U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
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5890
12/20/2011

VIA EMAIL: [redacted]@torres-law.com

Murphy Dredging & Construction
P.O. Box 1008
Chalmette, LA 70044

RE: Claim Number: N08057-0106

Dear Ms. Burns:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number N08057-0106 involving Murphy Dredging & Construction during the DM-932 spill incident. Please review the NPFC's Claim Determination for details.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number N08057-0106.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,

[redacted]
Claims Manager
U.S. Coast Guard

CLAIM SUMMARY / DETERMINATION FORM

| | |
|---|---|
| Date | : December 20, 2011 |
| Claim Number | : N08057-0106 |
| Claimant | : Murphy Dredging and Construction |
| Type of Claimant | : Corporate |
| Type of Claim | : Profits and Earnings Capacity |
| Claim Manager | : Robert Rioux |
| Amount Requested | : $331,934.63 |

## I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States.

## II. Responsible Party

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a Responsible Party under the Oil Pollution Act of 1990 (OPA).

## III. Claimant

Murphy Dredging Co., Inc., and Murphy Construction Co., Inc. (collectively, "Claimant") are dredging and construction companies with common ownership, incorporated in Louisiana and headquartered in Chalmette, LA. Murphy Dredging Company dredges sand from the Mississippi River for Murphy Construction. Murphy Construction pays Murphy Dredging for this service and Murphy Construction sells the sand to its customers.

## IV. Claim Description

On July 26, 2011, Claimant presented a claim for loss of profits and earning capacity damages to the NPFC, seeking $331,934.63 allegedly lost as a direct consequence of the DM 932 oil spill on July 23, 2008. According to Claimant's submission, due to the oil spill, the U.S. Coast Guard and U.S. Army Corp. of Engineers forced Claimant to cease dredging operations for ten days, from July 25, 2008 until August 3, 2008 (the shut-down).[1]

At the time of the incident, Claimant alleged to have been operating its dredge at 29° 55' 25.54" N, 89° 57' 17.77" W.[2] Claimant alleged that due to river closures as a result of the DM 932 oil spill, Claimant was directed by USCG personnel and the Army Corps of Engineers to cease dredging operations in the river for ten days, from July 25, 2008 until August 3, 2008.[3]

According to Claimant, the shut-down resulted in the following losses, totaling the sum certain amount of $331,934.63.

[1] Response to Worley Catastrophe Response request for additional information, November 5, 2010, at 7.
[2] Response to request for additional information, November 2, 2011, at 2a.
[3] Response to Worley Catastrophe Response request for additional information, November 5, 2010, at 7.

a. $15,134.63 in payroll losses.

Between July 25 and August 3, 2008, when the dredge was allegedly not operating, Claimant continued to maintain personnel on the dredge. Claimant seeks reimbursement of payroll expenses incurred during the time when the dredge was manned, but allegedly unable to pump sand. In Claimant's submission to the NPFC, Claimant states,

> [D]redge engines are run 24 hours a day, continuously pumping sand in order to stockpile the sand pits. Even when the dredge is not being operated, the tug boat engines are continuously run in order to move the anchors and to prevent them from getting stuck on the bottom and covered by sand . . . Mechanics also worked on alternating shifts to handle ongoing maintenance on the motors and generators.[4]

Claimant alleged to have incurred $15,134.63 in payroll expenses during the time period in which Claimant was unable to continue normal dredging operations. Claimant asserts that these expenses constitute lost profits because the payroll expenses are "usually covered by the sale of sand which our staff pumps into the stockpile pits."[5]

b. $1,800.00 in fuel for the light tower on the dredge.

During the shut-down, Claimant continued to fuel the light tower for the dredge.[6] Claimant seeks $1,800.00 in compensation for fuel costs, noting that Claimant was required to continue to fuel the light tower and because "the light/plant generator is run on a 24-hour basis for safety precautions on the river."[7]

c. $315,000.00 in lost sand sales.

