

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/05/2010
Claim Number	: G06003-001
Claimant	: Wisconsin Department of Natural Resources
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$73,535.52

### **FACTS:**

- Oil Spill Incident:*** The United States Coast Guard Marine Safety Unit (MSU) Duluth Case # 262485,<sup>1</sup> reports that on October 18, 2005, MSU Duluth received a phone call reporting an oil sheen in the Hughitt and Cummings slips of Howard's Bay, an inlet of Lake Superior, a navigable waterway of the US. The incident was reported to the National Response Center (NRC) on October 18, 2005 at approximately 12:08 p.m. CST via report # 776553.<sup>2</sup> An MSU Pollution Investigator responded on-scene, conducting an investigation of local trucking companies to determine a possible source.<sup>3</sup> After both the USCG MSU Duluth and the City of Superior Wisconsin (Superior) inspected these facilities/warehouses, it was determined that the Potential Responsible Party (PRP) was Mr. [REDACTED], owner of Superior Truck and Trailer (ST&T).

City inspection of the storm sewer lines found significant volumes of oily sludge in the Hughitt Ave line, and dye test confirmed that several of these inlets led to the ST&T warehouse. Furthermore, city inspections indicated that the Hughitt Ave line is the only part of the entire system leading to the Cummings slip that contained oil product or had oil stains.<sup>4</sup>

While touring ST&T, it was observed that a collection of used drums remained on the property. A sample was taken from these drums (sent for analysis but were deemed inconclusive<sup>5</sup>). Additionally, Superior and Wisconsin Department of Natural Resources (WDNR) inspectors observed oil stains and oil sludge on parts of the floor at this location, as well as oil products in floor sumps, uncovered containers and catch basins. Samples were taken off the vault floor, one toward the west at the stair bottom, the other at the sump pit. The sump pit and pump located on the south side of the building discharged directly into a manhole located at John Avenue. The pipeline that flowed through this manhole transverse south to East 2<sup>nd</sup> Street, then east to Lift Station #4, which is located at the corners of Cummings and 2<sup>nd</sup> Street. The oily substance was found along the 1445 feet of pipe line from the assumed lateral connection exiting ST&T

<sup>1</sup> See MSU Duluth's Case # 262485, opened 10/18/2005.

<sup>2</sup> See NRC Report # 776553, opened 10/18/2005.

<sup>3</sup> See PI Statement written by MST2 [REDACTED], dated 10/19/2005, submitted with the claim by Mr. [REDACTED] WDNR, on 5/13/2010.

<sup>4</sup> See Notice of Violation letter to Mr. [REDACTED] from Mr. [REDACTED], WDNR, dated 12/20/2007 and Summary of Findings Report prepared by Mr. [REDACTED], Superior, dated 3/24/2008, both submitted with the claim by Mr. [REDACTED], WDNR, on 5/13/2010.

<sup>5</sup> See USCG Marine Safety Laboratory Order # 06-039, dated 10/18-19/2005 and Summit Environmental Technologies, Inc., dated 11/16/2005, both submitted with the claim by Mr. [REDACTED], WDNR, on 5/13/2010.

and the outlet at Cummings slip.<sup>6</sup> Again, a fluorescent dye test, as well as visual tracing, was conducted to prove this.<sup>7</sup>

Mr. ██████ stated that there were a number of un-mapped sewers and storm drains underneath the area in which his warehouse resided. He admitted that old fuel lines located at his plant could still contain oil, as well as water lines running to and from the harbor, draining from the basement via a pump. A private lift station was also observed, which still filled with water during heavy rains. Mr. ██████ admitted that he pumped this water out through an abandoned sewer line into the harbor.<sup>8</sup>

The WDNR hired out WRR Environmental Services (WRR) and Environmental Troubleshooters (ET) for spill cleanup and removal activities in the affected area.

**Description of removal actions performed:** The claimant, WDNR, along with WRR and ET, mobilized to clean and decontaminate the areas affected by the oil spill.

WDNR actions included: initial response, project planning, inspection of Superior Truck and Trailer, testing of lines and sewers leading to the affected area, and overall maintenance/supervision of the spill site (October 2005-June 2009).

WRR actions included: placing boom and pads around the affected area, vacuuming/flushing the storm sewer, cleaning the oil slick from the lake, installing a manhole/storm sewer outlet in Howards Bay and mobilizing, containerizing, transporting and disposing of waste materials (October-November 2005, March-April 2007 and October-November 2007).

ET actions included: placing boom and pads around the affected area; recovering oil from the water; Diesel Range Organics (DRO), Gasoline Range Organics (GRO), RCRA metals (As, Ba, Cd, Cr, Pb, Hg, Se, Ag), Polynuclear Aromatic Hydrocarbons (PAH/PNA) and lead analytical reports; and reclaiming and disposing of contaminated absorbent boom and materials (May-July 2006 and June 2009).

- 3. The Claim:** On May 13, 2010, Wisconsin Department of Natural Resources (WDNR) submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of removal costs in the amount of \$73,535.53 for the services provided from October 18, 2005 through July 23, 2009. This claim is for removal costs based on the rate schedules in place at the time services were provided. A copy of the vendor rate schedules are provided in the claim submission.

This claim consists of copies of the invoicing and associated dailies; a copy of MISLE Case # 2624851; a copy of NRC report #776553; a copy of the State of Wisconsin Substance Release Notification Form for Spill File # nor\_05192006\_01; a copy of WDNR Bureau of Remediation and Redevelopment Activity Detail Report # 04-16-544485; a copy of the PI Statement written by MST2 ██████; a copy of the ICS Communications List prepared by MST1 ██████; a copy of the MSU Duluth Oil

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<sup>6</sup> See City of Superior ESDPW Memorandum written by Mr. ██████, ESDPW, dated 8/06/2007, submitted with the claim by Mr. ██████, WDNR, on 5/13/2010.

<sup>7</sup> See Summary of Findings Report prepared by Mr. ██████, Superior, dated 3/24/2008, both submitted with the claim by Mr. ██████, WDNR, on 5/13/2010.

<sup>8</sup> See PI Statement written by MST2 ██████, dated 10/19/2005 and Notice of Violation letter to Mr. ██████ from Mr. ██████, WDNR, dated 12/20/2007, submitted with the claim by Mr. ██████, WDNR, on 5/13/2010.

Sample Analysis Report; a copy of a letter written by the FOSC, CDR [REDACTED], to the NPFC regarding FPN G06003; copies of the WDNR Activity Analysis Reports for Activity # RRJW; copies of correspondence letters and DVD submitted by the PRP, Mr. [REDACTED], to the NPFC; copies of internal WDNR correspondence emails and letters; internal email correspondence and copies of maps and pictures.

The review of the actual cost invoicing and dailies focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented.

### **APPLICABLE LAW:**

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party’s liability will include “removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan”. 33 USC § 2702(b)(1)(B).

"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”.

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”.

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].

Under 33 U.S.C. 2713(b)(C) and 33 CFR 136.103(b)(3), claims for removal costs or damages may be presented first to the Fund by the Governor of a State for removal costs incurred by that State.

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.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 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].

### **DETERMINATION OF LOSS:**

#### **A. Findings of Fact**

1. The incident involved a discharge of “oil” as defined in OPA, 33 U.S.C. §2701(23) to navigable waters of the United States.
2. The FOSC coordination is evidenced via USCG Case # 262485, along with a memorandum written by CDR ██████████, USCG MSU Duluth.<sup>9</sup>
3. In accordance with 33 U.S.C. § 2713(b)(2) and 33 CFR 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted within six years after the date of completion of all removal actions for that incident. 33 U.S.C. § 2712(h)(1).
5. The U.S. Coast Guard and the City of Superior, Wisconsin, identified Mr. Steve Heimbach as the responsible party for this incident; however, he denied responsibility for the discharge. .
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that some removal costs presented (See Analysis under sub-section B for denied costs) were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR 136.205.

#### **B. Analysis:**

The NPFC Claims Manager reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were “removal actions” under OPA, 33 U.S.C. §2701(31) and the claims regulations at 33 CFR 136, containment of removal of oil from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare; (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

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<sup>9</sup> See MSU Duluth’s Case # 262485, opened 10/18/2005 and USCG MSU Duluth Memorandum written by CDR ██████████, submitted with the claim by Mr. ██████████ WDNR, on 5/13/2010.

The Claims Manager confirmed that the claimant performed a joint site assessment with the USCG on October 19, 2005.<sup>10</sup> The Claims Manager validated the costs incurred and determined what were reasonable, necessary and performed in accordance with the National Contingency Plan (NCP).

The NPFC determined that, of the \$73,535.52 claimed, \$64,892.47 is reimbursable under OPA. The breakdown of costs approved and costs denied are as follows:

**Salary:**

**Total Salary Costs Claimed: \$7,226.25**  
**Total Salary Costs Approved: \$5,615.42**

**Reasoning:** The WDNR provided the NPFC with a breakdown of personnel costs attributed to this spill.<sup>11</sup> Of the \$7,226.25 claimed, \$ 1,690.42 comes from allocable costs (According to the WDNR: An allocable activity does not relate to a specific work effort but benefits the work of the whole subprogram. There are three main types of allocable activities . . . One is leave time and the other is comp time. The third is general administration time.<sup>12</sup>). The WDNR did provide the NPFC with a breakdown of money allotted for allocable costs for this project during fiscal years 2005-2009; however, the WDNR did not provide documentation as to how the totals were derived. Therefore, due to the lack of evidence to support its claim, all WDNR allocable costs have been denied.<sup>13</sup> Based on the hours and rates provided to the NPFC by WDNR, the actual amount of compensable personnel costs totals \$5,615.42.<sup>14</sup> Therefore, this amount is approved.

**Fringe:**

**Total Fringe Costs Claimed: \$2,954.82**  
**Total Fringe Costs Approved: \$0.00**

**Reasoning:** The WDNR provided the NPFC with a breakdown of money allotted to fringe (the allocated percentage of employee fringe) for this project during fiscal years 2005-2009; however, the WDNR did not provide documentation as to how the totals were derived.<sup>15</sup> Because no documentation was submitted determining how these costs were calculated, all WDNR fringe costs have been denied.

**Contracts:**

**Total Contract Costs Claimed: \$61,132.96**

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<sup>10</sup> See ICS Communications List, prepared by MST1 [REDACTED], dated 10/20/2005, submitted with the claim by Mr. [REDACTED], WDNR, on 5/13/2010.

<sup>11</sup> See Labor Distribution for Activity RJWW spreadsheet, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 7/02/2010 and RRJW Howard's Bay Activity Analysis Report, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 5/26/2010.

<sup>12</sup> See Finance Data to CG document, submitted via email by Mr. [REDACTED], WDNR, on 8/04/2010.

<sup>13</sup> See email from Mr. [REDACTED] WDNR, to Ms. [REDACTED], NPFC, dated 8/04/2010 and See RRJW Howard's Bay Activity Analysis Report, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 5/26/2010..

<sup>14</sup> See NPFC Howards Bay Cost Analysis Spreadsheet, "WI Personnel Costs," and See Labor Distribution for Activity RJWW spreadsheet, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 7/02/2010.

<sup>15</sup> See NPFC Howards Bay Cost Analysis Spreadsheet, "Fringe Costs" and RRJW Howard's Bay Activity Analysis Report, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 5/26/2010.

**Total Contract Costs Approved: \$59,277.05**

**Reasoning:** The WDNR submitted both dailies and invoicing from its contractors, ET and WRR. However, the invoices provided amount to \$61,304.62, not the claimed amount of \$61,132.96, due to calculation errors on WDNR's part.<sup>16</sup> \$200.00 has been denied from ET Invoice #3519, dated May 30, 2009 (Supervisor; 2.5 hours at \$80.00 per hour = \$200.00),<sup>17</sup> because this item is not included in the provided dailies, only the invoicing. Additionally, all administrative fees included in the WRR invoices (totaling \$1827.57) are denied because administrative costs are not compensable costs under OPA. Therefore, the NPFC determines \$59,277.05 as compensable costs.

**Supplies:**

**Total Supply Costs Claimed: \$821.88**

**Total Supply Costs Approved: \$0.00**

**Reasoning:** The invoices provided for supply costs calculate a total of \$821.88 but, due to calculation errors on WDNR's part, the actual amount claimed should be \$368.67.<sup>18</sup> The WDNR did provide the NPFC with a breakdown of money allotted to supplies for this project during fiscal years 2005-2009; however, the WDNR did not provide documentation as to how the totals were derived.<sup>19</sup> Therefore, due to the lack of evidence to support its claim, all WDNR supply costs have been denied.

**Indirect Charges:**

**Total Indirect Charges Claimed: \$1,399.61**

**Total Indirect Charges Approved: \$0.00**

**Reasoning:** The WDNR describes the Indirect Charges as "DNR administrative costs, depreciation of administrative facilities, central services cost allocation plan and Single Audit costs . . . negotiated with, and approved by, the US Department of Interior."<sup>20</sup> This Indirect Rate "applies to all Grants (including contracts, cooperative agreements, etc.) which come to the DNR from federal and other outside funding sources. At their request, [the WDNR has] one rate for all grants."<sup>21</sup> While it is true that A-87 guidelines show these types of charges apply to grant programs, the OSLTF is not a grant program. Therefore, this does not apply and all costs "Indirect Charges" are subsequently denied.

**C. Determined Amount:**

The NPFC hereby determines that the OSLTF will pay **\$64,892.47** as full compensation for the uncompensated removal costs incurred by the Claimant and submitted to the NPFC under claim #G06003-001. All costs claimed are for charges paid for by the Claimant for removal

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<sup>16</sup> See NPFC Howards Bay Cost Analysis Spreadsheet, "Contractor Invoices," and individual invoices for both ET and WRR, submitted with the claim by Mr. [REDACTED], WDNR, on 5/13/2010.

<sup>17</sup> See ET Daily for 5/30/2006, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 7/02/2010.

<sup>18</sup> See NPFC Howards Bay Cost Analysis Spreadsheet, "Supply Costs" RRJW Howard's Bay Activity Analysis Report, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 5/26/2010.

<sup>19</sup> See RRJW Howard's Bay Activity Analysis Report, submitted by Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, via email on 5/26/2010.

<sup>20</sup> See email from Mr. [REDACTED], WDNR, to Ms. [REDACTED], NPFC, dated 5/26/2010.

<sup>21</sup> *Ibid.*

actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

**AMOUNT: \$64,892.47**

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *10/20/10*

Supervisor Action: *Approved*

Supervisor's Comments: