

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/30/2010
Claim Number	: N08057-056
Claimant	: Koch Supply and Trading LP and Koch Shipping, Inc.
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: (b) (6)
Amount Requested	: \$134,554.92

### **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<sup>1</sup> 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 Supply and Trading LP and Koch Shipping, Inc. (KS&T). At the time of the collision, The M/T Eagle Otome was under charter by KS&T for a shipment of fuel oil for Valero Marketing and Supply Company (Valero), at Valero's St. Charles Refinery (Mississippi River Mile Marker (MM) 125).<sup>2</sup> When the spill occurred, the Eagle Otome stopped at the Magnolia Anchorage (MM 45) and, to avoid the effects of the spill, returned to Southwest Pass (SWP) Anchorage (just outside of the Mississippi River). Due to the spill and the likelihood of vessels getting oiled in the immediate spill area, the USCG stopped operations of this and other vessels several times. KS&T was delayed a total of 4 days, 12 hours and 6 minutes. Therefore, KS&T is claiming a direct income loss totaling \$88,447.91.

Additionally, during the 4.5041667 days of delay, the Eagle Otome claims additional pilot, tug and bunker expenses, totaling \$46,107.01.

When combining KS&T's claims of damage and additional expenses, the total claim for loss of profits due to the oil spill is \$134,554.92. KPS did present these costs to the RP's representatives, Worley Catastrophe Response (Worley); however, all costs were denied by the RP.<sup>3</sup>

### **IV. APPLICABLE LAW**

<sup>1</sup> See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

<sup>2</sup> See Claim submission forms, submitted by KPS to the NPFC on 9/03/2009

<sup>3</sup> See Claim submission forms, submitted by KPS to the NPFC on 9/03/2009

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.”

Covered 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 net costs of providing 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 NPFCA 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.

## **V. DETERMINATION OF LOSS:**

### ***A. Overview:***

1. FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports under Federal Project Number N08057.
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. 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.
4. 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.
5. The claim was submitted on time.
6. The claimant seeks **\$134,554.92** in loss of profits, as a consequence of the M/T Eagle Otome’s additional time, pilots, tugs and fuel.
7. The claimant asserts that if not for the oil spill the voyage would not have resulted in additional time, pilots, tugs and fuel.

8. Presentment of costs to the RP was made by KPS, representatives for KS&T, 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.
9. 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.<sup>4</sup> At the time of the spill, there were many large vessels in the area that were oiled due to the DM 932 oil spill. The Eagle Otome was detained in SWP, outside of the dirty zone awaiting USCG clearance to depart, which was granted on July 27, 2008.<sup>5</sup>

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.<sup>6</sup> 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:**

KS&T is claiming that the oil spill directly caused them loss of profits because the Eagle Otome was sitting idle and the voyage was increased by 4.5041667 days. The Eagle Otome was stopped as follows:

7/23/2008 @ 02:42 hours	Arrival at SWP
7/23/2008 @ 09:54 hours	Anchor down at Magnolia Anchorage due to oil spill; Notice of Readiness tendered
7/23/2008 @ 12:18 hours	Anchor up at Magnolia Anchorage to move south
7/23/2008 @ 18:00 hours	Anchor down at SWP Anchorage
7/27/2008 @ 14:48 hours	Anchor up at SWP Anchorage
7/28/2008 @ 06:24 hours	Anchor down at AMA Anchorage, waiting instructions
7/29/2008 @ 17:36 hours	Anchor up at AMA Anchorage
7/29/2008 @ 20:18 hours	All fast
7/30/2008 @ 21:30 hours	Hose disconnection complete
8/01/2008 @ 19:48 hours	Dropped outward pilot (DOP)

The total stoppage time claimed by Koch: 4 days, 12 hours and 6 minutes, or approximately 4.5041667 days.

<sup>4</sup> Polreps 1-18; documenting river closures and traffic management through August 8, 2008.

<sup>5</sup> See Eagle Otome Voyage Time Sheet, submitted with the claim by KPS to the NPFC on 9/03/2009 and the Deck Log Book and internal email correspondence, in the submission supplement documents, submitted by KPS to the NPFC on 12/29/2009

<sup>6</sup> See Eagle Otome Voyage Time Sheet, submitted with the claim by KPS to the NPFC on 9/03/2009 and the Deck Log Book and internal email correspondence, in the submission supplement documents, submitted by KPS to the NPFC on 12/29/2009

Per the terms of the charter agreement between KS&T and American Eagle Tankers Inc, Limited (AET), AET charged a detention rate of \$35,000 per day.  $\$35,000 \times 4.5041667$  (KS&T's claim) = \$157,645.83 in freight damages due to the oil spill.<sup>7</sup>

Per the terms of the contract between KS&T and Valero, 8 Valero paid fifty percent of the damages starting six hours after the Notice of Readiness (7/23/2008 @ 15:54 hours until 7/27/2008 @ 14:48 hours, when the Eagle Otome departed Southwest Pass), time which adds up to 94 hours and 54 minutes, or 3.95416667 days.<sup>9</sup> When multiplying the 1.977083335 days by \$35,000 per day (which is half the detention days of 3.95416667 multiplied by \$35,000), the total amount Valero paid KS&T (pertaining to the spill) equals approximately \$69,197.92.

Subtracting what Valero paid (\$69,197.92) from the initial damage claim (\$157,645.83), KS&T is asking to be reimbursed the difference of **\$88,447.91**.

#### **D. Increased Bunkers**

KS&T asserts that the delay resulted in an increase in the consumption of bunkers. In their claim submission, KS&T shows the breakdown of the amount of bunkers consumed during the idle period (From initial arrival at SWP to Magnolia, and back to SWP):<sup>10</sup>

<b><u>Times and Dates:</u></b>	<b><u>IFO</u></b>
03:00 on 7/23/2008 through	1103.70 mt
03:57 on 7/23/2008	-1083.20 mt
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Total:	20.50 mt

*The top number represents the amount of oil (in tons) that were read at the time of entry into SWP, subtracting the amount of oil read at the time that the Eagle Otome arrived back at SWP Anchorage to find the difference.*

At a cost of \$721.21/mt for the IFO, the additional bunkers consumed amount to **\$14,784.81** ( $\$721.21 \times 20.50 \text{ mt} = \$14,784.81$ ).<sup>11</sup>

#### **E. Additional Costs**

KS&T is claiming additional costs due to increased pilots, tugs and launch fees:

##### **Pilots:**

Increased pilotage fees can be broken down in the following categories:<sup>12</sup>

##### **From SWP to Magnolia Anchorage:**

##### ***Crescent River Port Pilots' Association:***

<sup>7</sup> See Charter Party Addendum, Sub-Point F, Section x, dated November 6, 2006, submitted with the claim by KPS on 9/03/2009

<sup>8</sup> See Charter Party, "Discharge, Laytime, Demurrage, Ocean Tankers and Ocean Barges 16,000 DWT And Over," dated June 30, 2008, submitted with the claim by KPS on 9/03/2009

<sup>9</sup> See Eagle Otome Voyage Time Sheet, submitted with the claim by KPS to the NPFC on 9/03/2009

<sup>10</sup> See Oil Spill Invoice from AET to K&T, submitted with the claim by KPS to the NPFC on 9/03/2009

<sup>11</sup> See Chevron Marine Products fuel invoice, submitted with the claim by KPS to the NPFC on 9/03/2009

<sup>12</sup> See New Crescent River Port Pilots' Association and Associated Branch Pilots, submitted with the claim by KPS to the NPFC on 9/03/2009

MAGNOLIA ANCHORAGE:	\$1987.46
D.W.T.'S MIN (Of 21,000):	\$181.67
D.W.T.'S CHARGE (21,000 TO 60,000):	\$861.90
D.W.T.'S CHARGE (OVER 60,000):	\$938.00
ZONE CHARGE (OVER 60,000 DWT):	\$1085.10
COMMUNICATION:	\$4.50
PENSION:	\$1718.11
VTS:	\$357.78
CAPITAL IMPROVEMENTS:	\$31.13
KATRINA RECOVERY:	\$245.00

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Total: \$7410.65

*Associated Branch Pilots:*

DEEPEST DRAFT:	\$1888.56
SUMMER DEADWEIGHT TONNAGE:	\$1879.54
COMMUNICATIONS:	\$3.00
CAPITAL SURCHARGE:	\$75.00
PENSION SURCHARGE:	\$469.71
KATRINA RELATED SURCHARGE:	\$29.00
PILOT FEE COMMISSION COLLECTION:	\$30.00

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Total: \$4374.81

*From Magnolia Anchorage to SWP:*

*Crescent River Port Pilots' Association:*

MAGNOLIA ANCHORAGE:	\$1987.46
D.W.T.'S MIN (Of 21,000):	\$181.67
D.W.T.'S CHARGE (21,000 TO 60,000):	\$861.90
D.W.T.'S CHARGE (OVER 60,000):	\$938.00
ZONE CHARGE (OVER 60,000 DWT):	\$1085.10
AWAIT BERTH:	\$343.68
COMMUNICATION:	\$4.50
PENSION:	\$1718.11
VTS:	\$357.78
CAPITAL IMPROVEMENTS:	\$31.13
KATRINA RECOVERY:	\$245.00

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Total: \$7754.33

*Associated Branch Pilots:*

DEEPEST DRAFT:	\$1888.56
SUMMER DEADWEIGHT TONNAGE:	\$1879.54

COMMUNICATIONS:	\$3.00
CAPITAL SURCHARGE:	\$75.00
PENSION SURCHARGE:	\$469.71
KATRINA RELATED SURCHARGE:	\$29.00
PILOT FEE COMMISSION COLLECTION:	\$30.00

Total: \$4374.81

**Combined Total: \$23,914.60**

Tugs:

Increased tug fees can be broken down into the following categories:<sup>13</sup>

Assistance fees, 2 @ \$2350.00	\$4700.00
Fuel Surcharge:	\$1645.00

**Total: \$6,345.00**

Launch:

Increased launch fees can be broken down as follows:<sup>14</sup>

Ticket # 95710:	\$531.30
Ticket # 95696:	\$531.30

**Total: \$1,062.60**

**Total increased expenses due to oil spill and resulting USCG relocation and delay of the vessel: \$31,322.20**

**F. Analysis:**

KPS submitted a claim—with requested addendums-- that was well-documented and easy to understand. They were able to demonstrate that KS&T was indeed negatively impacted and delayed by the DM 932 oil spill. However, while KS&T shows a correct time period of 9.71 days between the Eagle Otome's arrival at SWP (at 2:42 hours on 7/23/2008) until DOP (drop off pilot outbound) at AMA Anchorage (at 19:48 on 8/01/2008), with a total difference in time of 4.50 days (from a forecasted 5.21 day voyage without the spill and the actual voyage with the spill), the NPFC has determined only 4.2 days are fully compensable (Starting at the NOR at 09:54 hours on July 23, 2008, not 02:42 hours as KS&T calculates in its claim).

According to the Charter Party Addendum agreement between AET and KS&T,<sup>15</sup> AET was to begin charging KS&T overtime at the rate of \$35,000 per day in excess of the minimum period

<sup>13</sup> See Crescent Towing and Salvage Co. Inc., submitted with the claim by KPS to the NPFC on 9/03/2009

<sup>14</sup> See Delta Launch Services, LLC, Invoices, submitted with the claim by KPS to the NPFC on 9/03/2009

<sup>15</sup> See Charter Party Addendum, Sub-Point F, Section x, dated November 6, 2006, submitted with the claim by KPS on 9/03/2009

of three cumulative Service Ship days, beginning with the Notice of Readiness (NOR). Koch shows, through its own "Calculation of Net Freight Damages" chart, as well as invoicing and internal email correspondence between AET and KS&T,<sup>16</sup> that the Eagle Otome would have started to accrue delay charges after three days (Starting at approximately 18:00 hours on July 23, 2008, three days after the NOR was tendered at 18:00 hours on 7/20/2008), regardless of the spill. In other words, the spill added to the delay and the resultant charges. Also, according to this same documentation, the actual time of delay directly related to the oil spill for the Eagle Otome did not begin until the NOR was issued at 09:54 hours on 7/23/2008. Therefore, when beginning with the NOR at 09:54 hours on 7/23/2008 and ending with the DOP at 19:48 hours on 8/01/2008, the actual voyage calculation time directly related to the DM 932 oil spill is approximately 9 days, 10 hours 34 minutes, or 9.44 days. Subtracting the 5.21 days that KS&T would have been delayed regardless of the spill, the actual time difference between the forecasted voyage without the spill and the actual voyage equals an approximate time difference of 4.23 days (9.44 actual days – 5.21 forecasted days = 4.23 days difference). 4.23 days multiplied by an overtime rate of \$35,000 per day equals freight damages in the amount of \$148,050.00. Subtracting the \$69,197.92 that KS&T recovered previously from Valero, the compensable freight damages due KS&T equal \$78,852.08.

Additionally, KS&T does prove through documentation provided the NPFC that they did incur \$46,107.01 of increased bunker consumption, pilots, tugs and launch fees as a direct result of the oil spill. These added costs (as explained in sub-points D and E above) are valid and are compensable.

#### ***G. Determination:***

The NPFC hereby determines that the OSLTF will pay **\$124,959.09** as full compensation for the lost profits incurred by the Claimant as a result of the increased expenses incurred during the voyage charter of the EAGLE OTOME and submitted to the NPFC under claim # N08057-056. All increased expenses claimed are for charges paid for by the Claimant without mitigating or offsetting increases in revenues for the voyage in question. The lost profits determined are for damages as that term is defined in OPA and, are compensable damages, payable by the OSLTF as presented by the Claimant.

#### **VI. DETERMINED AMOUNT: \$124,959.09**

Claim Supervisor: *Tom Morrison*

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments:

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<sup>16</sup> See AET Lightering Invoice # L04739C-US, dated 8/06/2008, submitted with the claim on 9/03/2009 and Email from Eagle Otome Captain Varun Kumar to AET, dated 8/01/2008, in the submission supplement documents, submitted by KPS to the NPFC on 12/29/2009