Claimant states that the dredge, ST. ANTHONY,[8] dredges between 5,000 and 7,000 cubic yards of sand each day.[9] After the sand is dried in pits for a period of at least two weeks, it is sold for $5.25/cubic yard.[10] As the dredge did not run for ten days, Claimant presents the following calculation to determine lost revenue from sand sales: (6,000 cubic yards per day x 10 days x $5.25 per cubic yard = $315,000.00).[11]

Explaining their lost sales, Claimant states:

> [S]ales of river sand previously arranged were lost because they could not be filled. Furthermore, due to the closure of [Claimant's] operations, river sand stockpiles were severely depleted which also affected [Claimant's] ability to fill orders it normally would have been able to fill for several months in 2008 after operations resumed.[12]

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4 Murphy Dredging Co., Inc. response to Worley Catastrophe LLC, at 3, June 25, 2010 (Exhibit C).
5 Response to request for additional information, November 2, 2011 at 3a.
6 Response to request for additional information, November 2, 2011, at 1a.
7 Id.
8 Name of dredge provided via email to the NPFC, November 4, 2011.
9 Response to request for additional information, November 2, 2011at 5a.
10 Id.
11 Id.
12 Claimant's original submission to Worley Catastrophe Response, June 25, 2010 (Exhibit C).

In total, Claimant alleged to have sustained damages in the amount of $331,934.63 in (1) payroll costs (2) fueling expenses, and (3) loss of sand sales resulting from the closure of the lower Mississippi river following the DM 932 oil spill.

Claimant first presented this claim to the Responsible Party on June 25, 2010 and November 5, 2010, as indicated in the Optional OSLTF Claim Form received by the NPFC on July 26, 2011. Claimant's submission to the NPFC includes a copy of Claimant's reply to Worley Catastrophe's request for additional information, dated June 25, 2010 and identified as Exhibit C. Claimant also indicated on the Optional OSLTF Claim Form that the Responsible Party denied payment on this claim prior to its presentment to the NPFC, and also certified that Claimant has not commenced an action in court to recover costs which are the subject of the claim.[13]

## V. Applicable Law

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 C.F.R. § 136 are met, including the general provisions of 33 C.F.R § 136.05 and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 C.F.R. § 136.231, et seq.

Pursuant to the provisions of 33 C.F.R. § 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 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 C.F.R. § 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; alternative employment or business not undertaken, bur 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 C.F.R. § 136.235(a)-(e).

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[13] Optional OSLTF Claim Form, 22 July 2011; *See also*, Order Granting Motion to Dismiss, Civil Action No. 08-4007 (E.D. La., 2009).

Under 33 C.F.R. § 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.

## VI. NPFC Analysis

Claimant alleges that the barge DM 932 oil spill resulted in the U.S. Coast Guard and Army Corps of Engineers ordering the shutdown of Claimant's dredging operations in the Mississippi River for "approximately 10 days".[14] In order to verify this statement, and to identify the exact period in which Claimant ceased operations pursuant to Coast Guard orders, the NPFC requested that Claimant provide documentation to verify certain information, including (1) the location of the dredge, and (2) the shut-down orders, including the time at which orders to cease dredging operations were given and later lifted.[15]

In regards to the location of the dredge at the time of the oil spill, Claimant provided the following coordinates: 29° 55' 25.54" N, 89° 57' 17.77" W.[16] Claimant stated that the "dredge is always located at the same location on the river in reference to the location of our stockpile pits, as verified by our permits."[17] The NPFC requested that Claimant present a copy of the dredging permit or contract awarded to Claimant by Army Corps of Engineers during the time that Claimant was allegedly affected by the oil spill.[18] Claimant failed to respond to this request, stating that "[r]espondent was not able to locate the contract in time to submit with this response."[19] The NPFC contacted the ACOE who provided a copy of Claimant's dredging permit application, noting that Claimant had been approved to conduct certain dredging operations on "the left descending bank of the Mississippi at a point about 88 miles above the Head of Passes, at Chalmette, Louisiana, within St. Bernard's Parish."[20] Based on the information independently gathered by the NPFC, the NPFC is able to confirm that Claimant's dredge was indeed operating in an area of the river affected by river closures following the DM 932 oil spill.[21]

Having confirmed the location of the dredge at the time of the spill,[22] the NPFC requested documentation regarding the actual shut down of dredging operations, such as the name of the individuals who directed the shut down, or documentation to verify that Claimant indeed shut-down business for ten days pursuant to Coast Guard orders.[23]

In Claimant's submission to the NPFC, Claimant provided a letter on Murphy Dredging Co. Inc.'s letterhead, signed by Lamont Murphy, the company's secretary/treasurer, stating that "our dredge was forced to cease operations by the U.S. Coast Guard and U.S. Army Corps. of

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[14] Response to Worley Catastrophe request for additional information, June 25, 2010 (Exhibit C) at 3.
[15] NPFC request for additional information, August 16, 2011.
[16] Response to request for additional information, November 2, 2011, at 2a.
[17] Id.
[18] NPFC request for additional information, August 16, 2011.
[19] Response to NPFC request for additional information, November 2, 2011 at 2b.
[20] Department of the Army, permit approval letter for Murphy Construction, Inc, Re: MVN 2004-1804 EKK, Feb. 11, 2011. Permit # P20101377.
[21] Coast Guard POLREPs indicate that closures in the Lower Mississippi River extended from MM 98 to the Southwest Pass Sea Buoy.
[22] 33 C.F.R. § 136.105(a) states that "The claimant has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim."
[23] NPFC request for additional information, August 16, 2011, at 2a.

Engineers." The NPFC requested that Claimant provide documentation to verify that these orders were given, and that they were implemented at a particular time.[24] Claimant stated that such documentation could not be provided because "orders were given verbally by Coast Guard personnel who were policing the river after the oil spill."[25]

Based on the foregoing, the NPFC does not have sufficient information to verify the exact period in which Claimant's dredging operations were actually suspended, or to verify that the orders to suspend operations were actually given by the U.S. Coast Guard and Army Corps of Engineers.

The remainder of this determination shall address Claimant's specifically alleged losses consisting of (1) payroll expenses, (2) fuel costs, and (3) lost sand sales.

a. Payroll Expenses

**Claim:** Claimant seeks reimbursement from the Fund for payroll expenses totaling $15,134.63, incurred during June 25 – August 3, 2008, when the dredge was allegedly not operating.

**Documentation:** Claimant provides 2007 yearly payroll records for five dredge employees and two heavy equipment employees, who manned the dredge during the shut-down. Claimant also provides a spreadsheet and pages from a Murphy's payroll journal showing payments made to these employees for the week ending 7/30/08 and 8/6/08.

**NPFC Findings:** Because payroll expenses do not constitute a financial loss in this case, this component of the claim is denied in the amount of $15,134.63.

Expenses that are regularly incurred during the course of business do not, in themselves, constitute a loss of profits under OPA.[26] Although Claimant refers to these expenses as "incidental",[27] Claimant has not provided evidence to show that these expenses were in fact, incidental, and not expenses usually incurred in the regular course of business, whether the dredge was pumping sand or shut down.

Claimant references costs associated with "maintenance and preparatory work to resume dredging" after the closure was lifted.[28] However, Claimant has not provided any evidence or documentation to indicate precisely what these costs were, or to indicate that such costs were actually paid by Claimant.

According to Claimant's submission, the dredge is always manned, even when dredging operations are halted.[29] Because Claimant has not provided any proof that payroll expenses during the time of the alleged shut-down constituted an actual loss of profits, this component of the claim is denied.

b. $1,800.00 in fuel for light tower for the dredge

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[24] NPFC Request for Additional Information, August 16, 2011 at 2.

[25] In letter to the NPFC dated November 2, 2011, Murphy stated in a response to the NPFC request for information regarding the shut-down, "orders were given verbally by Coast Guard personnel who were policing the river after the oil spill," and further stated that "The U.S.C.G. should have record of what personnel were assigned to our region of the river at the time of the river closure."

[26] 33 C.F.R. § 136.233(b).

[27] Claimant's original submission to Worley Catastrophe Response, June 25, 2010 (Exhibit C).

[28] Claimant's original submission to Worley Catastrophe Response, June 25, 2010 (Exhibit C).

[29] Response to request for additional information, November 2, 2011, at 1a.

**Claim:** Claimant seeks reimbursement for the cost of fueling the light tower for the dredge during the alleged ten-day shut-down.

**Documentation:** The NPFC requested that Claimant provide evidence of the fuel burn rate for the light tower in order to determine how much fuel the tower actually burns over a particular time period. Claimant was unable to reply to this request and stated that,

> [Claimant does] not know how to differentiate or figure out the exact fuel burn rate for the light on the light tower, as all of the dredge functions are run by the same generators. [Claimant] tried to arrive at a figure that was thought to be a fair and conservative number for the expense to run the light tower.[30]

In support of these costs, Claimant presents a copy of an invoice from John Stone Oil Distributors, LLC, showing fuel and related costs totaling $46,182.08, with payment due on 29 July 2008.[31]

**NPFC Findings:** This portion of the claim is denied on two grounds. As with the claimed payroll expenses, costs of fueling the light tower are costs incurred during regular business operations, and do not, in and of themselves constitute a loss of profits.[32] The cost of fueling a light tower, which is constantly fueled regardless of whether dredging operations are taking place or the dredge is in standby, does not constitute a proven loss or reduction in profits or earning capacity.

Secondly, Claimant has not provided documentation to indicate that Claimant incurred fuel costs during the alleged shut-down of $1,800.00. Claimant indicated that this specific calculation could not be done, but that the company "tried to arrive at a figure that was thought to be a fair and a conservative number for the expense to run the light tower."[33] OPA requires that compensation for a loss of profits claim be limited to, "the actual net reduction or loss of earnings or profits suffered."[34] Claimant has not sufficiently identified the actual cost of fueling the light tower, nor has Claimant provided documentation to prove that the cost constituted a loss of profits or earning capacity.

This component of the claim in the amount of $1,800.00 is therefore denied, as continuous fuel costs for the light tower (1) do not constitute a loss of profits, and (2) because the claimed amount is unsubstantiated.

c. <u>$315,000.00 in lost sand sales</u>

**Claim:** Claimant seeks $315,000 in lost sand sales resulting from approximately ten days in which Claimant's dredge was allegedly not operating.

**Documentation:** Claimant provides financial documentation, including 2007 and 2008 Forms 1120S for Murphy Dredging Co., Inc. Claimant also provides various documentation showing monthly sand sales from 2007 to 2010, including:

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[30] Id. at 4b.
[31] John W. Stone Oil Distributor, LLC, Invoice Number GR151745.
[32] 33 C.F.R. 136.233(b).
[33] Response to request for additional information, November 2, 2011 at 4.
[34] 33 C.F.R. § 136.235

- Spreadsheet showing monthly sales of sand for 2007 and 2008. According to these spreadsheets, Claimant conducted $655,057.52 in sand sales in 2007, compared to $792,202.34 in sand sales in 2008.
- Bar graph showing monthly sales from January 2007 to December 2009, indicating a sharp increase in sales in October 2007 and October 2009.
- Bar graph showing sales of sand by month for January to December 2010, showing a fairly steady decrease of sales from January through December 2010, with very low sales from September through December 2010.
- Accountant reports, 2005, 2006, 2007, 2009, 2010, showing yearly sand revenue.

In support of Claimant's assertion that sales were either cancelled and/or orders for sand were unable to be filled, Claimant provides two letters from customers, including a letter from Vernes Keeler of V. Keeler & Associates, a Demolition and Site Preparation Company in New Orleans, LA, and a second letter from Terry Dalke of Parish Construction & Demolition, in Metairie, LA. Both letters are dated in September 2010, and both letters indicate that during the period of September to December 2008, Claimant was not able to supply the companies with several orders of approximately 10,000 to 22,000 cubic yards of sand to allow the companies to bid on certain construction projects.[35]

Claimant also submitted "call records of [Claimant's] ticket office clerk,"[36] in support of Claimant's assertion that sand orders could not be filled due to depletion of the stockpiles as a result of the river closure following the DM 932 oil spill.

In a letter dated 16 August 2011, the NPFC requested that Claimant provide evidence to demonstrate that Claimant was capable of dredging 6,000 cubic yards of sand each day, by providing a record of daily drilling activity. Claimant stated that daily records are not kept, and stated that pit surveys provide an indication of the capacity of the dredge and the pits at the time of the shut down.[37] Claimant also indicated that each stockpile pit has the capacity to hold approximately 200,000 cubic yards of pumped river sand.[38]

**NPFC Findings:** This portion of the claim is denied because Claimant has not provided documentation to prove that (1) in the course of normal business operations, Claimant dredged 6,000 cubic yards of sand each day, (2) at the time of the alleged shut-down, Claimant had the pit capacity for 60,000 additional cubic yards of sand (6,000 cubic yards of sand a day x 10 days shut down), (3) certain orders for sand were actually placed, and unable to be filled due to depletion of the stockpiles, and (4) Claimant sustained a loss of profits during the period in which Claimant alleges to have been affected by the DM 932 oil spill.[39]

Claimant estimates that because the dredge was capable of dredging between "5,000 and 7,000 cubic yards [of sand] per day" the alleged ten-day shut down resulted in Claimant being unable to dredge approximately 6,000 cubic yards of sand per day, or 60,000 cubic yards of sand over the course of the ten days.[40] The NPFC requested that Claimant provide evidence of daily dredging operations to substantiate this figure, but Claimant was unable to comply with the

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[35] Letter from V. Keeler & Associates, September 2, 2010 states that the company was "not able to bid on several jobs of 18,000 cubic yards to 22,000 cubic yards of pump sand"; Letter from Parish Construction & Demolition states that the company "was not able to bid on numerous jobs which would have consisted of purchasing between 10,000 to 15,000 cubic yards of sand . . . around the months of September through November 2008."

[36] Response to request for additional information, November 2, 2011, at 1b.

[37] Id. at 5a.

[38] Id. at 5b.

[39] 33 C.F.R. § 136.233(c) requires that Claimant demonstrate "the amount of the claimant's profits or earnings in comparable periods and during the period when the claims loss or impairment was suffered".

[40] Response to request for additional information, November 2, 2011, at 5a.

request, stating that "Murphy Dredging/Murphy Construction does not keep a daily record of the amount of sand dredged."[41] Because the NPFC does not have information to verify the daily output or capacity of Claimant's dredge, the NPFC cannot pay damages based on an approximate ten-day shut-down of dredging operations when neither the daily dredge output, nor the actual time of the alleged shut-down have been verified.

Furthermore, Claimant's yearly sand sales do not reflect that Claimant likely would have sold an additional 60,000 cubic yards of sand in 2008, had Claimant been able to continue normal dredging operations for the ten days in which Claimant alleged to have been shut down. Claimant's record of monthly sand sales in 2007 and 2008 indicate that Claimant sold 93,674 cubic yards of sand in 2007 and 108,814 cubic yards of sand in 2008.[42] In 2007, if Claimant's dredge ran continuously, 365 days per year, Claimant would have sold an average of 256.64 cubic yards of sand each day. In 2008, assuming Claimant's dredge operated 355 days out of the year (minus the ten days Claimant alleged to have been shut down), Claimant sold an average of 306.518 cubic yards each day. Based on the total number of cubic yards of sand sold in 2007 and 2008, Claimant's allegation that Claimant lost the sale of an additional 60,000 cubic yards of sand is unsupported by Claimant's prior earnings. The 60,000 cubic yards of sand, which Claimant alleged to have been unable to dredge over a period of ten days would have totaled 55.13% of the Claimant's total sales in 2008, or 64.05% of the Claimant's total sales in 2007.[43]

Additionally, Claimant has not provided evidence to demonstrate that at the time of the alleged shut down, Claimant had the pit capacity to accommodate an additional 60,000 cubic yards of sand. The NPFC requested that Claimant provide evidence to show the capacity of each of Claimant's pits, as well as the pit levels at the time of the shut down. Claimant responded to this request by providing copies of pit surveys which demonstrate the pit levels on particular days.[44] Claimant also stated that each pit holds approximately 200,000 cubic yards of sand.[45] However, the surveys do not indicate that at the time the dredge was alleged to have stopped operations, the stockpile pits were in fact prepared to accommodate an additional 60,000 cubic yards of sand. Furthermore, according to Claimant's dredging permit, provided to the NPFC by the ACOE, Claimant's "fill area" is designated at 168,000 cubic yards of sand,[46] rather than the 200,000 per pit, as indicated by Claimant. Based on the lack of documentation regarding the size of the pits and the levels of the pits at the time of the alleged shut down, the NPFC does not have sufficient information to determine whether or not Claimant would have had the capacity to have accommodated the additional 60,000 cubic yards of sand it alleged to have been unable to pump as a result of the DM 932 oil spill.

In terms of specific lost sales, Claimant alleged to have lost $315,000.00 in sand sales as a result of the shut down. To support this assertion, Claimant provides letters from two clients, stating that they were unable to bid on certain construction projects due to Claimant's inability to provide enough sand to furnish large orders.[47]

A letter from V. Keeler & Associates states that the company was "not able to bid on several jobs of 18,000 cubic yards to 22,000 cubic yards of pump sand during the time periods around

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[41] Id. at 5.
[42] Record of monthly sand sales, provided in Claimant's original submission.
[43] Chart showing monthly sand sales indicates that Claimant sold 93,674 cubic yards of sand for total sales of 655,057 in 2007 and 108,814 cubic yards of sand, for total sales of 792,202.34 in 2008.
[44] Professional Land Surveyors reports, April 9, 2007, October 24, 2007, February 12, 2008, July 28, 2008, January 28, 2009, October 19, 2009.
[45] Response to NPFC request for additional information, 2 November 2011 at 5b.
[46] Joint permit application, Permit # P20101377, at 4.
[47] *Supra* note 35.

September through December 2008 . . . due to [Claimant's] stockpile being depleted".[48] A second letter from Parish Construction & Demolition contains essentially the same assertion, citing the company's inability to bid on "numerous jobs which would have consisted of purchasing between 10,000 to 15,000 cubic yards of sand."[49] Claimant also presents "call records of [Claimant's] ticket office clerk." These records are meant to support Claimant's contention that they were unable to fill orders due to stockpile depletion.

Two customer letters do not indicate that Claimant lost any particular sales as a result of the alleged shut down. These prospective sales were contingent on contracts being awarded to the above mentioned companies. These losses are therefore speculative and cannot be compensated under OPA's Loss of Profits damage category, which requires that a claimant provide evidence to demonstrate that a claimant incurred an actual loss that can be directly linked to the DM 932 oil spill incident.[50]

Furthermore, Claimant's monthly sales records in 2007 and 2008 fail to support Claimant's allegation that these sales, which allegedly included "several jobs of 18,000 to 22,000 cubic yards of pump sand"[51] were actually lost. In fact, in 2007 and 2008, only in the month of June 2008 does Claimant sell at least 18,000 cubic yards of sand.

Additionally, call records kept by Claimant's ticket office clerk fail to identify particular sales that were not filled. The notes are mostly illegible and do not contain clear records of sand orders and sales. Furthermore, Claimant has not provided a record of daily dredging operations, so it is unclear whether the alleged depletion of stockpiles resulted from the shut down that is the subject of this claim, or if other factors played a role in alleged stockpile depletions.

Claimant's financial documentation does not indicate that Claimant's earnings actually dropped in the period in which Claimant alleges a loss. Claimant indicates that although the shut down affected Claimant's ability to dredge from July 25 until August 3, 2008, Claimant's "losses did not occur until October 2008,"[52] and allegedly continued through the end of 2008. However, documentation provided by Claimant indicates that Claimant's sand sales totaled $655,057.62 in 2007 and $792,202.34 in 2008.[53] Although sales from October – December 2008 do appear to be lower than sales in those months of 2007, total yearly sales do not indicate that Claimant actually sustained a loss as a result of the inability to dredge due to the river closure. Furthermore, in response to a question from the NPFC concerning bar graphs depicting monthly sand sales, Claimant stated that the charts were not an accurate representation of monthly sales and were "not prepared by a professional accountant."[54] Claimant requests that the NPFC reference accountant's reports for accurate information.[55] The accountant reports present information regarding yearly revenue generated by sand sales in 2005, 2006, 2007, 2009 and 2010.[56] Claimant does not present a report for 2008. Although the reports provided contain information regarding revenue generated by sand sales, they do not indicate that Claimant actually lost revenue or profits in 2008 as a result of the DM-932 oil spill.

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[48] Letter signed by Vernes Keeler, September 2, 2010.
[49] Letter signed by Terry Dalke, September 18, 2010.
[50] 33 C.F.R. § 136.233(b) requires that the claimant provide proof 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." (emphasis added).
[51] *Supra* note 48.
[52] Letter from Claimant to Sydney Torres, November 11, 2008.
[53] Chart of monthly sand sales, 2007, 2008.
[54] Response to NPFC request for additional information, November 2, 2011 at 6e.
[55] Id.
[56] Reports for 2005, 2006, 2007, 2009 and 2010 prepared by Albert G. Kroeper, Exhibit 6.

Having reviewed all documentation provided by Claimant, the NPFC does not have sufficient or verifiable documentation of Claimant's monthly sand sales in order to demonstrate that Claimant actually lost profits during a particular period following the DM 932 oil spill. The alleged lower sales from October – December 2008 were not proven to be a direct consequence of the DM 932 oil spill. Rather, based on yearly totals, Claimant's 2008 sand sales saw an increase of over 20% as compared to 2007.[57]

Based on the foregoing, this claim is denied in its entirety. Claimant has failed to provide evidence to verify the amount of time Claimant was allegedly unable to continue normal dredging operations. Claimant has also failed to demonstrate that Claimant's alleged inability to continue normal dredging operations resulted in a loss or reduction in Claimant's profits or earning capacity.

Amount Approved: [redacted]

Claim Supervisor: [redacted]

Date of Supervisor's review: 12/20/11

Supervisor Action:

[57] "Chart of Sales Record" indicates sand sales of $655,057.52 in 2007 and $792,202.34 in 2008.