

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	917012-0001
<b>Claimant:</b>	Lac du Flambeau Tribe
<b>Type of Claimant:</b>	Municipality
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$9,091.00

### FACTS:

**Oil Spill Incident:** On January 31, 2016, the National Response Center (NRC) was notified of a vehicle falling through the ice, releasing gasoline into Flambeau Lake. Flambeau Lake, a navigable waterway of the United States, is a 1166 acre lake located in Vilas County, Wisconsin.<sup>1</sup> The rear portion of the 2000 Ford Explorer, broke through the ice while the driver was ice fishing on the Lac du Flambeau Reservation. Subsequently, the vehicle completely broke through the ice before settling at the bottom of the lake. Ms. [REDACTED], United States Environmental Protection Agency (USEPA) Region 5, Federal On-Scene Coordinator (FOSC) provided after the fact FOSC concurrence.<sup>2</sup>

**Claimant:** The Claimant, Lac du Flambeau Band Tribal Natural Resource Department, presented a removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$9,091.00. Pollution removal activities were conducted by Kumbier Towing and Recovery, including equipment and personnel costs for the removal of the vehicle from the lake, associated transportation costs, and the deployment of absorbent materials.

The claim consists of an OSLTF Claim Form, supplemental OSLTF form contents, FOSC coordination letter, NRC Report #1139552, LDF Police Report, LDF Citation # S569630, LDF Tribal Court Orders # NR-16-101 and NR-16-011, Kumbier Trucking Removal Invoice, proof of payment information, and the Standard Form 1080.

The NPFC denied the claim on June 2, 2017, on the basis that the Claimant has failed to demonstrate that the product released from the vehicle, causing the sheen and ensuing response, was oil as defined by Oil Pollution Act (OPA), and did not contain ANY hazardous materials. 33 USC § 2701(23).<sup>3</sup>

**Responsible Party:** The Responsible Party (RP) is identified as [REDACTED] (Mr. [REDACTED]) as the registered owner of the 2000 Ford Explorer. Mr. [REDACTED] was issued a Natural Resources Citation for littering on March 9, 2016.<sup>4</sup> Subsequently, Mr. [REDACTED] entered into a voluntary agreement with the Lac du Flambeau Tribal Conservation Department “to accept restitution in the amount of 50% of the amount paid to Kumbier’s Towing Service for towing and vehicle recovery services.”<sup>5</sup> Mr. [REDACTED] also pled guilty “to Failure to Obtain Permit for

<sup>1</sup> See Flambeau Lake. Available at: <http://dnr.wi.gov/lakes/lakepages/LakeDetail.aspx?wbic=2320500>

<sup>2</sup> See USEPA letter to the NPFC dated May 17, 2016.

<sup>3</sup> See NPFC Determination Package dated June 2, 2017.

<sup>4</sup> See Lac du Flambeau Department of Natural Resources, Natural Resources Citation dated March 9, 2016.

<sup>5</sup> See Lac du Flambeau Tribal Court Order Case Nos. NR-16-010 and NR-16-011 dated October 5, 2016.

Structure or Deposit in Reservation Water” in Lac du Flambeau Tribal Court. The NPFC issued two RP Notifications Letters to Mr. [REDACTED]. The first letter was sent to his listed address as [REDACTED]. The NPFC received return mail with an updated address as [REDACTED].<sup>6</sup> To date, no response has been received.

### **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”. “Oil” is defined in relevant part, at 33 USC § 2701(23), to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”.

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. 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. 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 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].

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

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<sup>6</sup> See NPFC RP Notification Letters dated April 11, 2017 and April 26, 2017, respectively.

Under 33 USC§ 2712 (f), payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

**Request for Reconsideration:** On July 19, 2017, the NPFC received the Claimant's official written request for reconsideration via email which contained a one page cover letter from the Claimant dated July 19, 2017, accompanied by a one page letter from Ms. [REDACTED], dated July 17, 2017, in her capacity as the USEPA FOOSC for the incident. The final page attached to the request was a one page email from Mr. [REDACTED], NPFC, to the Claimant dated July 12, 2017 which thanked the Claimant for notifying the NPFC of their request for reconsideration. It further stated that he would notify the Claimant once the reconsideration documentation was received.<sup>7</sup>

The official request for reconsideration as made in the USEPA letter dated July 17, 2017, stated that eyewitness testimony and pictures indicate a sheen and the FOOSC further stated that actions undertaken by the Claimant's response company were not inconsistent with National Contingency Plan (NCP) although it is important to note that no federal first-hand oversight was performed. The USEPA letter also contends there was no gas cap on the fuel tank and the fuel tank was damaged. The FOOSC also contended that no other hazardous substances within the engine compartment released. In closing, the EPA FOOSC stated that sample analysis was not performed because (1) hazardous conditions at the site for collection and (2) sample analysis would have increased response costs to the Claimant with limited utility in the case.<sup>8</sup>

**Reconsideration Claim Analysis:** Subsequent to the Claimant's submission of the July 19, 2017, request for reconsideration, the NPFC conducted a de novo review of the original claim submission, including the new documents submitted with the reconsideration request. This review included all issues relevant to the claim as if for the first time.

### **Oil Sample Analysis**

The Claimant is seeking oil pollution removal costs resulting from the January 31, 2016, incident on Lake Flambeau. A successful "removal costs" claimant must demonstrate that the product released during an oil spill incident was oil as defined by Oil Pollution Act (OPA), and did not contain ANY hazardous materials. 33 USC § 2701(23).

On June 2, 2017, the NPFC denied the Claimant's claim, finding that the "Claimant provided no documentation of the lab analysis results demonstrating that the material was oil and not a mixed substance." The NPFC further noted, "Should the Claimant decide to request reconsideration, the Claimant will need to provide a full sample analysis which delineates all the constituents contained in this spill, and showing that the material was only oil and not a mixed spill."

In support of its request for reconsideration, the Claimant provided the July 17, 2017, letter from the USEPA FOOSC, Ms. [REDACTED] (Ms. [REDACTED]). In this letter, Ms. [REDACTED] stated:

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<sup>7</sup> See July 17, 2017 email from Claimant to NPFC requesting reconsideration with attachments.

<sup>8</sup> See July 17, 2017 letter from USEPA to Mr. [REDACTED], NPFC.

“EPA consulted with the LDF Environmental Department throughout the response to this incident and determined that LDF’s actions were not inconsistent with the National Contingency Plan. The actions taken were unquestionably necessary to minimize and mitigate the effects of the discharge of gasoline into Flambeau Lake, an important ecological and cultural water body. Witness testimony and photos submitted by the Claimant demonstrate that gasoline was released to Flambeau Lake and measures were taken to abate the sheen. There was no gas cap when the vehicle was recovered and the gas tank was damaged. However, components of the engine housing other fluids were still intact. The sheen observed by witnesses during the recovery was consistent with petroleum sheening; it lacked coloring associated with other automotive fluids such as antifreeze or transmission fluid.

The removal was conducted under very difficult conditions. Extreme winter conditions created numerous safety concerns. Sample collection would have been very dangerous. Additionally sample analysis would have added to the response costs with limited utility in this case.”

The June 2, 2017, determination correctly concluded that the Claimant failed to submit documentation establishing that the substance involved in the January 31, 2016, incident on Lake Flambeau was oil as defined by Oil Pollution Act (OPA). The Claimant asserts on reconsideration that witness testimony pertaining to the absence of the gas cap, the presence of sheening, and the color of the fluids must be taken into consideration. Also, the Claimant asserts that sample analysis was not collected due to weather conditions and would have resulted in greater response costs. Unfortunately, the available evidence, including the letter from Ms. [REDACTED], does not establish that the substance reported in Lake Flambeau was oil as defined by Oil Pollution Act (OPA). In consideration of the Claimant’s and USEPA’s assertions on reconsideration, the NPFC has determined that the Claimant has not met its burden by a preponderance of the evidence in demonstrating that the spilled product was strictly oil. The Claimant took no samples nor did the Claimant have any representatives of Kumbier Towing provide a written report delineating the state of the car once recovered from the lake nor did Kumbier Towing provide any indication whatsoever that the vehicle in question did in fact contain all engine fluids including but not limited to any hazardous substances. Based on the foregoing, the NPFC’s initial determination that the Claimant failed to prove the product spilled was an OPA oil stands.

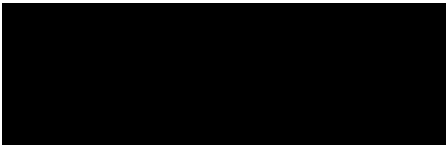

### **Subrogation**

In order to pay claims for uncompensated removal costs from the OSLTF, evidence produced by Claimant must satisfy a Responsible Party’s burden of proof under the OPA. Notwithstanding the lack of oil sample analysis in this case, the Claimant entered into a voluntary agreement with the responsible party, Mr. [REDACTED], to accept \$4,545.50 for removal costs.

Despite the payments received by Mr. [REDACTED] amounting to \$700.00 to the Lac du Flambeau Tribal Conservation Department towards oil removal costs with the remainder paid in monthly installments of \$100.00, the Claimant continues to assert their claim for reconsideration in the full amount of \$9,091.00.

Subrogation would allow the OSLTF to stand in place of the Claimant for losses resulting from the oil spill. The Claimant has failed to subrogate all rights and causes of action by voluntarily entering into an agreement with the Responsible Party to assume the remaining \$4,545.50 of oil removal costs. 33 U.S.C. § 2715 (a). See also, 33 C.F.R. 136.107. The Claimant has failed to subrogate all rights and causes of action regarding cost recovery litigation. Therefore, the claim is also denied on these merits upon performance of a de novo review.

**DETERMINATION:** The undersigned has thoroughly reviewed all of the information contained in the claim file and has analyzed it in accordance with the current provisions and the implementing regulations. The NPFC again denies the claim because the Claimant has failed to (1) demonstrate that the alleged incident involved the discharge of oil as defined by OPA, and (2) the Claimant failed to subrogate all rights and causes of action in accordance with 33 U.S.C. § 2715 (a) and 33 C.F.R. 136.107 . Based on the foregoing, this claim is denied upon reconsideration


Claim Supervisor: 
Date of Supervisor's review: <i>9/6/17</i>
Supervisor Action: <i>Reconsideration Denial Approved</i>
Supervisor's Comments: