

CLAIM SUMMARY / DETERMINATION on RECONSIDERATION

<b>Claim Number:</b>	N18023-0008
<b>Claimant:</b>	City of Kenova
<b>Type of Claimant:</b>	Government
<b>Type of Claim:</b>	Public Services
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$26,942.94
<b>Action Taken:</b>	<b>Offer in the amount of \$24,988.82</b>

**EXECUTIVE SUMMARY:**

In January 2018, the Uninspected Towing Vessel (UTV) GATE CITY sank in the Big Sandy River, a navigable waterway of the United States, near Kenova, West Virginia. The UTV ANNA C<sup>1</sup> was determined to pose a substantial threat of discharge of oil into the Big Sandy River. Both vessels required oil pollution response activities and both are relevant to this claim.

In accordance with the Oil Pollution Act of 1990 (OPA), Western Rivers Assets and River Marine Enterprises were identified as the responsible parties (RPs) for the GATE CITY.<sup>2</sup> Western Rivers Assets was identified as the responsible party for the ANNA C.<sup>3</sup> Western Rivers and River Marine are both owned by Mr. (b) (6).

The City of Kenova's Water Treatment Plant closed its water intakes due to the incident. Because of this, they could not produce or treat river water to maintain water tanks at sufficient levels to provide their customers with clean water. The City of Kenova ("Kenova" or "Claimant") presented its claim to the RP. Having not received payment from the RP after ninety days,<sup>4</sup> Kenova presented its claim to the National Pollution Funds Center (NPFC) for \$73,446.26.<sup>5</sup> Kenova initially sought reimbursement for increased personnel costs, additional water purchased, lost water sales, miscellaneous supplies, fuel costs, and legal fees. Subsequently, Kenova withdrew its lost water sales costs totaling \$39,739.88 and deducted \$2,000.00 from the legal expenses costs from the claim, which reduced its claimed costs from \$73,446.26 to \$31,706.38.<sup>6</sup> The NPFC determined \$6,918.55 of the requested amount as compensable, and offered this amount to Kenova as full compensation of the claim.<sup>7</sup> On April 15, 2020, the NPFC received the Claimant's timely request for reconsideration for \$26,942.94.<sup>8</sup>

Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by the Claimant, information it obtained independently, and the applicable law and regulations. Upon

<sup>1</sup> The ANNA C was renamed JO RENEE on November 7, 2008. However, all of the incident documentation refers to the vessel as the ANNA C. This determination will refer to it as such to avoid any potential confusion.

<sup>2</sup> Western Rivers Assets was the owner. River Marine Enterprises was the operator.

<sup>3</sup> Western Rivers Assets was the owner. There was no discernible operator.

<sup>4</sup> 33 CFR 136.103(c).

<sup>5</sup> Letter from Claimant's counsel dated August 26, 2019 containing its original claim submission.

<sup>6</sup> Letter from Claimant to NPFC dated October 23, 2019.

<sup>7</sup> NPFC determination issued to Claimant dated February 24, 2020.

<sup>8</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

reconsideration, the NPFC concludes that the facts established within the NPFC's initial determination as well as information provided by the Claimant within its request for reconsideration or obtained independently by the NPFC support the Claimant's request for reconsideration and offers to reimburse the Claimant \$24,988.82 for damages incurred as a result of the oil spill incident, as outlined in the original determination and below.

### **I. CLAIM HISTORY:**

On August 27, 2019, the Claimant submitted its claim to the NPFC for \$73,446.26.<sup>9</sup> On October 23, 2019, Claimant withdrew legal expenses in the amount of \$2,000.00 from its claim, reducing its claimed legal costs from \$6,100.00 to \$4,100.00. The Claimant also submitted a withdrawal of its claimed lost water sales revenue in the amount of \$39,739.88. Subsequently, the claimant verified its new claimed sum of \$31,706.38.<sup>10</sup> On February 24, 2020, the NPFC determined that \$6,918.55 of the \$31,706.38 was compensable, and denied the remainder of the claimed costs.<sup>11</sup>

On April 15, 2020, the NPFC received the Claimant's timely request for reconsideration.<sup>12</sup>

### **II. REQUEST FOR RECONSIDERATION**

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim. The Claimant has the burden of providing all evidence, information, and documentation deemed necessary by the NPFC to support the claim.<sup>13</sup> When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final.<sup>14</sup>

On April 15, 2020, the Claimant timely requested reconsideration of the NPFC's initial determination and provided information in support of costs denied by the NPFC.<sup>15</sup> Specifically, Claimant's counsel categorized the charges denied by the NPFC and provided statements and factual evidence to allegedly support why those charges should be compensable.

### **III. ANALYSIS ON REQUEST ON RECONSIDERATION:**

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim in accordance with our governing claims regulations at 33 CFR 136.115(d).

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<sup>9</sup> Letter from Claimant's counsel dated August 26, 2019 containing its original claim submission.

<sup>10</sup> Email from Claimant to NPFC dated October 24, 2019.

<sup>11</sup> NPFC determination issued to Claimant dated February 24, 2020.

<sup>12</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>13</sup> 33 CFR 136.105(a).

<sup>14</sup> 33 CFR 136.115(d).

<sup>15</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

The NPFC has thoroughly reviewed and considered the Claimants' request for reconsideration and because the claimant has met its burden, finds the following costs reimbursable as described below:

### **1. Non-Police Personnel Costs**

NPFC Initial Determination – Charges in the amount of \$22,202.40 were denied as the claimant failed to meet its burden in demonstrating that these costs were based on increased hours or wages compared to normal costs incurred by the Claimant.<sup>16</sup>

Claimant's Response - Charges totaling \$16,638.96 of the originally claimed \$22,202.40 in non-police personnel costs should be approved. The costs represent hours worked outside of employees' standard regular work hours. The amounts are readily calculable based on time reports and payroll records previously provided,<sup>17</sup> along with information included in Claimant's reconsideration request,<sup>18</sup> which contained the standard workweeks of various employees for whom reimbursement is sought. The standard workweek information was provided by Mayor Timothy Bias and (b) (6), who supervise Water Department employees. Claimant stated the hourly rate information was verifiable through a spreadsheet maintained by (b) (6), who tracked personnel time devoted to the spill, and by taking employees' gross pay for the subsequent week and dividing it by weighted hours worked. The hours claimed per individual, were broken down into weekday overtime, Saturday overtime and Sunday overtime. The rates were categorized as regular hourly rates, overtime hourly rates and Sunday overtime rates. Claimant's reconsideration request explained the overtime rates of non-police personnel as 1.5 times the regular rate for all weekdays and Saturdays over forty hours, and double the regular rate for all hours worked on Sunday.<sup>20</sup> Claimant provided a spreadsheet displaying the calculation of personnel and benefits costs outside employees' standard work weeks attributable to the spill.<sup>21</sup> The calculations display the overtime hours cited on the employee time sheets and reports, the hourly rates provided on the summary of Water Department employees' oil spill time and pay rates, and benefits costs which include FICA, retirement and workers compensation costs. Claimant explained these benefits costs as FICA/Medicare taxes equaling 7.65% of wages, retirement contributions equaling 11% of wages, and workers' compensation costs equaling 12% of wages.<sup>22</sup>

NPFC Determination upon Reconsideration – The NPFC was unable to verify hourly rates using the employee's gross pay for the subsequent week, then dividing it by weighted

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<sup>16</sup> NPFC determination issued to Claimant dated February 24, 2020.

<sup>17</sup> Exhibit 2 and 3 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>18</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>19</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, Exhibit 1, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>20</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>21</sup> Revised Wage-Benefits Calculations Spreadsheet dated April 15, 2020. Claimant's reconsideration letter notes the spreadsheet was originally created by Kenova's external accountant, and the information was modified by Claimant's counsel to eliminate time that would be part of an employee's standard workweek and to add Police Department employees.

<sup>22</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

hours worked as suggested by the Claimant. However, the NPFC was able to verify hourly rates through the spreadsheet maintained by (b) (6).<sup>23</sup> Additionally, the overtime hours provided in the reconsideration request match the overtime hours cited on employee time sheets and reports,<sup>24</sup> and the hourly rates for overtime costs submitted for non-police personnel match the hourly rates cited on the summary of Water Department employees' oil spill time and pay rates.<sup>25</sup> Using the standard percentages provided by the claimant to calculate the benefits costs, the NPFC was able to validate the benefits costs for each of the personnel. As such, the supporting documentation provided indicates employees worked overtime hours because of the incident, and explains the rates used to calculate the totals, while supporting the total costs paid. Therefore, upon reconsideration the NPFC approves all non-police personnel costs, totaling **\$16,638.96**.

## **2. Police Personnel Costs**

NPFC Initial Determination - Charges in the amount of \$1,680.00 for Police Department costs were denied because Claimant failed to explain the rates used to reach the totals provided. Specifically, the \$25.50 per overtime hour rate claimed for four of the five personnel, and the \$37.50 per overtime hour rate claimed for the Chief of Police could not be validated by any of the supporting information provided by Kenova.<sup>26</sup>

Claimant's Response –The \$1,680.00 in police personnel costs should be approved. Claimant provided a breakdown of police hours and hourly costs with their reconsideration claim.<sup>27</sup> Claimant states the hourly rate for the Chief of Police is calculated by dividing his gross pay by the weighted hours worked.<sup>28</sup> Using the gross income amount of \$1,001.54 shown on the current earnings report dated January 5, 2018,<sup>29</sup> and dividing the gross income amount by the standard 40 hours regular time work schedule supported by the employee time sheets and reports document,<sup>30</sup> the claimant cites the hourly rate for the Chief of Police as \$25.04 per hour.<sup>31</sup> The claimant states the Chief of Police overtime rate as being 1.5 times his regular rate, which would determine his overtime rate as \$37.56 per hour. The overtime rate is supported on the bottom of the employee time sheets and reports document.<sup>32</sup> These documents support 26 overtime hours associated with the water plant shutdown.<sup>33</sup> Using the overtime rate of \$37.56 per hour, Kenova claims \$976.56 plus the benefits costs of \$299.32, which totals \$1,275.88 for the Chief of Police's 26 overtime hours. The Claimant states the hourly rate for all other police officers whose overtime costs are claimed is calculated by dividing their gross

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<sup>23</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, Exhibit 1, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>24</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>25</sup> Exhibit 1 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>26</sup> NPFC determination issued to Claimant dated February 24, 2020.

<sup>27</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>28</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>29</sup> Exhibit 3 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>30</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>31</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>32</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>33</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

pay by weighted hours worked, and cites the hourly rate as \$17.00 per hour, and overtime rate as \$25.50 per hour.<sup>34</sup>

NPFC Determination upon Reconsideration – The NPFC finds the \$25.04 hourly rate for the Chief of Police is properly supported. At 1.5 times his hourly pay rate, the \$37.56 per hour overtime rate, multiplied by the 26 hours supported by the employee time reports,<sup>35</sup> equals \$976.56. Using the standard percentages provided by the claimant to calculate the benefits costs, the NPFC is able to validate the benefits costs for the remaining \$299.32 claimed.

The gross income amounts of the remaining 4 police officers cited, are unequal to one another as shown on the current earnings report dated January 5, 2018.<sup>36</sup> When dividing the amounts of the 40 hour work week cited on the employee time sheets and reports document,<sup>37</sup> the rates generated for police personnel (b) (6), (b) (6) and (b) (6) do not match the \$17.00 per regular hourly rate suggested by the Claimant.<sup>38</sup> Dividing the gross average rate of the police officers also fails to produce the regular hourly rate suggested. Although 1.5 times this regular rate of \$17.00 per hour equals the \$25.50 overtime hourly rate suggested by the Claimant, the NPFC cannot validate this rate using the documentation provided. For policeman (b) (6), dividing the amount found on the subsequent week's earnings report,<sup>39</sup> does equal the \$17.00 regular hourly rate suggested by the Claimant. However, the employee time reports for (b) (6) fail to display any of the overtime hours cited by the Claimant associated with the water plant shutdown.<sup>40</sup> Additionally, the time reports for all police personnel other than the Chief of Police fail to validate the overtime hours requested by the Claimant.<sup>41</sup> Additionally, when comparing the overtime totals requested in Kenova's reconsideration request with the overtime totals cited on the Kenova Police Department memorandum,<sup>42</sup> they do not match. When adding the costs claimed for the Chief of Police with the police personnel totals provided in Kenova's reconsideration request letter,<sup>43</sup> the total for all police costs fails to match the \$1,680.00 in police costs requested.<sup>44</sup> As such, all overtime costs for police officers other than the Chief of Police, are denied. However, of the \$1,680.00 requested on reconsideration, the NPFC finds the Police Chief's overtime hours and benefits accrued during the spill incident totaling **\$1,275.88** are compensable. The remaining \$404.12 in police costs are denied.

