

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 02/25/2010
Claim Number	: N08057-023
Claimant	: Express Marine Inc.
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: (b) (6)
Amount Requested	: \$201,369.83

### **I. Facts**

#### ***Tug Baltimore & Barge EMI 1850***

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 (RP) under the Oil Pollution Act.

### **III. Claimant**

Express Marine Inc. has a fleet of tugs and barges which transport dry bulk and liquid cargoes along the Atlantic and Gulf Coasts, Caribbean and associated bays, harbors and rivers. They are the registered owners and operators of the U.S. Flagged vessels Baltimore and EMI 1850.

### **IV. Claim Description**

#### **A. Original Claim Submission**

1. The law firm of Palmer Biezup & Henderson LLP, representing Express Marine Inc., submitted a Loss of Profits and Earning Capacity claim for damages and losses resulting from the July 23, 2008 oil discharge in the Mississippi River from barge 932. The claim was received at the National Pollution Fund Center (NPFC) on May 12, 2009 in the amount of **\$142,679.88**.<sup>1</sup> The Claimant requests **\$113,238.00** in demurrage/delay time, alleging that on two separate occasions, their vessels were delayed a total of 167.76 hours. Claimant alleges that under the contract of affreightment, they would have been able to collect demurrage payable at \$675.00 per hour for 167.76 hours of delay equaling \$113,238.00, if the oil spill had not created a valid Force Majeure event. The Claimant also requests 20% (**\$22,647.60**) in administrative expenses related to the delay. This additional amount is requested to cover activities that it's administrative and management personnel undertake.<sup>2</sup> In addition, 5% (**\$6,794.28** total) is claimed as interest on both the delay (\$5,661.90) and administrative expenses (\$1,132.38).

<sup>1</sup> See, Palmer Biezup & Henderson LLP letter to the NPFC dated May 6, 2009.

<sup>2</sup> See, Palmer Biezup & Henderson LLP letter to the NPFC dated May 6, 2009, page 6, para. 2.

2. At the time of the oil spill, Express Marine Inc. was operating the tug Baltimore and barge EMI 1850 under a contract of affreightment with Progress Fuels Corporation (PFC). PFC purchases coal for use in an electric generating plant owned and operated by Progress Energy Florida, Inc. (PEF), located near Red Level, Citrus County, Florida, known as the Crystal River Plant. The contract of affreightment required Express Marine to provide a dedicated seagoing tug and barge unit to transport coal to the Crystal River Plant on a continuous basis from terminals nominated by PEF. The tug Baltimore and barge EMI 1850 (herein known as “vessels”) were utilized exclusively by Express Marine to transport coal under the contract of affreightment.

3. In July, 2008, PEF was utilizing the International Marine Terminal (IMT) to supply coal for loading by Express Marine under the affreightment contract. IMT is located in Myrtle Grove, Louisiana on the West Bank of the Mississippi River at Lower Mississippi River (LMR) mile 57.

4. Under the legal analysis section of the Claimants submission letter, the Claimant states they are not submitting any corporate financial statements and that they are irrelevant to the evaluation or the payment of the claim.”<sup>3</sup>

## **B. Amended Sum Certain With New Delay Valuation**

While responding to a National Pollution Fund Center (NPFC) request for additional information, the Claimant amended the claimed amount to **\$201,369.83**.<sup>4</sup> In this letter, the Claimant provided an attached “cash flow” spreadsheet, which they allege shows that on average the tug Baltimore and barge EMI 1850 loaded at IMT on the Mississippi River every seven days and the invoiced amount for each trip averaged \$162,133.52. The Claimant then states that considering the 167.76 hours (6.9 days) delayed as alleged in the first presentment of the claim, the loss now equals **\$159,817.33** in damages ( $\$162,133.52 / 7 = \$23,161.93$  and  $6.9 \times \$23,161.93 = \$159,817.32$ ). The Claimant also requests 20% (**\$31,963.46**) in administrative expenses related to the delay and 5% (**\$9,589.04** total) as interest on both the delay (\$7990.87) and administrative expenses (\$1,598.17).

## **C. Vessel Delays**

### **1. First Delay – Loading**

On July 25, 2008, after discharging cargo at the Crystal River Plant, the vessels received orders from PEF to immediately proceed to IMT for loading. Upon arrival at the mouth of the Mississippi River, the vessels were forced to anchor at Southwest Pass on July 27, 2008 at 1305 local time (LT). On July 28, 2008 at 1900 LT, the vessels were granted permission by the Coast Guard to transit up river to the Magnolia Anchorage. The vessels arrived at this anchorage on July 29, 2008 at 1200 LT. On July 30, 2008, at 1010 LT the vessels shifted to the upper end of Pt. Celeste Anchorage to wait for the loading berth. Loading of the vessels did not commence until August 1, 2008 at 1140 LT, allegedly due to a backlog of vessels at IMT caused by the oil spill. Total hours claimed on this first delay are 118.59.

### **2. Second Delay – Loading**

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<sup>3</sup> See, Palmer Biezup & Henderson LLP letter to the NPFC dated May 6, 2009, page 4, Legal Analysis section.

<sup>4</sup> See, Palmer Biezup & Henderson LLP letter to the NPFC dated September 4, 2009, page 6 & 7.

After completion of loading on August 2, 2008 at 0830 LT, the vessels departed IMT and arrived at the Crystal River Plant on August 4, 2008. After discharging its cargo at 1110 LT on August 8, 2008, the vessels received instructions from PEF to immediately return to IMT for loading. The vessels anchored at Pt. Celeste anchorage on August 10, 2008 at 1000. Claimant alleges that the tug Baltimore issued a Notice of Readiness to load at this time. The force majeure declared by IMT and PEF remained in effect due to the continuing impact of the oil spill and resulting river closures. Loading of the vessels did not commence until August 12, 2008 at 1110 LT. Total hours claimed on the second delay are 49.17. This spans the elapsed time from issuance of the Notice of Readiness until actual commencement of loading.

#### **D. Mitigation and Saved Expenses**

In the Claimant's response letter to the NPFC dated September 4, 2009, they provide that there was no other location to load coal except in New Orleans during the spill period and that under the contract extension agreement, Express Marine was required to provide transportation services on an exclusive multi-year basis and did not have the right to seek alternative employment for the vessels, nor did it have the right to redirect the vessels to alternative ports.

#### **E. Claim Submission to the RP**

1. The Claimant, Express Marine Inc., submitted the original claimed amount of \$142,679.88 to the RP through Worley Catastrophe Response, LLC on March 4, 2009 as indicated on Claimant's original submission letter received by the NPFC on May 12, 2009.<sup>5</sup> On March 18, 2009, Worley Catastrophe Response requested additional information (Claimant's Exhibit B). In a letter dated April 13, 2009, the Claimant responded that the information requested was entirely irrelevant to the evaluation and payment of the claim (Claimant's Exhibit C). The RP issued a letter to the Claimant on April 29, 2009, stating their claim had been denied for the reasons set forth in the declaratory judgment complaint filed in the Eastern District of Louisiana on April 28, 2009 (Claimant's Exhibit D). The declaratory judgment was stayed and administratively closed until further orders of the court on September 2, 2009 by Judge Ivan L. R. Lemelle, United States District Judge of the United States District Court, Eastern District of Louisiana.<sup>6</sup> The RP's appeal was dismissed by the court on November 24, 2009.<sup>7</sup>

2. By letter dated May 19, 2009, the NPFC notified the RP that the Claimant presented the original claim totaling \$142,679.88 to the Fund.<sup>8</sup>

3. The NPFC has not been provided evidence by the Claimant or the RP as to whether the Claimant's amended claim in the amount of \$201,369.83 has been presented to the RP as required under OPA.

#### **V. APPLICABLE LAW**

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<sup>5</sup> See, Palmer Biezup & Henderson LLP letter to the NPFC dated May 6, 2009, number 4, claim status.

<sup>6</sup> See, United States District Court, Eastern District of Louisiana, Case 2:09-cv-03392-ILRL-KWR, document 70, dated September 2, 2009.

<sup>7</sup> See, United States District Court, Eastern District of Louisiana, Case 2:09-cv-03392-ILRL-KWR, document 78, filed November 30, 2009.

<sup>8</sup> See, NPFC letter to the RP dated May 19, 2009.

All claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714 (a) of this title. 33 U.S.C. §2713(a).

If a claim is presented in accordance with subsection (a) of this section and

- (1) each person to whom the claim is presented denies all liability for the claim, or
- (2) the claim is not settled by any person by payment within 90 days after the date upon which
  - (A) the claim was presented, or
  - (B) advertising was begun pursuant to section 2714 (b) of this title, whichever is later,the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 U.S.C. §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 U.S.C. §2713(b)(1)(A).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:

“(a) Uses generally

The Fund shall be available to the President for –

(4) [T]he 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; . . .

(b) Defense to liability for Fund

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.”

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 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

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 U.S.C. §2712(h)(2).

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

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 U.S.C. §2713(e). Those regulations 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, NPFCA, to support the claim. Further, a claim presented to the Fund should include, as applicable:

“[T]he 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).

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 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, et seq.

Pursuant to the provisions of 33 CFR 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 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)

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; all income from alternative employment or business undertaken; potential income from alternative employment or business not undertaken, but 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 CFR 136.235 (a) – (e).

Under 33 CFR 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. DETERMINATION**

The barge 932 oil spill disrupted shipping in and out of the Mississippi River. The NPFC reviewed the Coast Guard situation report-pollution (SITREP-POL) reports, which clearly state that vessels were delayed from 7/23/2008 until well after 7/28/2008. SITREP-POL Eight, stated

the Mississippi was closed from mile marker 98 to the sea buoy.<sup>9</sup> SITREP-POL Nine identified a safety zone from mile marker 98 through mile marker 11 in place and that all clean tows outside the safety zone would be given permission to transit after notifying the VTS.<sup>10</sup> On August 10, 2008, Sector New Orleans issued SITREP-POL Twenty, still maintaining a safety zone from mile marker 97 through mile marker 40.<sup>11</sup>

## **A. Original Claim Submission**

1. **Claim:** The Claimant sought total compensation of \$142,679.88. Claimant asserts there were \$113,238.00 in demurrage/delay costs (167.76 hours x \$675.00 an hour), 20% of the claimed demurrage/delay amount (\$22,647.60) in administrative costs related to these delays, and 5% (\$6,794.28) of the claimed demurrage/delay and administrative costs in interest.

### **2. Documentation:**

a. Claimant provided the following documents to support the claimed demurrage, administrative costs and interest:

1. Claim submission to ACL by letter dated March 4, 2009 (Claimant Exhibit A).
2. Affreightment Contract (Claimant Exhibit A, attachment 1).
3. PEF and IMT Force Majeure emails (Claimant Exhibit A, attachment 2).
4. PEF email noting Force Majeure dates and times (Claimant Exhibit A, attachment 3).
5. Deck Logs for the tug Baltimore (Claimant Exhibit A, attachment 4).
6. Dispatch Logs (Claimant Exhibit A, attachment 5).
7. Vessel start/stop trip logs (Claimant Exhibit A, attachment 6).
8. Notice of Readiness reports (Claimant Exhibit A, attachment 7).
9. Worley Catastrophe Response letter requesting additional information from the Claimant dated 3/18/09 (Claimant Exhibit B).
10. Claimant's response letter to ACL dated April 13, 2009 (Claimant Exhibit C).
11. Claimant's letter to the NPFC dated May 6, 2009.
12. ACL letter to Claimant dated April 29, 2009, denying the claim (Claimants Exhibit D).

### **3. NPFC Findings:**

#### **a. Vessel Demurrage/Delay**

##### **1. First Delay Loading**

a. The NPFC does find that there were two separate vessel delays. However, the first vessel delay is actually broken down into several smaller delays. The NPFC finds this accurate because the tug Baltimore and barge EMI 1850 would have had to transit up river regardless of any delays. Therefore, the actual transit time between anchorages cannot be included as delay time.

<sup>9</sup> See, MST1 (b) (6) email dated July 28, 2008 with inserted SITREP-POL Eight, para. 1.H.

<sup>10</sup> See, MST1 (b) (6) email dated July 29, 2008 with inserted SITREP-POL Nine, para. 2.M.

<sup>11</sup> See, MSTC (b) (6) email dated August 12, 2008 with inserted SITREP-POL Twenty, para. 1.H.

b. The NPFC finds the first vessel delay did start on 7/27/08 at 1305. That delay ended once the vessel weighed anchor in transit to Myrtle Grove on 7/28/08 at 1900 (**29.92 hours**). The vessel was again delayed on 7/29/08 at 0535 when it anchored at Magnolia anchorage. That delay ended once the vessel weighed anchor in transit to Pt. Celeste anchorage on 7/30/08 at 1010 (**28.58 hours**). The vessel again became delayed upon anchoring at Pt. Celeste anchorage on 7/30/08 at 1110. This delay ended when the vessel weighed anchor and transited to IMT on 8/01/08 at 0945 for loading (**46.58 hours**). (See Claimant's Exhibit A - attachment 4 for dates and times). The NPFC finds the total time the vessel was delayed during the first claimed delay is **105.08 hours**.

## 2. Second Delay Loading

a. According to SITREP-POL Twenty, on 8/10/08, there was still a safety zone in place from Mississippi River mile marker 97 through 40, requiring slow movement of vessels through this area due to continuing clean up efforts.<sup>12</sup> Subsequently, the NPFC finds it reasonable that there would still be a back up of vessel loadings at the IMT terminal, requiring these vessels to anchor.

b. The NPFC finds the second vessel delay did start on 8/10/08 at 1000 when, according to the tug Baltimore's logbook (Claimant's Exhibit A - attachment 4), the vessels anchored at Pt. Celeste Anchorage awaiting a berth at IMT for loading. The Claimant alleges that this delay ends 8/12/08 at 1110, when the barge EMI 1850 began loading at IMT. However, the NPFC finds that this delay ended when the vessels weighed anchor on 8/12/08 at 0835, enroute IMT for loading. The transit to IMT and crew change, as noted in Claimant's Exhibit A – attachment 4, are considered normal operations that would not be compensable as delay time. Therefore, the NPFC finds the total time the vessel was delayed during this second claimed delay is **46.58 hours**. Claimant's Exhibit A, attachment 6 supports this figure.

3. The NPFC noted in the contract of affreightment that the Claimant would have been entitled to a demurrage payment of \$675.00 an hour if, as stated by the Claimant in their original submission to the NPFC, the oil spill had not created a valid Force Majeure event. Regardless of whether the Claimant was entitled to the demurrage payment or not, the NPFC does not find this valuation of damages (loss) accurate or reasonable. A demurrage payment would have resulted in increased revenue due to the spill, instead of providing documented proof of a true loss.

Additionally, the NPFC would need to study comparable financials to establish a reasonable loss as required by the law under 33 CFR 136.233 (c) below:

*“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.”*

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<sup>12</sup> See, SITREP-POL Twenty, para. H.

Under the legal analysis section of the Claimant's original submission letter to the NPFC dated May 6, 2009, the Claimant stated they are not submitting any corporate financial statements and that they are irrelevant to the evaluation or the payment of the claim. The NPFC does not agree with this statement. Under OPA, the law requires comparative figures of financial documents that can support claimed damages which result in an actual loss be presented to the NPFC.

4. The NPFC does not find a flat \$675.00 an hour demurrage allowed in an Affreightment Contract between two parties satisfies proof of damages under OPA. Therefore, the NPFC does not find the \$113,238.00 in vessel delay/demurrage compensable as presented.

#### **b. Administrative Costs**

1. The NPFC evaluated the Claimants request for \$22,647.60 (20%) in compensation for administrative costs. The Claimant states that these costs were requested to cover activities that administrative and management personnel undertook monitoring the spill activity, while communicating with Progress Fuels Corporation, the Coast Guard and oil spill contractors regarding the movement of the barge, along with costs associated with overhead.
2. The Claimant stated there were no detailed time records of activities and therefore requested a percentage (20%) of the damages to cover these costs. The NPFC does not find this a reasonable valuation method to determine these costs. Under OPA, the NPFC would need documentation showing an actual loss instead of a general percentage based valuation. Therefore, the NPFC does not find the \$22,647.60 in administrative costs compensable as presented.

#### **c. Interest**

The NPFC evaluated the Claimants request for \$6,794.28 (5%) interest on the vessel delay and administrative portion of this claim. This is denied because that amount is not a loss of profit cost or damage compensable under OPA.

### **B. Amended Sum Certain With New Delay Valuation**

1. **Claim:** While answering an NPFC request for additional information email dated May 27, 2009, the Claimant amended their sum certain. They now seek total compensation in the amount of \$201,369.83. Claimant asserts there were \$159,817.33 in vessel delay costs, 20% of the claimed delay amount (\$31,963.46) in administrative costs related to these delays, and 5% (\$9,589.04) of the claimed delay and administrative costs in interest.

#### **2. Documentation:**

a. Claimant utilized the documents listed under the original claim submission while providing the following additional information to support the claimed vessel delays, administrative costs and interest:

1. Claimant's letter dated September 4, 2009 to the NPFC addressing additional information requested by the NPFC with attached "cash flow" spreadsheet.

### 3. NPFC Findings:

#### a. Vessel Demurrage/Delay

1. While answering an NPFC request for additional information email dated May 27, 2009, the Claimant re-valuated their alleged lost earnings in the amount of \$159,817.33. Claimant provided an attached "cash flow" spreadsheet, which the Claimant alleges shows that on average the tug Baltimore and barge EMI 1850 loaded at IMT on the Mississippi River every seven days and the invoiced amount for each trip averaged \$162,133.52. The Claimant then states that considering the 167.76 hours (6.9 days) delayed as alleged in the first presentment of the claim, the loss now equals \$159,817.33 in damages ( $\$162,133.52 / 7 = \$23,161.93$  and  $6.9 \times \$23,161.93 = \$159,817.32$ ). Claimant also alleges that because of the oil spill, Express Marine lost \$283,558.80 in the third quarter of 2008.

2. As stated in A.3.a.1-2 above, the NPFC finds the total claimed vessel delay time to be 151.66 hours not 167.67 hours.

3. After reviewing the "cash flow" spreadsheet, the NPFC found the Claimant did not accurately present the quarterly cash flow and losses. The Claimant's "cash flow" spreadsheet provides the following total invoice amounts:

- a. Quarter 2: \$1,817,651.70
- b. Quarter 3: \$1,540,385.00
- c. Quarter 4: \$1,830,235.91

The NPFC's review finds the following:

- a. Quarter 2: \$1,817,651.70
- b. Quarter 3: \$1,710,729.18
- c. Quarter 4: \$1,659,891.73

The Claimant moved the 9/28/08 – 10/01/08 trip (number 8975) from quarter three (the quarter in which the oil spill occurred) into quarter four, which gave quarters two and four a larger cash flow return in comparison to quarter three. In reality, there is no clear loss which can be placed on the oil spill in the third quarter. The cash flow in the fourth quarter is even lower than the third quarter. The Claimant claimed an average quarterly revenue of \$1,823,943.81 for quarters two and four, when in actuality the average quarterly revenue was \$1,738,771.71. The Claimant stated a \$283,558.80 loss in the third quarter because of the oil spill. The difference between the average second and fourth quarterly revenue of \$1,738,771.72 and the third quarter of \$1,710,729.18 equals \$28,042.54.

Through the three quarters presented on the spreadsheet, each trip averaged approximately three days. In the third quarter, besides the seven day trip (# 8886) from 7/25/08-8/01/08, there was another seven day trip (# 8873) 7/09/08-7/16/08 and one seventeen day trip (# 8936) from 8/27/08-9/13/08. The NPFC finds the \$28,042.54 third quarter difference in average costs cannot be directly attributed to the oil spill event. There are two other delays (trip 8873 - seven days and trip

8936 - seventeen days) in the third quarter, which could have contributed to the alleged loss. In addition, no income tax returns, financial statements, or similar financial documents, as required by OPA, were submitted to justify the “cash flow” spreadsheet numbers presented by the Claimant.

4. In an email dated January 25, 2010, which was written by the Claimants legal representative, Mr. (b) (6) to the NPFC, states, “the basic premise of the claim is that the oil spill resulted in our client not being able to carry as much coal from the Mississippi River to Florida as it would have if the spill had not occurred. Our client is only paid per ton of coal carried. The spill resulted in less tons of coal being carried and a corresponding loss of revenue resulted from the spill”.<sup>13</sup> The NPFC has not found any documentation in the claim to support the Claimants basic premise of the claim as stated above. There is no definitive documentation provided to show that the vessels could not carry as much coal from the Mississippi River to Florida because of the oil spill, nor does it find that the Claimant lost a voyage due to the delays.

5. After considering all of the evidence submitted by the Claimant in support of the amended vessel delay claim amount of \$159,817.33, the NPFC does not find it compensable as presented.

**b. Administrative Costs**

1. The NPFC evaluated the Claimants request for \$31,963.46 in compensation for administrative costs. The Claimant states that these costs were requested to cover activities that administrative and management personnel undertook monitoring the spill activity, while communicating with Progress Fuels Corporation, the Coast Guard and oil spill contractors regarding the movement of the barge, along with costs associated with overhead.

2. The Claimant stated there were no detailed time records of activities and therefore requested a percentage (20%) of the damages to cover these costs. The NPFC does not find this a reasonable method to determine these costs. The NPFC would need documentation showing an actual loss instead of a general percentage based valuation. Therefore, the NPFC does not find the \$31,963.46 in administrative costs compensable as presented.

**c. Interest**

The NPFC evaluated the Claimants request for \$9,589.04 (5%) interest on the vessel delay and administrative portion of this claim. This is denied because that amount is not a loss of profit cost or damage compensable under OPA.

**d. Amended Claim Presentation to the RP**

No evidence has been presented to the NPFC that the Claimant has made presentment of the amended claim and new sum certain in the amount of \$201,369.83 to the RP. Under OPA, 33 U.S.C. §2713(a), the Claimant is required to make presentment.

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<sup>13</sup> See, Mr. (b) (6) email to the NPFC dated January 25, 2010, para. two.

## **VII. SUMMARY**

The Claimant failed to demonstrate a loss of profits or earning capacity, which can be directly attributed to the barge 932 oil spill.

Based on the above, I recommend that Express Marine, Inc. be offered **\$0.00** as full compensation for the alleged damages it suffered when its vessels, the tug Baltimore and barge EMI 1850, were delayed as a result of the barge 932 oil spill.

## **VIII. DETERMINED AMOUNT: \$0.00**

Claim Supervisor: Thomas S. Morrison

Date of Supervisor's Review:

Supervisor Action:

Supervisor's Comments: