/10
(3) ACL Audit
(4) ATT B 2

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 2 [REDACTED]
E-mail: D [REDACTED]@uscg.mil
Fax: 202-493-6937

Claim Number: N08057-031	Claimant Name: United States Environmental Services, LLC 365 Canal Street Suite 2500 New Orleans, LA 70130
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I, the undersigned, ACCEPT the determination of \$221,443.62 as full compensation for the removal costs and damages paid or incurred by Claimant for services provided by the Claimant listed in the Spreadsheets of costs (attached hereto and incorporated by reference as if fully set forth herein), and claimed the Oil Spill Liability Trust Fund (Fund) under Claim Number N08057-031. These costs resulted from the below-described incident.

Date: 23 July 2008
Location: Mississippi River
Subject: DM 932 oil spill incident

This determination represents full and final release and satisfaction of all removal costs and damages paid or incurred by Claimant for services provided by the claimant and listed in the Spreadsheets of costs (attached hereto and incorporated by reference as if fully set forth herein), and claimed to the Oil Spill Liability fund (Fund) under Claim Number N08057-031 under the Oil Pollution Act of 1990 (33 U.S.C. 2712(a)(4)). This determination is not an admission of liability by any party. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the loss. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from the incident. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for costs which are the subject of the claim against the Oil Spill Liability Trust Fund (Fund).

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. 287 and 1001).

_____	_____
Title of Person Signing	Date of Signature
_____	_____
Typed or Printed Name of Claimant or Name of Authorized Representative	Signature

_____	_____
Title of Witness	Date of Signature
_____	_____
Typed or Printed Name of Witness	Signature

_____	_____	_____
TIN Required for Payment	Bank Routing Number	Bank Account Number