### **3. Miscellaneous Supply Costs**

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<sup>34</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>35</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>36</sup> Exhibit 3 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>37</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>38</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>39</sup> Exhibit 3 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>40</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>41</sup> Exhibit 2 of Letter from Claimant to NPFC dated October 23, 2019.

<sup>42</sup> Kenova Police Department memorandum dated February 2, 2018.

<sup>43</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>44</sup> See, NPFC Summary of Costs dated May 18, 2020 for a detailed explanation of these costs.

NPFC Initial Determination – Charges in the amount of \$155.43<sup>45</sup> were denied because the Claimant did not explain nor produce supporting documentation for these costs.<sup>46</sup>

Claimant's Response – The \$155.43 in supply costs should be approved. The Claimant explained these costs consisted of plug grounds, power centers, a canopy and tarps, which were necessary for the two kerosene heaters to be plugged in safely, and to prevent heat from escaping into the atmosphere.<sup>47</sup>

NPFC Determination upon Reconsideration – The Claimant provided a reasonable explanation of the costs incurred during a period of time when sub-freezing temperatures were encountered and heaters needed to be used to keep pumps from freezing. Therefore, the NPFC approves these supply costs totaling \$155.43.

#### **4. Legal Costs**

NPFC Initial Determination – Charges in the amount of \$1,550.00 were denied because the 6.2 hours claimed on January 11, 2018 provided the following description: “research environmental law and statute. Research done in contemplation of which governmental agencies were required to be notified. Determination of the controlling agency in charge of the spill site. Research as to what notification responsibility the City of Kenova had to the public authorities.” The NPFC found these costs describe actions counsel took to educate himself on the law and administrative procedures required during a spill incident; not actions that directly influenced response efforts.<sup>48</sup>

Claimant's Response – The \$1,550.00 for legal research should be approved. The Claimant asserts the actions counsel took to research various state and federal requirements was reasonable in order to properly advise Kenova officials during the spill response.<sup>49</sup>

NPFC Determination upon Reconsideration - No new documentation was provided to support the denied legal costs. Additionally, by January 11, 2018, the Coast Guard had already been notified and had been in contact with Kenova's water treatment plant about notification requirements.<sup>50</sup> Therefore, without any new evidence to consider, the \$1,550.00 in costs for this date remain denied.

#### **IV. CONCLUSION:**

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the Claimant's request for reconsideration for its uncompensated damages is approved in the amount of **\$24,988.82**.

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<sup>45</sup> Kenny's Queen Hardware Invoice dated January 11, 2018.

<sup>46</sup> NPFC determination issued to Claimant dated February 24, 2020.

<sup>47</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>48</sup> NPFC determination issued to Claimant dated February 24, 2020.

<sup>49</sup> Letter from Claimant's counsel to the NPFC dated April 15, 2020, requesting reconsideration of the NPFC's determination dated February 24, 2020.

<sup>50</sup> MISLE case report 1112177 dated January 10, 2018.

This determination is a settlement offer;<sup>51</sup> the Claimant has 60 days in which to accept this offer. Failure to do so automatically voids the offer.<sup>52</sup> The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.<sup>53</sup> Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

**AMOUNT APPROVED: \$24,988.82<sup>54</sup>**

	(b) (6)
Claim Supervisor:	(b) (6)
Date of Supervisor's review:	5/18/2020
Supervisor Action:	<i>Revised offer on reconsideration approved</i>

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<sup>51</sup> Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the uncompensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person. 33 CFR § 136.115(a).

<sup>52</sup> 33 CFR § 136.115(b).

<sup>53</sup> *Id.*

<sup>54</sup> *See*, NPFC Summary of Costs dated May 18, 2020 for a detailed explanation of these costs.