

CLAIM SUMMARY / DETERMINATION

Claim Number:	E13505-0003
Claimant:	Tom's Sewer and Drain and Heavy Duty Industrial Services, LLC
Type of Claimant:	Corporate
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$631,856.09

FACTS:

- A. Oil Spill Incident:** At 1930 on January 31, 2013, an inspector from the State of Ohio Department of Natural Resources (ODNR), went to the D&L Energy/Hardrock Excavating facility in Youngstown, OH, in response to an anonymous phone call and witnessed a facility employee illegally dumping drilling oil, mud and brine from a storage tank into a storm sewer that discharged into a tributary of the Mahoning River, a navigable waterway of the US. ODNR contacted State of Ohio Environmental Protection Agency (OEPA) for assistance, and OEPA's Emergency Response State On Scene Coordinator (SOSC), Mr. [REDACTED] responded and reported that the release of oil into the unnamed tributary of the Mahoning River may have been the result of a "deliberate discharge."¹ OEPA reported the incident to the National Response Center (NRC) on February 1, 2013 @1602 hours via report # 1037291.^{2, 3}

Upon responding to the reported source of the discharge, ODNR inspectors discovered workers discharging oil from a hose into the storm sewer catch. Subsequent to a full investigation of the illegal discharge, it was determined that on January 31, 2013, under the direction of a supervisor, an employee of D&L Energy, an oil and gas drilling operation, intentionally discharged the contents of four (4) frac tanks (approximately 20,000 gallons of crude oil, drilling mud and brine) into a storm drain that empties into a tributary of the Mahoning River.⁴ It is important to note that this report was prepared by EnviroScience at the request of US EPA Region 5. The OEPA further notified the United States Environmental Protection Agency (USEPA) as the Federal On-Scene Coordinator (FOSC).

On February 2, 2013, the FOSC, [REDACTED] of USEPA Region 5, issued a Notice of Federal Interest (NOFI) to Mr. [REDACTED], owner of D & L Energy and Hardrock Excavating.⁵ The FOSC issued a total of Six Pollution Reports (POLREPS) ranging from February 5, 2013 through December 11, 2013.⁶

¹ See, State of Ohio Environmental Protection Agency (EPA), Division of Emergency & Remedial Response -- Initial Pollution Incident Report (IPIR) dated February 1, 2013.

² See, NRC Report # 1037291 dated February 1, 2013.

³ See, State of Ohio EPA, District Office Investigation Report (DOIR) dated February 1, 2013.

⁴ See, D & L Energy, Inc. Emergency Response Activities Final Report dated August 16, 2013 prepared by EnviroScience for US EPA Region 5.

⁵ See, USEPA Notice of Federal Interest dated February 2, 2013.

⁶ See, USEPA Polreps 1-6.

B. Description of removal actions performed: Under an Order by Consent for Compliance under Section 311 of the Clean Water Act issued by the EPA FO SC,⁷ D & L Energy, Inc. assumed responsibility for the oil spill and hired Tom's Sewer and Drain (TSD) and Heavy Duty Industrial Services, LLC (HDIS) to conduct pollution removal activities including the removal of oil. From February 5, 2013, through March 7, 2013, removal activities involved placing and removing containment boom, cleaning out the contaminated storm drain, and removing wastewater from the tributary. In addition, crews cleaned heavy sediment discovered along the sewer line, using vacuum trucks to gather any wash water generated.⁸ On February 13, 2013, TSD and HDIS were forced to excavate access points along the main line to accommodate personnel needed to chip hardened oily material encrusted along the sewer line. Upon the successful cleaning of approximately 3000 feet of impacted storm sewer, TSD and HDIS completed its cleanup efforts, to include "the removal of the accumulated sediments at the outfall."⁹

CLAIM AND CLAIMANTS:

This claim for uncompensated removal costs was presented to the National Pollution Funds Center (NPFC) on December 9, 2015, by [REDACTED], of Daniel Daniluk, LLC Attorneys at Law, on behalf of her clients, Tom's Sewer and Drain, Inc. (TSD), an Ohio corporation, and Heavy Duty Industrial Services, LLC (HDIS), an Ohio limited liability company. Mr. [REDACTED] is a principal of both TSD and HDIS.¹⁰ TSD and HDIS provided removal support to the RP, D&L Energy, for this incident. The Claimants are specifically seeking uncompensated removal costs in the amount of \$631,856.09, asserting that D & L Energy, Inc. failed to pay them for this portion of their removal costs.

On July 28, 2016, the NPFC issued an offer to the Claimant in the amount of \$459,894.45.

REQUEST FOR RECONSIDERATION:

By email dated August 23, 2016, Ms. [REDACTED], Counsel for TSD and HDIS, stated that they would like to request reconsideration.¹¹ The NPFC acknowledged and accepted the Claimant's request for reconsideration of the claim as timely. By overnight mail dated August 23, 2016, the Claimant provided a three (3) page cover letter accompanied by several attachments, outlined as follows:

- U.S. Energy Information Administration list of Weekly Ohio All Grades All Formulations Retail Gasoline Prices;
- Heavy Duty Industrial Services, LLC, February 3, 2013, Rate Sheet;
- Invoices 42131-42138;
- Invoices 42121-42130;
- Invoices 42111-42120;

The Claimant stated in its request for reconsideration that the Claimant is requesting reconsideration on the basis that it had not provided documentation and/or information for some of the denied costs ranging in reasons such as illegible invoices, a missing rate sheet, items not included on the rate sheet that had

⁷ See, Order by Consent for Compliance under Section 311(c) and (e) of the Clean Water Act, issued by the EPA FO SC dated, February 26, 2013.

⁸ See, DOIR dated February 5, 2013.

⁹ See, DOIR dated March 7, 2013.

¹⁰ See, letter from Ms. [REDACTED] to [REDACTED] NPFC, dated December 23, 2015.

¹¹ See, letter from Ms. [REDACTED] to [REDACTED] NPFC, dated August 23, 2016.

been previously provided, and the absence of fuel surcharge information. The Claimant provided an extensive amount of supporting documentation with its reconsideration request.

NPFC Determination of Reconsideration:

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. 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.

Upon receipt of the Claimant's request for reconsideration, the NPFC performed a *de novo* review of the entire claim submission. This review sought to determine whether or not the Claimant provided evidence on reconsideration sufficient to prove that their removal costs were reasonable, properly documented, and OPA compensable pollution removal costs.

Invoices on Reconsideration

Invoice 4111

On reconsideration, the NPFC approves \$22,456.42 and denies \$375.00 in removal costs based on the supplemental information that was provided by the Claimant.

The NPFC continues to deny one (1) item for this invoice as follows:

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42112

On reconsideration, the NPFC approves \$31,395.92 and denies \$1,258.03 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why. Also, the excavating portion of Invoice 42112 includes an additional \$.03 in an undetermined difference and as such, this charge remains denied. The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42113

On reconsideration, the NPFC approves \$31,512.68 and denies \$1,113.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges

remain denied because they were not identified nor was a description provided to explain what was used and why. The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42114

On reconsideration, the NPFC approves \$32,324.00 and denies \$823.80 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why. Also, Invoice 42114 includes an additional \$2,000.00 in undetermined difference and as such, this charge remains denied as insufficiently supported. The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42115

On reconsideration, the NPFC approves \$30,460.01 and denies \$3,994.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why. Also, Invoice 42115 includes an additional \$3,000.00 in undetermined difference and as such, this charge remains denied as insufficiently supported. The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42116

On reconsideration, the NPFC approves \$24,451.60 and denies \$537.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why. The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did

not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42117

On reconsideration, the NPFC approves \$22,619.10 and denies \$315.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42118

On reconsideration, the NPFC approves \$25,877.05 and denies \$375.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42119

On reconsideration, the NPFC approves \$23,531.21 and denies \$390.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42120

On reconsideration, the NPFC approves \$22,718.47 and denies \$300.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42121

On reconsideration, the NPFC approves \$23,308.17 and denies \$360.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42122

On reconsideration, the NPFC approves \$27,060.59 and denies \$375.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42123

On reconsideration, the NPFC approves \$27,341.97 and denies \$360.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42124

On reconsideration, the NPFC approves \$24,469.07 and denies \$375.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42125

On reconsideration, the NPFC approves \$11,711.38 and denies \$150.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42126

On reconsideration, the NPFC approves \$9,469.92 and denies \$105.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42127

On reconsideration, the NPFC approves \$23,050.10 and denies \$360.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42128

On reconsideration, the NPFC approves \$21,543.11 and denies \$375.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42129

On reconsideration, the NPFC approves \$20,690.58 and denies \$330.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42130

On reconsideration, the NPFC approves \$24,659.24 and denies \$390.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42131

On reconsideration, the NPFC approves \$33,204.16 and denies \$1,028.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why. The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42132

On reconsideration, the NPFC approves \$27,071.11 and denies \$390.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42133

On reconsideration, the NPFC approves \$23,053.59 and denies \$390.00 in removal costs based on the supplemental information that was provided by the Claimant.

- The February 3, 2013, Heavy Duty Industrial Services Rate Sheet does not individually break down prices for items listed for miscellaneous equipment charges and as such, these charges remain denied because they were not identified nor was a description provided to explain what was used and why.

Invoice 42134

On reconsideration, the NPFC approves \$9,506.15 based on the supplemental information that was provided by the Claimant.

Invoice 42135

On reconsideration, the NPFC approves \$6,742.00 and denies \$634.20 in removal costs based on the supplemental information that was provided by the Claimant.

- The Claimant stated that they billed the RP a 10% markup on all Kirila Contractors invoicing and that the administrative markup is customary in the industry and the amount is actually on the low side. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42136

On reconsideration, the NPFC approves \$1,300.00 and denies \$4,667.50 in removal costs based on the supplemental information that was provided by the Claimant.

- Load Top Soil (\$350.00) and Fertilizer & Seed (\$50.00) are not listed on a rate sheet submitted by the Claimant and as such, these charges remain denied. Also, Invoice 42136 includes \$4,137.50 in undetermined difference from the invoiced subtotal and as such, these charges remain denied as insufficiently supported.

Invoice 42137

On reconsideration, the NPFC approves \$18,160.00 and denies \$7,815.00 in removal costs based on the supplemental information that was provided by the Claimant.

- With regard to the markup of subcontracted work performed on previous invoices, by letter dated August 26, 2016, the Claimant stated, "As you will see from the handwritten notes on each of the invoices, Tom's Sewer marked up the Kirila Contractors prices by 10% when billing D&L. This is customary in the business, and in fact, a 10% mark-up is on the low side."¹² Due to the absence of a rate sheet describing rates associated with Sludge Boxes and Open Top Boxes, the NPFC approves the Cowboy Industry invoiced amounts only. The NPFC again denies all markup because the Claimant did not have a provision in its rate schedule with D & L for such additional charges and as such, D&L was never informed in advance such a charge would be billed therefore all markup is denied as not supported by the rate schedule in place at the time the services were rendered.

Invoice 42138

On reconsideration, the NPFC approves \$1,500.00 and denies \$3,800.00 in removal costs based on the supplemental information that was provided by the Claimant.

- Invoice 42138 is missing several documents for personnel and equipment costs associated with services subcontracted by Wolford's Roll Off Inc. and as such, the charges not accompanying the Wolford's Roll Off Inc. invoices remain denied.

Invoice 10436PJ

On reconsideration, the NPFC denies \$106.75 in removal costs based on the supplemental information that was provided by the Claimant.

- The Claimant did not submit additional documentation for Invoice # 10432PJ and as such, this charge remains denied.

Please refer to the NPFC spreadsheet of costs on Reconsideration for an itemized description of charges.

On reconsideration, the NPFC hereby determines that the OSLTF will offer \$600,363.81 as full compensation for the reimbursable OPA compensable removal costs incurred by the Claimant and submitted to the NPFC under claim E13505-0003.

Determined Amount: \$600,363.81

Claim Supervisor:

Date of Supervisor's review: *September 15, 2016*

Supervisor Action: *Reconsideration Approved*

Supervisor's Comments:

¹² See letter from Ms. [REDACTED] to [REDACTED] NPFC, dated August 23, 2016.