CLAIM SUMMARY / DETERMINATION FORM

Date	:	1/27/2010
Claim Number	:	N08057-055
Claimant	:	Koch Nitrogen Company, LLC
Type of Claimant	:	Corporate
Type of Claim	:	Removal Costs
Claim Manager	:	[redacted]
Amount Requested	:	$72,951.92

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. Approximately 282,828 gallons oil[1] were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic.

II. Responsible Party

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

III. The Claimant and the Claim

Koch Companies Public Sector, LLC (KPS) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Koch Nitrogen Company, LLC (KNC). At the time of the collision, the M/V BW Helios was under a five year (plus or minus 30 days) time-charter by KNC and Bergesen Worldwide Gas, ASA (Bergesen), owners of the vessel.[2] The BW Helios, at the time of incident, was completing a voyage from Trinidad to KNC's Taft terminal, located at Lower Mississippi River mile marker 128.8.[3] KNC sustained a forced delay of entry into the Mississippi River, being detained at Southwest Pass Mile Marker # 1 and, therefore, unable to deliver its product. The BW Helios was detained from 0500 on July 25, 2008 until 1030 hours on July 27, 2008, resulting in a delay of 53 hours 30 minutes, or 2.229166667 days.[4]

The charter agreement between the two parties (Bergesen and KNC) was set at $850,000.00 per calendar month, or roughly $27,945.20 per day[5]. As the BW Helios was taken off-hire for 2.229166667 days, KNC is claiming a direct income loss of $62,416.67 for this time period. Additionally, during these 2.229166667 days, KNC claims the vessel consumed approximately 16.56 metric tons of fuel, increasing costs by $10,525.25. When the income loss and increased bunkers are combined, KNC's claim totals $72,951.92.

IV. APPLICABLE LAW

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[1] See, House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

[2] See, Time Charter between Bergesen Worldwide Gas ASA and Koch Nitrogen Shipping, LTD, submitted with the claim by KPS on 9/03/2009

[3] See, Claim Submission Forms, submitted with the claim by KPS on 9/03/2009

[4] See, letter to Worley Catastrophe Response, dated 2/09/2009 and Laytime Statement, both submitted with the claim by KPS on 9/03/2009

[5] See, Section 9, Line 018 of the charter between Bergesen and KNC, submitted with the claim by KPS to the NPFC on 9/03/2009

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

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

"The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages."

Damages include damages for loss of profits or earnings capacity as a result of loss or destruction or real or personal property or natural resources. 33 USC 2702(b)(E) Damages are further defined to include the costs of assessing the damages. 33 USC 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 USC 2717 (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)

Congress directed the President to promulgate regulations "for the presentation, filing, processing, settlement, and adjudication of claims…" 33 USC 2713 (e) Those regulations are found at 33 CFR part 136.

Under 33 CFR 136.105(a) & 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 the 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 the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss or 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 & B or 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 or 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, comparable 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 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 the 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, and 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)

V. DETERMINATION OF LOSS:

A. *Overview:*

1. The incident involved the discharge and continuing substantial threat of discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
2. Real or personal property or natural resources have been injured, destroyed, or lost; specifically oil was released into and injured the Mississippi River, a natural resource of the United States.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted on time.
5. The claimant seeks $72,941.92 in loss of profits, as a consequence of the M/V BW Helios's additional time, fuel, and additional costs.
6. The claimant asserts that if not for the oil spill the voyage would not have resulted in additional time and fuel.
7. Presentment of costs to the RP was made by KPS, representatives for KNC, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded denying responsibility for these costs.
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant to document what took place at the time of the incident.

B. *Causation:*

The Barge DM 932 oil spill did in fact release significant amounts of oil into and causing damage and injury to the Mississippi River, a natural resource of the United States. The resulting damage, injury and removal response disrupted shipping in and out of the Mississippi River.[6] At the time of the spill, there were many large vessels in the area that were oiled due to

[6] Polreps 1-18; documenting river closures and traffic management through August 8, 2008.

the DM 932 oil spill. The BW Helios was detained in Southwest Pass, outside of the dirty zone awaiting USCG clearance to depart, which was granted on July 27, 2008.[7]

The Claimant provided a record of the incident by submitting Voyage Documents and "Statement of Facts," which clearly demonstrate that the Mississippi River had closed and vessel traffic was redirected during the oil removal efforts.[8] Additionally, the USCG provided POLREPS to substantiate that the Mississippi River was either closed to vessel traffic or open to limited traffic during the response period.

C. *Vessel Delay Time:*

KNC is claiming that the oil spill directly caused them loss of profits because the BW Helios was sitting idle and the voyage was increased by 2.229166667 days. The BW Helios was delayed as follows:

From 7/25/2008 @ 05:00 hours until 7/27/2008 @ 10:30 hours

The total stoppage time: 2 days, 5 hours and 30 minutes, or approximately 2.229166667 days.[9]

Per the terms of the time-charter agreement between Bergesen and KNC, KNC paid a monthly hire rate of $850,000.00 a month, roughly $27,419.35 when divided by the 31 days in the month of July. KNC has submitted its claim amount based on the average days in a month, 30.4167, and has therefore concluded that KNC paid out a daily hire of $27, 945.20.[10] However, because the hire payment for each month is due in advance of each month, the NPFC cannot consider the average days in a month, but hire costs of the actual days of detention, per the charter.[11] This being said, KNC's claim for delay should total $61,122.30 ($27,419.35 X 2.2291966667 days = $61,122.30).

D. *Increased Bunkers*

The documented delay resulted in an increase in the consumption of bunkers. In their claim submission supplement, KNC shows the breakdown of the amount of bunkers consumed during the idle period:[12]

Times and Dates:		**IFO**
08:00 on 7/25/2008 through 10:30 on 7/27/2008		16.5 mt

	Total:	16.5 mt

At a cost of $638.50/mt for the IFO, the additional bunkers consumed amount to $10,535.25 ($638.50 x 16.5 mt = $10,535.25).[13]

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[7] See, BW Helios Operational Details Statement of Facts, submitted with the claim by KPS to the NPFC on 9/03/2009

[8] See BW Helios Operational Details Statement of Facts and Claim submission forms, submitted by KPS to the NPFC on 9/03/2009

[9] See, BW Helios Operational Details Statement of Facts, submitted with the claim by KPS to the NPFC on 9/03/2009

[10] See, claim submission supplement, submitted by KPS to the NPFC on 12/15/2009

[11] See, Charter between Bergesen and KNC, submitted with the claim by KPS to the NPFC on 9/03/2009

[12] See email from BW Helios Captain [redacted] to [redacted], KNC, in the submission supplement documents, submitted by KPS to the NPFC on 12/15/2009

E. ***Analysis:***

KNC submitted a claim which, with the addition of follow-up information and responses to NPFC requests, was easy to understand. They were able to demonstrate that the BW Helios was indeed negatively impacted and delayed by the DM 932 oil spill. However, simply because a vessel is delayed, the resultant costs and or increased delay time do not always translate into a loss of profit claim under OPA, as is the case here.

The time-charter between Bergesen and KNC states that KNC will pay a monthly rate of hire of $850,000.00, in advance. KNC is claiming that, because they continued to pay a daily rate to fulfill this monthly obligation to Bergesen, they are entitled to be reimbursed for the 53.5 hours they were delayed. Their reasoning is that not only did the BW Helios fall behind schedule, but KNC also paid this hire rate during the delay, thus reducing profit. The NPFC finds that this conclusion is incorrect. While it is true that this voyage did fall behind schedule by 53.5 hours, the conclusion that this necessarily affected KNC's bottom line is not proven. KNC paid their monthly hire rate regardless of whether or not the vessel was used. According to their 2008 Vessel Schedule for the BW Helios[14], the extra time did not cause subsequent voyages to be canceled nor any revenues or profits to be lost on these voyages. This is primarily due to the fact that their revenues/profits were earned by the megatons of ammonia delivered (and not by the time per se) and the fact that the BW Helios was on a revolving schedule between different ports for onloading and offloading—"as soon as one voyage ended, the other one started."[15] Koch has not met their burden of proof to show that the 53.5 hours of delay resulted in a loss of revenue and/or could not have been made up over the course of the balance of the year and the other voyages. As Bergesen and Koch have had this charter since 1984,[16] it is likely to assume that the BW Helios has been delayed before—most likely due to weather—and that KNC crew and schedulers allow for variance in travel/transit time when setting up their revolving voyage schedule for the year. The DM 932 oil spill occurred during hurricane season, a time when increased flexibility is often built into schedules. More importantly, the documentation supporting the voyages and transit durations does not provide enough detail to support the contention that the oil spill resulted in either lost or extra vessel days.

KNC does prove, however, through documentation provided the NPFC, that they did incur $10,535.25 in increased bunkers as a direct result of the oil spill. These added costs (as explained in sub-point D above) are valid and compensable.

F. ***Determination:***

The NPFC hereby determines that the OSLTF will pay **$10,535.25** as full compensation for increased expenses without commensurate or mitigating revenues that resulted in a loss of profits by the Claimant and submitted to the NPFC under claim # N08057-055. All costs claimed are for charges paid for by the Claimant for damages as that term is defined in OPA and, are compensable damages, payable by the OSLTF as presented by the Claimant.

<u>VI. DETERMINED AMOUNT: $10,535.25</u>

Claim Supervisor: ***Thomas S. Morrison***

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[13] See, Bominflot, Inc. fuel invoice, submitted with the claim supplement documents by KNC to the NPFC on 12/15/2009

[14] See, 2008 BW Helios Vessel Schedule, submitted with the claim supplement documents by KNC to the NPFC on 12/15/2009

[15] See, cover letter, submitted with the claim supplement documents by KNC to the NPFC on 12/15/2009.

[16] See, Charter between Bergesen and KNC, submitted with the claim by KPS to the NPFC on 9/03/2009