

CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/14/2011
Claim Number	: N08057-0104
Claimant	: Board of Commissioners of the Port of New Orleans
Type of Claimant	: Corporate
Type of Claim	: Real or Personal Property
Claim Manager	: [REDACTED]
Amount Requested	: \$30,000.00

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 oil¹ was 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

On July 15, 2011, Leger and Shaw (Leger) submitted a claim into the National Pollution Funds Center (NPFC) for its client, the Board of Commissioners of the Port of New Orleans (Board). At the time of the collision, the Board was in the process of making improvements to the Alabo Street Terminal (Mississippi River Mile Marker (MM) 92) and demolishing the Charbonnet Wharf (MM). As a result of the spill, a number of the wharves belonging to the Port of New Orleans (Port) were oiled, including the Charbonnet Wharf, which was to be demolished by Concrete Busters of Louisiana, Inc. (Concrete Busters). Because of this, Change Order # 2 was issued to provide a contract time extension, in part because the Port had to stop its work and clean up the oil before work could continue.² Oil Mop, LLC provided the clean-up operations.

On July 23, 2008, a directive was issued by the Port to Concrete Busters to suspend demolition efforts as a result of the oil spill. The Port claims that, in addition to the need to clean up the oil, this measure was made necessary due to possible health hazards to the Concrete Busters workers.³ United States Risk Management (USRM) performed an assessment for the Port, issuing a memorandum on August 1, 2008 that stated:

“The following issues/ recommendations have arisen in response to the #6 fuel spill that had occurred on Wednesday, July 23rd 2008:

If demolition is to occur/resume prior to the completion of the oil spill clean-up[,] the demolition contractor should have their personnel trained as 40 hour OSHA

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

² See both Exhibit BB, Memorandum from Ms. Barbara Humphrey, dated 7/29/2008, and Exhibit CC, Letter from the Port of New Orleans to Concrete Busters, dated 8/19/2008, both submitted to the NPFC with the additional documentation, dated 9/16/2011.

³ See Exhibit DD, Letter from the Port of New Orleans to Concrete Busters, dated 7/24/2008, submitted to the NPFC with the additional documentation, dated 9/16/2011.

HAZWOPPER workers. This requirement is necessary to inform the workers of the hazards that exist with toxic substances.

If equipment (i.e.[sic] motorized flat boats) is required to be placed into the water, prior to the oil spill clean-up completion, the equipment is required to be decontaminated prior to reintroduction into a clean water way.”⁴

As such, the Port required that Concrete Busters comply with USRM’s recommendations before returning to work. The Port supplied Concrete Busters with a “day for day” contract time extension through Change Order # 2,⁵ which also afforded an additional expense of \$30,000. The Port claims this additional rental cost of was due to the rental equipment remaining onsite during the period that the demolition efforts had ceased.⁶

In its original claim submission form, the Port classified its claim as Increased Public Services. As this claim is in actuality a Real or Personal Property Claim, the claims manager has adjusted the claim type to reflect this.

IV. APPLICABLE LAW

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party’s liability will include “removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan”. 33 USC § 2702(b)(1)(B).

“Oil” is defined in relevant part, at 33 USC § 2701(23), to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

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.

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims

⁴ See Exhibit EE, Letter from the Port of New Orleans to Concrete Busters and the US Risk Memorandum, both dated 8/01/2008, and submitted to the NPFC with the additional documentation, dated 9/16/2011.

⁵ See both Exhibit EE, Letter from the Port of New Orleans to Concrete Busters and the US Risk Memorandum, dated 8/01/2008, and Exhibit FF, Facsimile from Concrete Busters of Certificates of Hazardous Materials Awareness Training, all submitted to the NPFC with the additional documentation, dated 9/16/2011.

⁶ See Exhibit GG, Correspondence between the Port and Concrete Busters, submitted to the NPFC with the additional documentation, dated 9/16/2011.

for uncompensated damages. One type of damages available pursuant to 33 C.F.R. § 136.213 is a claim for injury to, or economic losses resulting from the destruction of, real or personal property. Such a claim may be presented only by a claimant either owning or leasing the property.

Under 33 C.F.R. § 136.215(a), a claimant must establish the following:

- (a) An ownership or leasehold interest in the property;
- (b) That the property was injured or destroyed;
- (c) The cost of repair or replacement; and
- (d) The value of the property both before and after injury occurred.

Under § 136.217(b), Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less. Compensation for loss of use of noncommercial property is not allowable.

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 property was injured by the oil, and, as a result of Change Order # 2, the claimant seeks \$30,000.00 in additional costs.
6. The claimant was owner of the affected property.
7. Presentment of costs to the RP was made by Leger and Shaw, representatives for the Port, prior to the submission of the claim. The NPFC also made notification of claimed costs to the RP.

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 operations within the Mississippi River.⁷ The USCG provided POLREPS to substantiate this statement.

C. Submitted Documentation:

The Port submitted the copies of the following documentation in support of its claim:

⁷ Polreps 1-18; documenting river closures and traffic management through 8 August 2008.

1. Claim description/cover letter, dated 7/15/2011.
2. Optional OSLTF Claim Form, dated 7/15/2011.
3. Affidavit of Mr. James Ruckert, CFO, Port of New Orleans, dated 7/15/2011.
4. Letter from Mr. Reagan Roussell, Concrete Busters to Mr. William Meliet, Port of New Orleans, dated 8/27/2008.
5. Port of New Orleans Estimate of Completed Work for Concrete Busters Contract Project # 578-36-0014, dated 10/2/2007.
6. Check from the Port to Concrete Busters, dated 10/07/2008.
7. RP presentment letter/package, dated 3/10/2011.
8. Affidavit of Mr. James Ruckert, CFO, Port of New Orleans, dated 3/03/2011.
9. 2/20/2009 Fax Package from Concrete Busters to the Port.
10. Memorandum from Ms. Barbara Humphrey to Mr. Jay Meliet, dated 7/29/2008.
11. Letter from Mr. William Meliet, Port of New Orleans, to Mr. Reagan Roussell, Concrete Busters, dated 8/19/2008.
12. Letter from Mr. William Meliet, Port of New Orleans, to Mr. Reagan Roussell, Concrete Busters, dated 7/24/2008.
13. Letter from Mr. William Meliet, Port of New Orleans, to Mr. Reagan Roussell, Concrete Busters, dated 8/01/2008.
14. US Risk Memorandum, dated 8/01/2008.
15. Facsimile from Concrete Busters, dated 8/28/2008, of Certificates of Hazardous Materials Awareness Training.
16. Letter from Mr. Reagan Roussell, Concrete Busters to Mr. Ray Lauga, Port of New Orleans, dated 8/11/2008.
17. Letter from Mr. Reagan Roussell, Concrete Busters to Mr. William Meliet, Port of New Orleans, dated 8/05/2008.

D. *Analysis:*

As an independent political subdivision of the State of Louisiana, the Port had the responsibility to maintain its wharves, docks, buildings warehouses, sheds, landings, and other properties, as well as any project or contract attached to any of its holdings. When the oil spill occurred and affected the work site at the Charbonnet Wharf, the hiring of USRM by the Port to assess the affected wharves was sensible, as was it reasonable for the Port to suspend the demolition efforts until it was determined that the site was clean and safe for the contracted personnel.

On July 24, 2008, the Port issued a directive to Concrete Busters to suspend its demolition efforts.⁸ It did not confirm that operations could resume until it issued Concrete Busters a letter on August 19, 2008, when it stated that Concrete Busters personnel could return to the demolition site on August 20, 2008.⁹ During this delay—and because equipment could not be used during this time—Concrete Busters incurred a stand-by rate of \$1500.00 per day,¹⁰ which resulted in the issuing of Change Order # 2, where both parties agreed to a total lump sum of \$30,000.00.¹¹ As the Port has shown, by the preponderance of the evidence, it would not have incurred this order or the costs totaling \$30,000.00 if the oil spill had not occurred.

⁸ See Exhibit DD, Letter from the Port of New Orleans to Concrete Busters, dated 7/24/2008, submitted to the NPFC with the additional documentation, dated 9/16/2011.

⁹ See Exhibit CC, Letter from the Port of New Orleans to Concrete Busters, dated 8/19/2008, submitted to the NPFC with the additional documentation, dated 9/16/2011.

¹⁰ See Exhibit GG, Correspondence between the Port and Concrete Busters, submitted to the NPFC with the additional documentation, dated 9/16/2011.

¹¹ Exhibit GG, Change Order # 2, between the Port and Concrete Busters, dated 10/02/2008, submitted to the NPFC with the additional documentation, dated 9/16/2011.

In brief: The Charbonnet Wharf was real property owned by and scheduled by the Port to be demolished by Concrete Busters at a fixed price. As a result of the wharf being oiled by the spill, the Port had to postpone/delay the contract in place by 28 days. Furthermore, as a result of the oil injury to the wharf, the ultimate cost of the contract was increased by \$30,000 in order to comply with delays and requirements resulting from the injury.

E. Determination:

The NPFC hereby determines that the OSLTF will pay \$30,000.00 as full compensation for the claimed lost profits incurred by the Claimant and submitted to the NPFC under claim # N08057-0104.

VI. DETERMINED

Claim Supervisor: [REDACTED]

Date of Supervisor's review: 12/14/11

Supervisor Action: OFFER APPROVED

Supervisor Comments: