

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/26/2008
Claim Number	: P05005-028
Claimant	: Creative Waste Management, Inc.
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: (b) (6)
Amount Requested	: \$172,165.18

I. Background:

Oil Spill Incident: On November 26, 2004, between 2100 and 2115 hours, the T/V ATHOS I struck a submerged anchor within Federal Anchorage #9 on the Delaware River (also known as the “Mantua Creek Anchorage”). The Claimant alleges that the incident occurred when two tugboats began maneuvering the ATHOS I (pushing from the vessel’s starboard side) toward the dock at the CITGO Asphalt Refinery Company terminal in Paulsboro, NJ. (See, TMC (Marine Consultants) Ltd. Report, May 25, 2005, hereinafter the “TMC Report”). The investigation into the incident revealed that the anchor punctured the vessel’s hull, rupturing the #7 port ballast tank and the #7 center cargo tank, causing an estimated 263,371 gallons of “Bachaquero crude oil” to discharge into the Delaware River, a navigable waterway of the United States. (See, SITREP-POL 50 dated 17 May 2006).

The T/V ATHOS I is a single-bottom hull, double-sided, 37,895 gross ton oil tank vessel with a breadth of 32.2 meters or 105.6 feet. The vessel is owned by Frescati Shipping Company Limited and was managed on the date of the incident by Tsakos Shipping & Trading S.A (hereinafter jointly referred to as the “Responsible Party” or “RP”). (See, Certificate of Financial Responsibility, #841496-15 with effective date of 17 May 2004 and expiration date of 17 May 2007).

As a result of the ATHOS I incident, the flood tide carried the oil up the Delaware River, past the Philadelphia Marine Center (PMC), to the Tacony-Palmyra Bridge. The Coast Guard Captain of the Port, Captain Sarubbi, established a Safety Zone that extended upriver to the Tacony-Palmyra Bridge and downriver below the Athos spill site to Commodore Barry Bridge (Exhibit 1, Marine Safety Information Bulletin (MSIB) #46-04 dated November 27, 2004)

On November 30, 2004, the Coast Guard enlarged the Safety Zone to include the area from the Tacony-Palmyra Bridge downriver to the intersection of the Marcus Hook Range and the Bellevue Range (Exhibit 2, MSIB #47-04)

Claimant: Creative Waste Management, Inc.’s (CWM) dredging business includes the dredging of the bottom of marinas for sediments due to shoaling from the Delaware River and its tributaries. CWM was under contract with Philadelphia Marine Center (PMC) to complete a dredging project that started on November 2, 2004.

In addition to this loss of profits claim, CWM also submitted a removal cost claim for cleaning the dredge and other equipment used in dredging, and a property damage claim for oil damaged

dredging equipment. The removal cost claim (P05005-027) was paid in the amount of \$9,396.01 and the property damage claim (P05005-028) was paid in the amount of \$19,369.98

Claim Description: The claimant alleges that, as a result of the ATHOS I spill, the tide carried the oil up the Delaware River past the Philadelphia Marine Center, which resulted in heavy oil in the marina area. CWM is seeking reimbursement for lost profits for operations downtime, extra costs of hiring a second shift crew, extra costs for holiday shifts, loss of dredging efficiency, loss of subsequent business, claim preparation fees, administration fees, and interest - all as a direct result of the oil spill incident. These claimed losses will be detailed in the Determination of Loss section below.

This claim was first submitted by CWM to Hudson Marine. Hudson Marine rejected the claim on the basis that Tsakos Shipping had expended monies in excess of its limit of liability under OPA 90.

The claimant authorized Palmer Biezup & Henderson LLP to submit this loss of profits claim to the NPFC on their behalf.

II. APPLICABLE LAW:

In general, claims for removal costs or damages must first be presented to the responsible party. 33 USC §2713(a). If the responsible party denies the claim or does not settle the claim within 90 days, the claimant may commence an action in court against the responsible party or present the claim to the Fund. 33 USC §2713(c).

Claims may be presented first to the Fund if the President or his delegated representative has advertised or notified claimants that the Fund is accepting claims resulting from an oil discharge. 33 USC §2713(b)(1)(A).

The uses of the OSLTF are described at 33 USC §2712(a). It provides in relevant part that:

“The Fund shall be available to the President for –

(4) the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;”

“The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of the claimant.” 33 USC §2712(b)

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 USC §2702(b).

Damages are further defined to include the costs of assessing the damages.

“(5) “damages” means damages specified in section 2702(b) of this title, and includes the cost of assessing these damages;” 33 USC §2701(5).

Removal cost claims must be presented within 6 years after the date of completion of all removal actions for the relevant incident. 33 USC §2712(h)(1). Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 USC §2712(h)(2).

In any case in which the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages. 33 USC §2712(i).

The applicable regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” are found at 33 CFR Part 136.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a claim presented to the Fund should include, as applicable:

“the reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney’s fees or other administrative costs associated with preparation of the claim.” 33 CFR 136.105(e)(8). The provisions of 33 CFR 136.231-136.235 provide the details for claims for profits and earning capacity. To substantiate a claim for lost profits, a claimant is required to 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 also 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 CFR 136.233 (a) – (d)

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 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.

III. DETERMINATION OF LOSS:

A. Statement of Loss

The claimant seeks \$172,165.18 for loss of profits, which, along with the NPFC’s determination, are itemized below:

Item Description	Amount Claimed	Amount Determined
Downtime	\$38,080.00	\$0.00
Extraordinary 2 nd Crew Costs	\$5,702.13	\$0.00
Holiday Pay	\$3,529.00	\$0.00
Loss of Efficiency	\$21,760.00	\$21,760.00
Loss of Inversand Business	\$40,000.00	\$0.00
Spill Related Administrative Costs (15%)	\$21,015.38	\$0.00
Claim Preparation Costs	\$42,078.67	\$0.00
Total	\$172,165.18	\$21,760.00

The NPFC’s analysis of each item is detailed in the following Causation section.

B. Causation:

Philadelphia Marine Center (PMC) is located on the Delaware River, immediately north of the Benjamin Franklin Bridge, which spans the Delaware River between Philadelphia, PA and Camden, NJ, within the spill-affected area. Creative Waste Management began work under the contract for a maintenance dredging project for Philadelphia Marine Center on November 2, 2004 (Exhibit 3, contract between CWM and PMC).

The dredging was set to commence on October 27, 2004, however, the dredge scow was unavailable. Creative Waste was in standby mode for the timeframe of October 27 - November 1 due to scow unavailability. PMC paid CWM \$340 an hour, the standby rate, for these days (Exhibit 4, July 20, 2007 letter from Palmer, Biezup & Henderson on behalf of CWM). The estimated approximate length of time for completion of the dredging project was 60 dredging days. The expected project completion was during the first part of January 2005 in anticipation of the fresh water at the marina freezing after that time. The terms of the contract required that CWM dredge continuously without interruption to complete the project on time and before the freeze. The dredging project was actually completed on 10 January 2005.

The 4,000 cubic yard dredge barge in use at the time of the incident became filled with dredge spoils on November 27, 2004 and the Coast Guard denied it permission to be towed past the spill site until December 3, 2004. Because of this, the dredge spoils could not be discharged using normal timing and procedures.

On November 27, 2004, the productivity of the dredging operations deteriorated due to oil response activities and the need to frequently decant the full barge. Dredging operations were halted on 1 December 2004 since additional dredge materials could not fit in the barge, even with decanting efforts. CWM states that this resulted in dredging downtime spanning six days.

An additional one-day delay occurred on 8 December 2004. CWM was denied movement of the dredge and dredge pipe by the Coast Guard from the North Basin to the South Basin of PMC due

to oil recovery activity in the South Basin. CWM was granted permission to move the equipment on 9 December 2004.

The marina was also used as a staging and boat fueling area for the oil recovery efforts of the various contractors hired to complete the cleanup. The cleanup contractors utilized both the boat ramp at PMC and the piers for offloading supply trucks and transferring the supplies to boats. The use of the fueling facility also caused slowdowns in the dredging operation because of the increase in wake activity as a result of the movement of vessels requiring refueling. The NPFC finds that causation has been proven for certain losses in efficiency of dredging.

Dredging Inefficiency:

Creative Waste Management states that dredging efficiency dropped significantly after the oil contaminated the marina. The dredging operations could not be carried out at the normal speed. Based upon the information submitted by CWM, 87 shifts were required to complete the project, but if the incident had not occurred, a total of 79 shifts would have accomplished the work. (Exhibit 4, letter dated 07/20/2007). The NPFC finds this contention to be evidenced by the documentation provided (Exhibit 7). The calculation of the resulting loss using a dredge efficiency equation will be outlined in the valuation portion of this determination.

No Causation

Downtime:

CWM requests a total of 7 days at 16 hours per day at \$340 per hour (for a total of \$38,080) for downtime that was allegedly a direct result of the incident. The \$340 per hour rate is the standby rate.

As outlined in the email from Mr. (b) (6) (Exhibit 5, dated March 18, 2008), the crew did not remain on scene for the duration of the shifts that are being requested. For standby rates to be valid and compensable, personnel should be standing by ready to operate the dredge. Additionally, two of the individuals covering the dredge during this time were salaried personnel (27 November-30 November 2004) and no timesheets are available from them annotating their time on scene. The data provided for two hourly personnel cover December 1st, 2nd and 8th. While the number of hours worked per day are listed and the start and stop times are captured for one individual, this information is not listed for the second individual as part of the information submitted in support of this request. It is unclear whether any standby costs actually resulted from the oil spill. The NPFC made several requests for the claimant to support the claimed costs, but CWM did not provide sufficient data to meet the burden of proving this loss. Therefore, the amount of \$38,080.00 requested for downtime is denied.

Extraordinary Second Shift Crew Costs:

The claimant seeks reimbursement of \$5,702.13 in costs it incurred to hire a second shift crew. These costs include airfare, lodging, meals, and rental car costs. As stated in the letter dated July 20, 2007 from Palmer, Biezup & Henderson on behalf of CWM (Exhibit 4), downtime costs were for two shifts per day from November 27, 2004 through December 2, 2004. Consequently, the CWM crew was already working two shifts, and the costs for the subsequent second shift crew did not start until December 7, 2004. CWM had opted to cease dredging operations from

November 20 through November 22, 2004 for a long weekend in lieu of a break over Thanksgiving. As the July 20, 2007 letter states, the CWM crew had agreed to work double shifts for a period of time to make up for the time lost due to the long weekend and a delay at the beginning of the project before the spill. This supports the NPFC's conclusion that the need for additional personnel on the second shift was not a direct result of the spill.

The NPFC does not accept the argument that the spill required the claimant to hire a second crew. Additionally, the NPFC does not find reasonable the claimant's expenditure of extraordinary costs to hire on a second crew. This action did not mitigate any alleged damages, but exacerbated them. The hiring of a second shift was not a direct result of the incident, but was a business decision. Therefore, the extraordinary 2nd crew costs of \$5,702.13 are denied.

Subsequent Business:

The claimant asks for \$40,000 for business that it lost subsequent to the spill, and which it claims was due to the spill. On 13 January 2005, CWM submitted a dredging proposal to Inversand Company for dredging manganese greensand that is used in potable water. The proposal was accepted by Inversand and the work was to commence on 17 January 2005. Creative Waste states that the contract was cancelled because their dredging equipment was contaminated by the oil and could not be sufficiently cleaned for use on this contract.

The claimant's attorney's letter of 20 July 2007 states that on January 7, 10 and 11, 2005 attempts were made to clean the dredge pipe that would have been used for the Inversand contract, which was due to start January 17, 2005. The pipe allegedly could not be cleaned satisfactorily and thus could not be used for this project. Per the same letter, the HDPE pipe had become impregnated with oil. The verbal agreement with Inversand was not executed until January 13, 2005, two days after the claimant knew that the pipe could not be cleaned and was not useable for subsequent projects (Exhibit 6 Letter, email, purchase order cancellation between CWM and Inversand). The contamination of the pipe, the attempts to clean the pipe, and the realization that the pipe could not be cleaned satisfactorily all occurred prior to CWM entering into the contract with Inversand.

Even if the contract been executed before the failed cleaning, the claimant has still not connected the contract cancellation to the spill. The January 15, 2005 cancellation notice from Inversand to CWM does not mention the reasons for the cancellation, or whether it was related to the oil spill. Additionally, there are no costs listed on the cancellation notice (Exhibit 6).

For the foregoing reasons, the NPFC finds that the claimant has failed to meet its burden of proving this alleged loss and any connection to the oil spill. The cost of \$40,000.00 for the loss of subsequent business with Inversand Company (Exhibit 4, letter from Palmer, Biezup & Henderson on behalf of Creative Waste dated 7/20/2007) is denied.

Holiday Pay Costs:

The claimant seeks reimbursement of \$3,529.00 in holiday compensation paid to its employees for dredge operations. The claimant merely alleges, without support, that these costs resulted from the spill. Per the 20 July letter, the employees were paid normal holiday pay at the regular rate plus double time for working the holidays, which consisted of 12/24/04, 12/25/04, 12/31/04, and 01/01/05. As originally stated, the agreement between PMC and CWM estimated the project

to last 60 dredging days. 60 dredging days beyond the actual start date of November 2nd runs through the holiday period regardless of the spill. The necessity of the holiday hours worked has not been directly connected to the incident. Holiday pay costs totaling \$3,529.00 are denied.

Spill-Related Administrative Costs:

The claimant seeks \$21,015.38 in fees relating to administrative costs. These fees are based upon the dollar value of the three claims presented to NPFC. This total consists of 15% of the removal claim for \$9,396.01, the property damage claim for \$21,635.41 and the loss of profits claim for \$109,071.13. The claimant has not made it clear what these costs represent, but they appear to be costs relating to preparation of the claim. Per 33 CFR 136.105(e)(8), compensable assessment costs are:

“the reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney’s fees *or other administrative costs associated with preparation of the claim* (emphasis added).”

Because the acquisition and administration fees totaling \$21,015.38 are specifically excluded by 33 C.F.R. 136.105(e)(8), they cannot be paid from the Oil Spill Liability Trust Fund and are accordingly denied.

Claim Preparation Costs:

The claimant seeks costs labeled “claim preparation costs.” A review of these costs confirms that they are indeed claim preparation costs. Claim preparation costs are specifically denied per 33 CFR 136.105(e)(8), as stated above in the Acquisition and Administrative Fees section. These costs are denied.

Payment of Interest:

The claimant seeks payment of an unspecified amount of interest on the claim. Only losses directly resulting from an oil spill and specifically listed in section 2702 of OPA are compensable. Payment of interest is not included in section 2702, and the claim for interest is thus denied.

C. Valuation:

Loss of Efficiency:

The request for the loss of efficiency in the amount of \$21,760.00 is allowable. This cost is supported by loss of efficiency calculations as a result of the Post-Dredge Volume Calculations letter from S.T. Hudson Engineering, Inc., dated January 27, 2005 (Exhibit 7). The calculations that follow will show how many shifts it took to complete the post-spill dredging versus how many shifts it would have taken absent the spill. The calculations will show that the spill caused the claimant to run an extra 7.7 shifts. At the \$340 standby rate, these extra 7.7 shifts are valued at \$21,760.

The Post-Dredge volume calculations indicate that approximately 33,357 cubic yards of materials were removed from the areas within the marina. An additional 309 cubic yards of materials were removed below the 2' overdredge limits, for a total of 33,666 cubic yards of materials removed. 11,632 cubic yards were removed from the North Basin in 28 shifts, and 22,034 cubic yards were removed from the South Basin in 59 shifts.

All 59 dredging shifts in the South Basin took place after the spill. For the North Basin, 23 shifts took place pre-spill, and 5 took place post-spill. The post-spill dredging rate in the South Basin is calculated by dividing the 22,034 cubic yards dredged by the 59 shifts, to get a rate of 373.5 cubic yards dredged per shift.

As mentioned, 23 dredging shifts were completed in the North Basin before the spill and 5 dredging shifts were completed in the North Basin after the spill, and 11,632 cubic yards were dredged in total. Thus, letting X = the rate of dredging pre-spill (in cubic yards), and letting Y = the rate of dredging post-spill (in cubic yards), the problem resolves itself to the following equation:

$$23X + 5Y = 11,632$$

The variable Y , representing the post-spill dredging rate, was already found to be 373.5 cubic yards per shift. Substituting Y into the equation allows us to solve for X , representing the pre-spill dredging rate. Thus:

$$\begin{aligned} 23X + 5(373.5) &= 11,632 \\ X &= 424.5 \end{aligned}$$

Pre-spill, the claimant was able to dredge at a rate of 424.5 cubic yards per shift, compared to the (previously-calculated) post-spill dredging rate of 373.5 cubic yards per shift.

Dividing the total amount dredged (33,666) by the pre-spill (i.e., usual) dredge rate reveals that, but for the spill, it would have taken 79.3 shifts to complete the dredging operation ($33,666 \text{ yd}^3 \div 424.5 \text{ yd}^3/\text{shift} = 79.3$ shifts). However, it took 87 shifts to complete the dredging operation (28 shifts in the North Basin + 59 shifts in the South Basin = 87 total shifts). Thus, the NPFC concludes that the spill caused the dredging operation to take an additional 8 shifts (87 actual shifts – 79 “but for” shifts).

The extra shifts are valued at the standby rate of \$340, or \$21,760. Thus, the NPFC concludes that the cost of the eight additional shifts (\$21,760.00) is compensable.

III. DETERMINED AMOUNT: \$21,760.00

Claim Supervisor:	(b) (6)
Date of Supervisor's Review:	2 April 2008
Supervisor Action:	Approved as presented.
Supervisor's Comments:	Claimant is entitled to recover from OSLTF determined amount.