

CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/24/2008
Claim Number	: P05005-028 (Reconsideration)
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	: \$202,298.53

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 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. The anchor punctured the vessel's hull, causing an estimated 263,371 gallons of "Bachaquero crude oil" to discharge into the Delaware River, a navigable waterway of the United States.

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 (See 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. (CWM) is a dredging contractor whose business includes the dredging of the bottom of marinas for sediments due to shoaling from the Delaware River and its tributaries; and dredging sediments from sediment lagoons using in various mining operations. (See (b) (6) letter dated July 20, 2007). 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 allegedly directly resulting from the oil spill incident. These claimed losses were detailed in the NPFC's initial Claim Summary/Determination dated March 26, 2008 attached to the NPFC's letter dated April 2, 2008. The NPFC denied the majority of the claimed damages because the claimant failed to meet its burden of proving them, but offered to pay \$21,760.00 for the claimed dredging inefficiencies. On June 2, 2008, the NPFC received the claimant's request for reconsideration dated May 29, 2008.

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 Oil Spill Liability Trust Fund (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 \$202,298.53 for loss of profits as itemized below:

Item Description	Amount Claimed
Downtime	\$38,080.00
Extraordinary 2 nd Crew Costs	\$5,702.13
Holiday Pay	\$3,529.00
Loss of Efficiency	\$21,760.00
Loss of Inversand Business	\$40,000.00
Acquisition and Admin. Fees (15%)	\$20,675.57
Interest	22,551.83
Claim Preparation Costs	\$50,000.00
Total	\$202,298.53

The NPFC previously only found the claimed loss of efficiency compensable and offered \$21,760.00 for it.

B. Reconsideration Determination:

1. NPFC Findings of Fact:

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. (See Claimant's exhibit 5, Annotated Map). On November 2, 2004, Creative Waste Management began work under a contract for a maintenance dredging project for Philadelphia Marine Center (See contract between CWM and PMC).

The dredging was set to commence on October 27, 2004, however, the dredge scow to be provided by PMC, via Weeks Marine, was unavailable until November 2, 2004. (See claim letter from Palmer, Biezup & Henderson dated July 20, 2007). Under the contract, the estimated length of time to complete the dredging project was 60 dredging days. The claimant stated that the project started on November 2 and we find that dredging daily put the expected project completion date around the beginning of January 2005. The terms of the contract required that CWM dredge continuously without interruption to complete the project on time and before the river froze for the winter, usually in mid-January. (See claim letter from Palmer, Biezup & Henderson dated July 20, 2007). According to the claimant's July 20, 2007 letter and exhibit #9, the crews did not dredge November 7, November 14, and between November 20 and 22, 2004. The dredging project was actually completed on 10 January 2005.

During the project, the 4,000 cubic yard dredge barge became filled with dredge spoils on November 27, 2004 and the Coast Guard did not allow it to be towed past the spill site until December 3, 2004. Because of this, the dredge spoils could not be dumped as planned. Therefore, on November 27, 2004, the productivity of the dredging operations deteriorated due to oil response activities and the need to frequently decant¹ the full barge. Dredging operations halted on 1 December 2004 since additional dredge materials could not fit in the barge, even with decanting efforts. (See claimant's letters of July 20, 2007 and May 29, 2008, along with The Levermans Daily Log).

¹ Decanting is the process of taking the water/liquid out of the barge leaving only the dredged material.

2. Dredging Inefficiency:

The NPFC previously found that causation had been proven for certain losses in efficiency of dredging for Creative Waste Management. The inability to dredge under normal conditions and the fact that PMC's marina was used as a staging and boat fueling area for the various contractors hired to complete the cleanup caused slowdowns in the dredging operation because of an increase in wake activity from the vessels refueling at the marina. (See claimant's exhibit 25, Letter from PMC dated 12//20/04). CWM stated that dredging efficiency dropped significantly after the oil contaminated the marina. The NPFC agreed.

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. (See letter dated 07/20/2007). The NPFC agreed with this contention shown by the claimant's loss of efficiency calculations based on the Post-Dredge Volume Calculations letter from S.T. Hudson Engineering, Inc., dated January 27, 2005. The NPFC affirms its previous findings with respect to dredging inefficiency. The calculation of the resulting loss using a dredge efficiency equation is outlined below.

Calculation

The calculations that follow 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 show that the spill caused the claimant to run an extra 8 shifts.

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' over-dredge 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:

$$23X + 5(373.5) = 11,632$$

$$X = 424.5$$

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 ($33,666 \text{ yd}^3 \div 424.5 \text{ yd}^3/\text{shift} = 79.3 \text{ shifts}$). However, it took 87 shifts to complete the dredging operation² (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 vs. 79 “but for” shifts).

The NPFC maintains its initial determination on inefficiency and concludes that the cost of the eight additional shifts is compensable. At the \$340 per hour standby rate, these extra 8 shifts (at 8 hours each for a total of 64 hours at the standby rate) are valued at **\$21,760.00**.

3. Downtime:

The NPFC originally denied the claimed \$38,080.00 for alleged downtime costs at the end of November and one day in December. CWM states that dredging downtime spanned six days from November 27 to December 3 with an additional one-day delay on 8 December 2004. The claimant alleges that the barge was filled with spoils at the end of the day on November 26 and that it requested an empty barge, but that the Coast Guard prevented the full barge from moving to the dumping area and no empty barge replaced it.³ The claimant alleges that no effective dredging could be done from November 27 through December 3. The claimant also alleges that due to oil recovery activity in the South Basin the Coast Guard denied CWM’s request to move the dredge and dredge pipe from the North Basin to the South Basin of PMC on December 8, causing another delay. CWM states that it was granted permission to move the equipment on 9 December 2004. Because of this, CWM requests a total of 7 days at 16 hours per day at the \$340 per hour standby rate (for a total of \$38,080) for downtime that was allegedly a direct result of the incident. (See claimant’s letters dated July 20, 2007 and May 29, 2008).

PMC’s refusal to pay CWM the claimed downtime is a contractual issue and not a result of the spill. PMC was obligated to pay under the contract with CWM. Specifically, Exhibit A to the contract states *“The standby rate applies to delays that are no fault of CWM. Such delays may include requests from PMC or the unavailability of transportation and disposal. Charges will not apply to delays caused by weather or other acts of nature that are beyond anyone’s control.”* (See Clarification #8 of Dredging Contract Exhibit A). The situation with the oil spill allegedly causing the unavailability of transportation and disposal, falls squarely within this term of the

² See Claimant’s spreadsheet in exhibit 9 and claimant’s calculation in exhibit 12.

³ The CG Marine Safety Information Bulletin provides documentary evidence that vessel movements within the safety zone (PMC’s marina was within this zone) were severely limited. See MSIB #47-04 dtd November 30, 2004.

contract. Any standby pay for alleged downtime is clearly contractual in nature and not a result of the oil spill because if the oil spill had not occurred then no standby would have been owed for downtime. If the oil spill caused standby pay to be due, it would be a windfall gain because of the spill, and not being paid for it is not a loss caused by the spill.

In its May 29, 2008 letter, the claimant asserts that it was incurring costs throughout the alleged downtime. These costs include leasing of equipment not being used and employee pay while dredging was halted. Though the claimant does not claim these costs for downtime, the NPFC believes that these are the appropriate measure of losses during downtime and not the contractual standby rate. The NPFC also finds that, contrary to the claimant's assertion that downtime totaled seven days, it actually amounted to two days. (See Levermans Daily Log for November 27-December 3, and December 8). Though the claimant states that its downtime started when dredging became ineffective, this is not accurate. In actuality, ineffective dredging equates to inefficient dredging, which is included in the inefficiency damages addressed in the previous section above. So, the days where dredging continued, but inefficiently (i.e. November 27-November 30), have already been accounted for in the previous section. As for the alleged December 8 delay, we found insufficient evidence that the downtime was related to the spill. Though CWM offers a letter from PMC which states that the oil spill caused certain downtime that correlates to the downtime claimed by CWM, we don't find it persuasive given other evidence; such as the claimant's own statements regarding dredging (though ineffective) via its attorney's letters and the Levermans Daily Log. The Levermans Daily Log for that date describes repairs being made to the dredge, the Sea Tow boat being out of service, and unsafe tidal conditions, but does not mention any Coast Guard actions to prevent movement of the dredge and barge. Therefore, the NPFC finds that CWM's dredging was halted for two days only, December 1 and 2. (See Levermans Daily Log dated 12/1/04 covering 12/1-12/3/04). The claimant continued to incur expenses during these two days for which the claimant can be compensated.

As discussed in the previous paragraph, the NPFC is already offering compensation for inefficiency in dredging. Inefficient dredging encompasses part of the claimed downtime period. To pay downtime standby costs on top of that would be paying for the same costs, which is not allowed under OPA's prohibition on double recovery. (See OPA section 1012(i)).

Therefore, we are not offering the \$38,080.00 requested for downtime. However, we agree with the claimant that costs were incurred during the downtime; but for only two days as discussed above. They are compensable as follows:

<u>Item</u>	<u>Cost/Day</u>	<u>Dec. 1&2 (#days)</u>	<u>Total Costs</u>
Dredge Lease	\$775.00	2	\$1550.00
Forklift Lease	\$102.38	2	\$204.76
Boat Lease	\$75.00	2	\$150.00
Vehicle Lease	\$34.00	2	\$68.00
Pump Lease	\$76.24	2	\$152.48
Adapter Lease	\$1.70	2	\$3.40
Portable Toilet Rental	\$2.95	2	\$5.90
		Subtotal	\$2134.54

Personnel		Time over 2days	
(b) (6)		0	0
(b) (6)		0	0
(b) (6)	\$12/hr	11hrs.	\$132.00
(b) (6)	\$19/hr	10hrs	\$190.00
(b) (6)		0	0
(b) (6)		0	0
		Subtotal	\$322.00
		TOTAL	\$2456.54

We find that **\$2,456.54** in continuing expenses reduced the claimant's profit and are compensable.

4. Extraordinary Second Shift Crew Costs:

The NPFC originally denied the claimed extraordinary second shift crew costs. The claimant seeks reimbursement of \$5,702.13 in costs it incurred to hire a second shift crew. However, these costs only include airfare, lodging, meals, and rental car costs for the dredge operator, (b) (6), who was hired and brought in from Louisiana. In its reconsideration request letter dated May 29, 2008, the claimant argues that hiring a second crew was necessary to get the dredging job done before the river froze over. CWM argues that the first crew could no longer work double shifts because oil allegedly coated the decks of the dredge and boat making it difficult to walk.

Additionally, the claimant alleges that hiring the second crew prevented the expenditure of \$70,100.00 in demobilization and remobilization costs of the dredge equipment for the winter. As purported evidence of this the claimant refers us to exhibit A of the contract with PMC; and NOAA water data for the Delaware River. We do not find these to be evidence that the oil spill caused the claimed costs. Regarding the river freezing over, as discussed later in this document, the claimant alleges that it was to begin another dredging project for Inversand Company on January 17th in Sewell, NJ. The claimant has not explained how it could dredge in winter in New Jersey for Inversand and not on the Delaware River. If water freezing prevents dredging, the claimant should have explained how freezing does not affect dredging in Inversand's lagoon, while it does affect dredging in the Delaware River.

The NPFC's previous decision to deny these extraordinary costs is correct, but we will clarify the decision. 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 shows that multiple shifts were already contemplated prior to the oil spill. The claimant has not proven that it was necessary to incur the extraordinary costs of hiring (b) (6) to come to Philadelphia to

operate the dredge. The NPFC does not pass judgment on the propriety of hiring a second crew. The NPFC merely finds that the claimant has not met its burden of showing that the oil spill required it to seek the services of a non-local dredge operator and incur the expense of getting him to Philadelphia and paying for his expenses while he was there. The decision was a business decision and may have been the reasonable/logical decision, but its connection to the oil spill has not been shown.

Therefore, the extraordinary 2nd crew costs of \$5,702.13 are again **denied**.

5. Holiday Pay Costs:

The NPFC originally denied the claimed holiday pay of \$3,529.00 paid to its employees for dredge operations. According to 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. The claimant merely alleges, without support, that these costs resulted from the spill.

In its reconsideration request letter the claimant states that the job would have been done on December 24 if the crew had worked double shifts every day had the spill not occurred. The claimant asserts that double shifts would not have been worked every single day, but enough double shifts would have been worked to ensure that the crew had Christmas and New Year's off. The claimant bases these assertions on the inefficiencies created by the oil spill requiring extra shifts to complete the job. While we agree that extra shifts may have been the best choice, we do not agree that the holidays would not have been worked but for the oil spill. The agreement between PMC and CWM estimated the project to last 60 dredging days.⁴ It did not specify that holidays were excluded or double shifts would be worked to avoid working holidays. In fact, it specifically contemplated "near-continuous operation." (See Exhibit A to the dredging contract). 60 dredging days beyond the actual start date of November 2nd runs through the holiday period regardless of the spill. According to the claimant's July 20, 2007 letter and exhibit #9, the crews did not dredge November 7, November 14, and between November 20 and 22, 2004. This put the earliest end date at January 5, 2005, if CWM dredged for 60 days straight from the start date. The fact that the crew would have done what it took to avoid working on the holidays is not proven, since prior to the spill the crew specifically negotiated other time off in exchange for working on Thanksgiving.

The claimant has not met its burden of proving that the holiday hours worked resulted from the incident. And, the NPFC believes CWM would have dredged through the holidays with or without the spill given the amount of material dredged and the estimated amount of time expressed in exhibit A of the contract with PMC. Therefore, the claimed holiday pay costs totaling \$3,529.00 are again **denied**.

6. Inversand Business:

The NPFC originally denied the claimed \$40,000 for lost subsequent dredging business, which it claims was caused by the spill. This portion of the claim is based on the project that was to

⁴ The contract estimated that it would take about 35 dredging days to dredge 13,000 cubic yards of material and about 60 dredging days to dredge 22,000 cubic yards of material. In fact, the CWM dredged 33,666 cubic yards of material, which presumably would be expected to take substantially more than 60 days.

begin upon completion of the PMC project. On 13 January 2005, CWM submitted a dredging proposal to Inversand Company for dredging manganese greensand that is used to filter 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. According to the claimant, it attempted to clean its dredge pipe, but was unsuccessful. (See claimant's July 20, 2007 letter).

As evidence to support reconsideration, the claimant provided the same documents as before, with the addition of an affidavit from (b) (6), a senior project manager at CWM discussing the contract and its cancellation. We find this document self-serving to CWM and not persuasive. 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. The agreement with Inversand was not executed until January 13, 2005, two days after the claimant knew that the pipe could not be cleaned and might not be useable for subsequent projects (See CWM Letter dated January 13, 2005, Inversand email of January 14, 2005, and January 15, 2005 Inversand 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 all occurred prior to CWM entering into the contract with Inversand. There is no documentation of Inversand's reasons for cancellation. The NPFC previously informed the claimant of the need to provide documentation that the contract was cancelled because of oil contamination, but CWM still provided no such documentation.

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 (See letter from Palmer, Biezup & Henderson on behalf of Creative Waste dated 7/20/2007) is again **denied**.

7. Spill-Related Administrative Costs:

The NPFC originally denied the claimed administrative costs because it found that these costs were claim preparation costs. On reconsideration the claimant states that the costs were actually "extraordinary costs that CWM incurred while trying to manage the dredging project at the PMC marina during the oil spill." The claimant seeks \$20,675.57 in fees allegedly relating to administrative overhead costs related to the spill. These fees are based upon the dollar value of the three claims presented to NPFC and are calculated at 15% of the \$9,396.01 removal claim paid, 15% of the \$19,369.98 property damage claim paid and 15% of the \$109,071.13 loss of profits claim currently pending.

First, the claimant has already executed releases of all removal costs and property damages, so any costs relating to these are denied as already released/waived. Second, the claimant states in its May 29, 2008 letter that, "[n]o commercial dredging company maintains detailed time records of activities that its administrative and management personnel undertake. Further, it was not reasonable for CWM to maintain such records for the sole purpose of submitting a claim to the NPFC." We pass no judgment on the validity of this statement. However, we do require evidence to support the claimed damages. The claimant's business decision not to maintain

records to support its claim represents an assumed risk that the claim may not be paid. Merely alleging that the oil spill caused additional administrative expenses equal to 15% of the claimed amounts without providing evidence of causation and the actual damages is not sufficient, as it provides the NPFC no basis upon which to pay the claimant as required by OPA. The claims regulations require proof before a claim may be paid.

CWM provided no evidence that it actually incurred administrative costs of 15% of the amounts claimed. Merely alleging that administrative costs were incurred because of the oil spill with no evidence that the amount claimed was actually lost/expended as a result of the spill is not sufficient for payment from the Fund. The claimant's attorney references court decisions to support the reasonableness of paying administrative costs and the reasonableness of the 15% calculation as a reason for the NPFC to pay the claimed amount. In response, we must explain that courts are not bound by the same rules that the Fund is. The cited decisions were not applying OPA, its implementing regulations and they were not referring to a federal trust fund. The cited decisions also are not relevant to CWM's claimed damages based on an arbitrary assignment of a percentage to the claimed amounts. We make no decision regarding whether 15% is reasonable as a percentage of the claimed damages. We do find that the claimant's alleged loss and its use of 15% of the amount claimed have no evidentiary basis. Therefore, the NPFC again **denies** the claimed administrative costs because the claimant has not met its burden of proving the costs or their connection to the oil spill.

8. Payment of Interest:

The NPFC originally denied the claimed interest on the claimed amounts. In its reconsideration request the claimant seeks payment of interest based on each of its different claims as follow:

- a. Interest of \$886.88 on Removal Costs paid of \$9,396.01
- b. Interest of \$2,624.63 on Property Damages paid of \$19,369.98
- c. Interest of \$19,040.32 on Lost Profits claimed at \$129,746.67

The claimant argues that not having the claimed removal costs, property damage and profits resulted in an impairment of earning capacity and CWM could have invested its money elsewhere. CWM argues that an RP is liable to the claimant for interest under 33 U.S.C. §2705 and so the Fund should pay it as well.

The language of section 2705(a) specifies that an RP or the RP's guarantor is liable to a claimant for interest. This section only applies to liability of RPs, not the Oil Spill Liability Trust Fund (Fund). Only losses directly resulting from an oil spill and specifically listed in section 2702 of OPA are compensable by the Fund. Interest on claimed losses is not impairment of earning capacity and is not included in section 2702. Additionally, the claimant has already executed releases of all removal costs and property damages, so any costs relating to these must be denied as already released/waived. Therefore, the claim for interest is again **denied**.

9. Claim Preparation Costs:

The NPFC originally denied claim preparation costs as being specifically excluded pursuant to the claims regulations at 33 CFR 136.105(e)(8). Damages are defined under 33 U.S.C. §2701(5) and include the damages listed in section 1002(b) and the costs of assessing the damages listed.

Referring to the compensability of damage assessment costs, 33 CFR 136.105(e)(8) states that 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]

In its reconsideration request the claimant admits that the regulations do not allow recovery of these costs, but argues that we should pay the costs because the regulations do not accurately reflect the provisions of OPA 90 and not paying them does not keep with the spirit of OPA 90. We do not judge the spirit of OPA 90 and are bound by the regulations which, as the claimant admits, do not allow claim preparation costs to be paid from the Fund. Therefore, we again **deny** these costs in accordance with the specific exclusion of 33 CFR 136.105(e)(8).

Conclusion

In its reconsideration request submission, the claimant provides arguments with little to no evidence supporting the claimed damages. The NPFC understands that CWM was impacted by the oil spill. However, even after attempting to assist the claimant’s attorney in understanding what is necessary to support the claim, the NPFC finds that the attorney either refused or is unable to provide the documentary evidence required to support causation and proof of damages beyond what is being offered.

IV. RECOMMENDATION:

I recommend that the NPFC offer the claimant \$24,216.54 as full compensation for the losses it has proven resulted from the ATHOS I oil spill. All other claimed amounts are denied as not being proven compensable.

Claim Supervisor:	Thomas S. Morrison
Date of Supervisor’s Review:	
Supervisor Action:	
Supervisor’s Comments:	