

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
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5890

12/11/2008

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Number: 7007 2680 0002 9613 4904

Creative Waste Management, Inc.
C/o Palmer Biezup & Henderson LLP
ATTN: Mr. Richard S. Tweedie
620 Chestnut Street
956 Public Ledger Building
Philadelphia, PA 19106-3409

Re: Claim Number P05005-028

Dear Mr. Tweedie:

The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$69,207.13 is compensable for OPA claim number P05005-028.

This reconsideration determination is based on an analysis of information submitted.

All costs that are not determined as compensable are considered denied. Disposition of this reconsideration constitute final agency action.

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

Director (ca)
U.S. Coast Guard
National Pollution Funds Center
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

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, your payment will be mailed within 30 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] 6937.

Sincerely,

[redacted]
Chief, Claims Adjudication

ENCL: Acceptance/Release Form

Claim Summary/Determination Form

Exhibits: 1. Creative Waste Information

2. Claim Letter

3. Page 15 of Claimant's Reconsideration Request

4. Contract# PMC2004001

5. Marine Safety Information Bulletin

6. Claim# P05005-027

7. Claim# P05005-029

8. POLREPS 1-9

9. Leverman's Daily Log for 23-26 November 2004

10. Shifts Chart

11. Letter from PMC to CWM, dtd December 20, 2004

12. Efficiency Calculations

13. A.—CWM letter dtd 1/13/05, B.—Inversand email dtd 1/14/05, C.—Inversand purchase order cancellation between CWM and Inversand dtd 1/15/05

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National Pollution Funds Center

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Claim Number: P05005-028	Claimant Name: Creative Waste Management, Inc. c/o Palmer Biezup & Henderson LLP ATTN: Mr. Richard S. Tweedie 620 Chestnut Street 956 Public Ledger Building Philadelphia, PA 19106-3409
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I, the undersigned, ACCEPT the determination of \$69,207.13 as full compensation for the loss profits claim, P05005-028, associated with the Athos I oil spill.

This determination represents full and final release and satisfaction of all claims under the Oil Pollution Act of 1990 (33 U.S.C. 2712(a)(4)), associated with the Athos I oil pollution incident. 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

_____ ETN / SSN Required for Payment	_____ Bank Routing Number	_____ Bank Account Number
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CLAIM SUMMARY / DETERMINATION FORM

Date : 12/10/2008
Claim Number : P05005-028
Claimant : Creative Waste Management, Inc.
Type of Claimant : Corporate (US)
Type of Claim : Loss of Profits and Earning Capacity
Claim Manager : Dawn Unglesbee
Amount Requested : \$202,298.53

FACTS:

- 1. Oil Spill Incident:** On November 26, 2004, between 2100 and 2115 hours, the T/V ATHOS I struck a submerged anchor within Federal Anchorage #9 on the Delaware River (also known as the "Mantua Creek Anchorage"). The Claimant alleges that the incident occurred when two tugboats began maneuvering the ATHOS I (pushing from the vessel's starboard side) toward the dock at the CITGO Asphalt Refinery Company terminal in Paulsboro, NJ. The investigation into the incident revealed that the anchor punctured the vessel's hull, rupturing the #7 port ballast tank and the center cargo tank causing an estimated 263,371 gallons of "Bachaquero crude oil" to discharge into the Delaware River, a navigable waterway of the United States.

The T/V ATHOS I is a single hull, double-sided, 37,895 gross ton oil tank vessel with a breadth of 32.2 meters or 105.6 feet. The vessel is owned by Frescati Shipping Company Limited and was managed on the date of the incident by Tsakos Shipping & Trading S.A.

As a result of the ATHOS I incident, the flood tide carried the oil up the Delaware River, past the Philadelphia Marine Center (PMC), to the Tacony-Palmyra Bridge. The Coast Guard Captain of the Port, Captain Sarubbi, established a Safety Zone that extended upriver to the Tacony-Palmyra Bridge and downriver below the Athos spill site to Commodore Barry Bridge.

On November 30, 2004, the Coast Guard enlarged the Safety Zone to include the area from the Tacony-Palmyra Bridge downriver to the intersection of the Marcus Hook Range and the Bellevue Range.

- 2. Claimant:** Creative Waste Management, Inc (CWM) is a sludge dewatering and sludge removal environmental service company that provides a variety of services to industrial, utility and municipal clients. CWM offers a broad spectrum of Dredging Contractor and Dewatering Contractor Services with over 35-years experience developing and applying proven sludge dewatering, waste management technologies (See Exhibit 1, Creative Waste Information).

CWM's dredging business includes; dredging bottom sediments due to shoaling from the Delaware River and its tributaries and dredging of sediments from sediment lagoons used in various mining operations.

- 3. Claim Description:** In the original Loss of Profits claim submitted by Palmer Biezup & Henderson LLP (PBH), dated July 20, 2007 and signed by Mr. Richard Tweedie, Creative Waste Management sought \$172,165.18 in lost profits, as a direct consequence of the T/V ATHOS I oil spill. The Claimant states that profits were lost when the tide

carried the oil up the Delaware River past the Philadelphia Marine Center. CWM's loss of revenue claim is summarized as follows (See exhibit 2—Claim Letter):

Downtime	\$ 38,080.00
Extraordinary 2 nd Crew Costs	5,702.13
Holiday Pay	3,529.00
Loss of Efficiency	21,760.00
Loss of Inversand Business	<u>40,000.00</u>
	\$ 109,071.00

Acquisition and Admin. Fees (15%)	21,015.38
Claim Preparation Costs	<u>42,078.67</u>
	\$172,165.18

These claimed losses were detailed in the NPFC's initial Claim Summary/Determination dated March 26, 2008 attached to the NPFC's letter dated April 2, 2008. The NPFC denied the majority of the claimed damages because the claimant failed to meet its burden of proving them, but offered to pay \$21,760.00 for the claimed dredging inefficiencies.

4. **The Request for Reconsideration:** On June 2, 2008, the Claimant provided an official written request for reconsideration relating to its claim for loss of profits and impairment of earnings capacity. All supporting documentation for their request for reconsideration came under a cover letter dated May 29, 2008. CWM's loss of revenue reconsideration claim is summarized as follow (See exhibit 3—Page 15 of Claimant's Reconsideration Request):

Downtime	\$ 38,080.00
Extraordinary 2 nd Crew Costs	5,702.13
Holiday Pay	3,529.00
Loss of Efficiency	21,760.00
Loss of Inversand Business	<u>40,000.00</u>
	\$ 109,071.00

Acquisition and Admin. Fees (15%)	20,675.57
Interest	22,551.83
Claim Preparation Costs	<u>50,000.00+</u>
	\$202,298.53

The claimant's request for reconsideration includes interest and claim preparation costs which raise the sum certain by \$77,551.83.

5. **Contract:** CWM is a dredging contractor that was awarded a contract to conduct maintenance dredging at the Philadelphia Marine Center (PMC). CWM was responsible for the dredging while PMC was responsible for the transportation of the dredge spoils by barge from the dredge site in Philadelphia to White's Basin for discharge (See Exhibit 4, Contract# PMC2004001).

Dredging was to be performed to a depth of -6.0 feet mean low water with up to a two foot over-dredge. The parties understood that the dredging could commence after the conclusion of the 2004 boating season (October 26, 2004) to avoid disruption of the marina during the boating season. CWM knew that there was a good possibility that the fresh water at the marina could freeze over by the first part of January and stay frozen for the remainder of the winter. The window of opportunity for the dredging was November

through the beginning of January. It was critical that the work begin and continue without interruption in order to complete the work before the water froze (Exhibit 2, Claimant's Exhibit A to Contract# PMC2004001).

The conditions of the contract made it imperative that CWM dredge continuously without interruption. Also the parties agreed, (Contract Exhibit A) that CWM was entitled to a standby rate of \$340 per hour if the dredge crews had to stop to allow piers to be moved or other events for which PMC was responsible.

6. **Dredging Project:** PMC is located on the Delaware River immediately North of the Benjamin Franklin Bridge which spans the Delaware River between Philadelphia and New Jersey. The marina includes a North Basin and a South Basin as well as a boat launching ramp that allows small boats to launch.

White's Basin is a dredge spoil area located on the New Jersey side of the Delaware River near the Commodore Barry Bridge.

CWM owns certain dredging equipment and rents other specialized equipment depending on the requirements of a particular job and the availability of its equipment. CWM rented, for the PMC dredging project, the dredge ERIN P and other equipment including a HI-Reach fork lift from Hertz, two automobiles from Enterprise Leasing and a boat from Delaware River Towing.

The barge into which the dredge spoils were pumped was leased and operated by PMC.

The dredge ERIN P is 61 feet long, 12 feet wide, has a tonnage of 40 tons and is owned by Dredging Supply Rental, Inc., Harvey Louisiana.

Dredging commenced on November 2, 2004 in the North Basin at PMC Marina

APPLICABLE LAW:

Claims may be presented first to the Fund if the President or his delegated representative has advertised or notified claimants that the Fund is accepting claims resulting from an oil discharge. 33 U.S.C. §2713(b)(1)(A).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:

“(a) Uses generally

The Fund shall be available to the President for –

(4) [T]he payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages; . . .

(b) Defense to liability for Fund

The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of the claimant.”

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 U.S.C. §2712(h)(2).

In any case in which the President has paid an amount from the OSLTF for any removal costs or damages specified under 33 U.S.C. §2712(a), no other claim may be paid from the Fund for the same removal costs or damages. 33 U.S.C. §2712(i).

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 U.S.C. §2713(e). Those regulations are found at 33 CFR Part 136.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a claim presented to the Fund should include, as applicable:

“[T]he reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney’s fees or other administrative costs associated with preparation of the claim.” 33 CFR 136.105(e)(8).

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, et seq.

Pursuant to the provisions of 33 CFR 136.231, claims for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

“In addition to the requirements of Subparts A and B of this part, a claimant must establish the following—

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant’s income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant’s profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.” 33 CFR 136.233 (a) – (d)

If a third party claimant or an RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF. But the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident; all income from alternative employment or business undertaken; potential income from alternative employment or business not undertaken, but reasonably available; any saved overhead or normal business expenses not incurred as a result of the incident; and state, local, and Federal tax savings. 33 CFR 136. 235 (a) – (e).

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

DETERMINATION OF LOSS:

A. Overview:

1. The Claimant seeks \$202,298.53 in profits lost as a consequence of the ATHOS I oil spill.
2. The Claimant asserts that profits were lost when its dredging business was interrupted and was prevented from completing the contracted shifts between CWM and PMC, due to the on going response, cleanup, and the vessel traffic restrictions.
3. The incident involved the discharge of "oil" as defined in OPA 90, 33 USC § 2707 (23), into navigable water.
4. In accordance with 33 CFR § 136.105(e)(12), the claimant stated that no lawsuit has been filed for the loss of profits claimed.
5. In the process of adjudicating this claim, the NPFC Claims Manager thoroughly reviewed all submitted documentation.

B. Causation:

The ATHOS I oil discharge disrupted businesses and shipping in and out of the Delaware River. At the time of the spill, Creative Waste Management Inc. was bound by a contract with Philadelphia Marine Center (PMC), Contract# PMC2004001, to conduct maintenance dredging at the PMC Marina. Under the contract, CWM was responsible for dredging as well as retaining a contractor for the transportation of the dredge spoils by barge from the dredge site in Philadelphia to White's Basin for discharge and movement of the dock system as required.

Due to the ATHOS I oil spill, PMC Marina was heavily oiled and free floating oil collected in the area. In addition, the Marina was used as a staging and boat fueling area for oil recovery efforts by various cleanup contractors. The dredge, dredge pipe, boat, barge, and other equipment being utilized by CWM for the dredging project were heavily oiled due to the floating crude oil.

The Captain of the Port (COTP) of Philadelphia closed the Delaware River to all maritime traffic from the Tacony Palmyra Bridge South to the Marcus Hook / Bellevue range intersection. All vessel traffic within the safety zone were required to obtain Coast Guard pre-approval to enter, depart from and to, or to shift within the safety zone. A U.S. Coast Guard request form located on the Maritime Exchange Website had to be FAXED to the Unified Command's Waterways Management Division prior to all vessel transits (See Exhibit 5—Marine Safety Information Bulletin).

At the time of the River closure, CWM was fully engaged in dredge operations. The dredge-barge in use at the time became filled with dredge spoils and was in need of being towed to White's Basin to off load the barge of the spoils then return to dredging operations. PMC submitted the required requests to the Coast Guard for permission to tow the barge to White's Basin, permission from the Coast Guard was initially denied to the request to move the barge and dump the spoils. Eventually, permission was given to move and dump the

barge on 2 December. The full barge caused the loss of productive shifts after 26 November, 2004.

Coast Guard gave permission to have the barge transit to the dump site late on December 2, 2004. The barge was transported to the dredge spoils site and dredging operations resumed in the North Basin on December 3, 2004. At this time the work became extremely difficult and the dredge crew was able to only work one shift per day. Dredging continued through December 7, 2004 at which time the dredging at the North Basin was complete. The claimant provided and outside engineering firm's analysis documenting and quantifying the reduced production.

The Coast Guard granted permission to CWM to move its equipment to the South Basin and commence dredging on December 9, 2004. Dredging continued to be less productive during this period. The claimant provided and outside engineering firm's analysis documenting and quantifying the reduced production.

On January 7, 2005, 15,000 feet of dredge pipe had to be cleaned by the ATHOS I cleanup contractor, National Response Corporation (NRC). 15,000 feet of dredge pipe had to be cleaned in result of the ATHOS I oil spill. NRC and CWM crew employees all cleaned the dredge pipe. CWM's rented forklift and boat, all, were used for cleaning operations.

It is important to note that the assistance of the dredge crew was vital to the gross decontamination. Without the assistance of CWM's employees and specialized equipment, the cleaning of the dredge pipe would have taken much longer.

The dredge itself was cleaned by NRC as well however; NRC advised CWM that it could not clean the dredge at PMC and it would be necessary for CWM to take the dredge to Essington, Pennsylvania, which is 13-miles down the Delaware River from PMC, to a designated boat cleaning station. CWM hired Clearwater Marine Towing, tug VIGOROUS, to tow the dredge to Essington on January 11, 2005. It is important to note that the NPFC paid CWM \$9,396.01 via removal cost claim# P05005-027 under reconsideration, for this cleaning. The costs associated with the cleaning of the dredge included (1) the cost of tug services to tow the dredge ERIN P to Essington, PA for cleaning, (2) the leasing costs for the dredge ERIN P while it was being towed to Essington, PA and being cleaned (See Exhibit 6—Claim# P05005-027).

Also the NPFC paid CWM \$19,369.98 via property damage claim# P05005-029. The costs associated with the damage claim included (1) Dredge Pipe & Bend Adapters (2) Suction Hoses (3) Nylon, Poly, and wire ropes (4) clothing (5) cleaning supplies (See Exhibit 7—Claim# P05005-029)

The dredge was delivered back to its owner on January 17, 2005.

The Claimant provided a record of the incident by submitting various documents which clearly proves that the Delaware River had closed and restricted vessel traffic during the oil removal efforts. POLREPS one through nine substantiate that the Delaware River was either closed to vessel traffic or open to limited traffic during the response period (See Exhibit 8—POLREPS 1-9). Based on the evidence, we find that the ATHOS I oil contaminated the Philadelphia Marine Center, Creative Waste Management's dredge, all of which caused downtime, additional shifts, and loss of efficiency.

C. Loss Shifts/Production:

Just prior to the spill the dredge completed the following shifts:

- November 23, 24, 2004—dredge crews worked double shifts.
- November 25, 2004—(Thanksgiving) dredge crews worked one shift.
- November 26, 2004—dredge crews worked two shifts (See Exhibit 9—Leverman’s Daily Log for 23-26 November 2004).

At the end of the second shift on November 26, the dredge barge was full of spoils. On November 27, the crew discovered that oil was floating in the marina and had coated the dredge equipment also; the barge could not be moved to off load spoils due to the vessel traffic restrictions related to the oil spill. As described earlier in the “Causation” section, this full barge in effect resulted in CWM losing 6 days (12 scheduled shifts) of dredging from November 27, 2004 to December 3 when dumping of the full barge was completed. Dredging then continued in Area B until it was completed on December 7, 2004. CWM then intended to move the barge and start dredging Area C with two shifts on December 8, 2004, but again the Coast Guard would not grant permission for the dredge to be moved to Area C due to oil recovery activity in the area. Permission to move the dredge and barge was not granted until December 9, 2004. This second delayed movement cost CWM two more lost shifts, bringing the total of lost shifts to 14. (Claimant’s Exhibit 10—Shifts, and Leverman’s Logs as well as an invoice to PMC support these lost days).

The fact that CWM lost 7 dredging days (14 shifts) is acknowledged by PMC. PMC refuses to pay CWM its claim of \$38,000.00 for the downtime stating:

“...Please be advised that per the terms of our contract, we cannot be responsible for downtime caused by factors beyond our control, such as the oil spill on the Delaware River.”(See Exhibit 11, Letter from PMC to CWM, dated December 20, 2004)

CWM was being paid \$13.64 per cubic yard of dredge material that it removed (See Exhibit A of Contract# PMC2004001). During the seven days when no dredging could be conducted CWM was incurring significant costs but earning no income and consequently no profit. But for the oil spill, CWM would have expected to remove 424.5 cubic yards of dredge material per shift (See Exhibit 12, Efficiency Calculations).

During the seven days of downtime, CWM’s income was zero. CWM’s claim of **\$38,080.00** is based on the contract amount that PMC agreed to.

$$340 \text{ \$/hour} \times 14 \text{ shifts} \times 8 \text{ hours/shifts} = \$38,080.00.$$

The valuation and the supporting documentation regarding the lost shifts for this portion of the claim is found reasonable.

D. Dredging Inefficiency:

The NPFC previously found that causation had been proven for certain losses in efficiency of dredging for Creative Waste Management. The inability to dredge under normal conditions and the fact that PMC’s marina was used as a staging and boat fueling area for the various contractors hired to complete the cleanup caused slowdowns in the dredging operation because of an increase in wake activity from the vessels refueling at the marina. (See claimant’s exhibit 25, Letter from PMC dated 12//20/04). CWM stated that dredging efficiency dropped significantly after the oil contaminated the marina. The NPFC agreed.

The dredging operations could not be carried out at the normal speed. Based upon the information submitted by CWM, 87 shifts were required to complete the project, but if the incident had not occurred, a total of 79 shifts would have accomplished the work. (See letter dated 07/20/2007). The NPFC agreed with this contention shown by the claimant's loss of efficiency calculations based on the Post-Dredge Volume Calculations letter from S.T. Hudson Engineering, Inc., dated January 27, 2005. The NPFC affirms its previous findings with respect to dredging inefficiency. The calculation of the resulting loss using a dredge efficiency equation is outlined below.

Calculation

The calculations that follow show how many shifts it took to complete the post-spill dredging versus how many shifts it would have taken absent the spill. The calculations show that the spill caused the claimant to run an extra 8 shifts.

The Post-Dredge volume calculations indicate that approximately 33,357 cubic yards of materials were removed from the areas within the marina. An additional 309 cubic yards of materials were removed below the 2' over-dredge limits, for a total of 33,666 cubic yards of materials removed. 11,632 cubic yards were removed from the North Basin in 28 shifts, and 22,034 cubic yards were removed from the South Basin in 59 shifts.

All 59 dredging shifts in the South Basin took place after the spill. For the North Basin, 23 shifts took place pre-spill, and 5 took place post-spill. The post-spill dredging rate in the South Basin is calculated by dividing the 22,034 cubic yards dredged by the 59 shifts, to get a rate of 373.5 cubic yards dredged per shift.

As mentioned, 23 dredging shifts were completed in the North Basin before the spill and 5 dredging shifts were completed in the North Basin after the spill, and 11,632 cubic yards were dredged in total. Thus, letting X = the rate of dredging pre-spill (in cubic yards), and letting Y = the rate of dredging post-spill (in cubic yards), the problem resolves itself to the following equation:

$$23X + 5Y = 11,632$$

The variable Y, representing the post-spill dredging rate, was already found to be 373.5 cubic yards per shift. Substituting Y into the equation allows us to solve for X, representing the pre-spill dredging rate. Thus:

$$\begin{aligned} 23X + 5(373.5) &= 11,632 \\ X &= 424.5 \end{aligned}$$

Pre-spill, the claimant was able to dredge at a rate of 424.5 cubic yards per shift, compared to the (previously-calculated) post-spill dredging rate of 373.5 cubic yards per shift.

Dividing the total amount dredged (33,666) by the pre-spill (i.e., usual) dredge rate reveals that, but for the spill, it would have taken 79.3 shifts to complete the dredging operation ($33,666 \text{ yd}^3 \div 424.5 \text{ yd}^3/\text{shift} = 79.3 \text{ shifts}$). However, it took 87 shifts to complete the dredging operation (28 shifts in the North Basin + 59 shifts in the South Basin = 87 total shifts). Thus, the NPFC concludes that the spill caused the dredging operation to take an additional 8 shifts (87 actual shifts vs. 79 "but for" shifts).

The NPFC maintains its initial determination on inefficiency and concludes that the cost of the eight additional shifts is compensable. At the \$340 per hour standby rate, these extra 8 shifts (at 8 hours each for a total of 64 hours at the standby rate) are valued at \$21,760.00.

The Claimant's request of **\$21,760.00** for Loss of Efficiency and the supporting documentation provided is found reasonable.

E. Extraordinary Second Crew Costs:

Evidence proves that the decision to hire a second crew was a decision necessitated by the oil spill. If CWM had not completed the dredging by the time the river started to freeze the resulting economic impact on CWM would have been greater since CWM would have had to demobilize the dredging operation and remobilize in the spring when the ice had melted. The cost to demobilize the dredging operation, truck the dredge to the owner, re-truck the dredge back to Philadelphia in the spring would have been approximately \$71,700.00 (See Exhibit A of Contract# PMC2004001).

Due to the dredging delays caused by the oil spill between November 27, 2004 and December 3, 2004 and the inability of a dredge crew to work a double shift, CWM was faced with two options: (1) Hire a second dredge crew (2) Continue working with one dredging shift and hope the river did not freeze until the dredging was complete. If not for the oil spill, CWM would not have been faced with these options.

On reconsideration, the NPFC finds the **\$5,702.13** claimed costs and the supporting documentation reasonable for this item.

F. Holiday Pay Costs:

According to the Efficiency Calculations (Exhibit 10), a total of 79 shifts would have been necessary to complete the dredging if there was no oil spill. Prior to the oil spill, 23 dredging shifts were complete leaving 56 shifts to finish after November 26, 2004 and before mid January 2005.

If not for the oil spill, the dredge crew would have had Christmas and New Years off however; the crews were required to work two shifts every day including Christmas and New Years.

To expedite the dredging project before the River froze, CWM paid for the dredging crew to dredge through the holidays.

Given the number of shifts impacted by the oil, on reconsideration the NPFC finds the **\$3,529.00** in Holiday Pay costs and the supporting documentation reasonable.

G. Loss of Business:

The NPFC originally denied the claimed \$40,000.00 for lost subsequent dredging business, which it claims was caused by the spill. This portion of the claim is based on the project that was to begin upon completion of the PMC project. On January 13, 2005, CWM submitted a dredging proposal to Inversand Company for dredging manganese greensand that is used to filter potable water. The proposal was accepted by Inversand and the work was to commence on January 17, 2005. Creative Waste states that the contract was cancelled because their dredging equipment was contaminated by the oil and could not be sufficiently cleaned for use on this contract. According to the claimant, it attempted to clean its dredge pipe, but was unsuccessful.

The January 15, 2005 cancellation notice from Inversand to CWM does not mention the reasons for the cancellation, or whether it was related to the oil spill (See Exhibit 13-A—CWM letter dtd January 13, 2005, 13-B—Inversand email dtd January 14, 2005, and 13-C—Inversand purchase order cancellation between CWM and Inversand dtd January 15, 2005). The agreement with Inversand was not executed until January 13, 2005, two days after the claimant knew that the pipe could not be cleaned and might not be useable for subsequent projects (See Exhibit 13-A, 13-B, 13-C). The contaminated pipe, the attempts to clean the pipe, and the realization that the pipe could not be cleaned all occurred prior to CWM entering into the contract with Inversand. There is no documentation of Inversand's reasons for cancellation. The NPFC previously informed the claimant of the need to provide documentation that the contract was cancelled because of the oil contamination. To date, the claimant has not been able to produce such a document.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

For the foregoing reasons, the NPFC finds that the claimant has failed to meet its burden of proving this alleged loss had any connection to the oil spill. The cost of \$40,000.00 for the loss of subsequent business with Inversand Company is again denied.

H. Other Claimed Damages:

The following claimed costs are hereby denied as they are not reasonable costs incurred by the claimant in assessing the damages claimed per 33 CFR 136.105(e)(8). Compensable assessment costs do not include attorney's fees or other administrative costs associated with preparation of a claim.

Acquisition and Admin.	\$20,675.57	-Denied, Not OPA compensable.
Interest	\$22,551.83	-Denied, Not OPA compensable.
Claim Preparation Costs	\$50,000.00	-Denied, Not OPA compensable.

I. Fuel Costs:

Additionally, during the reconsideration process, the NPFC became aware that it had overlooked CWM's requested reimbursement for **\$136.00** in fuel costs to keep the dredge idling continuously in cold weather. This item and these costs were identified and validated by the Responsible Party's contractor during the incident and the information provided indicates that CWM is entitled to reimbursement for the \$136 dollars based upon ten days of eight hours idling and a burn rate of one gallon per hour and \$1.70 per gallon of fuel.

J. Summary:

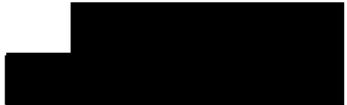
This claim is based on the fact that CWM seeks to be made whole from a situation beyond its control, where the oil spill caused CWM to suffer extensive loss of profits/impairment of its earning capacity as a result of the ATHOS I oils spill. CWM's equipment was oiled making the dredging harder and more dangerous. CWM was forced to stop dredging for a total of seven days due to the oil spill. CWM had to hire a second crew and ask the crew to work holidays in order to complete the dredging prior to the river freezing over and in order to avoid the additional costs of demobilizing and remobilizing the dredge equipment.

The claimant's submission of evidence satisfies the NPFC the CWM has provided sufficient evidence/documentation to prove by a preponderance of the evidence that CWM incurred the OPA compensable charges under review as a result of the ATHOS I spill.

K. Conclusion:

On reconsideration, the NPFC determines that Creative Waste Management, Inc. suffered OPA compensable lost profits damages of **\$69,207.13** due to the 2004 Delaware River Oil Spill. All other damages claimed by CWM, Inc. in its request for reconsideration are determined by the NPFC to not be OPA compensable and are hereby denied.

DETERMINED AMOUNT: \$69,207.13



Claim Supervisor: Thomas S. Morrison

Date of Supervisor's Review: 12/11/08

Supervisor Action: offer approved

Supervisor's Comments: