

CLAIM SUMMARY / DETERMINATION

Claim Number:	N08057-044
Claimant:	BP North America Petroleum, a Division of BP Products North America, Inc.
Type of Claimant:	Corporate
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	[REDACTED]
Amount Requested:	\$1,357,228.93

Incident

On July 23, 2008, at approximately 0130, the tank barge DM 932, sank as a result of a collision with M/T TINTOMARA and discharged approximately 282,828 gallons of oil into the Mississippi River, a navigable waterway of the United States. The Federal On-Scene Coordinator (FOSC) and the Unified Command (UC) initially closed the river to vessel traffic to conduct removal operations and later managed and restricted vessel traffic when the River reopened until cleanup was complete.

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.

Claimant

The claim was presented to the Oil Spill Liability Trust Fund (OSLTF or the Fund) on July 17, 2009, by Fowler Rodriguez Valdes-Fauli on behalf of BP North America Petroleum, a division of BP Products North America, Inc. (BP or Claimant). BP chartered the vessel TORM ESTRID to transport oil cargo that it sold to Petroleum Marketing International (Petromar) in Bonaire, N.A.

Claim

BP alleges that the oil spill and river closures caused significant delays to the vessel it chartered and delays in cargo loading. BP argues that these delays caused it to lose profits from losses on the sale of the oil cargo and losses from paying extra demurrage to the vessel owner. The total amounts claimed are \$336,913.06 for demurrage and \$1,020,315.87 for depreciation of cargo sales price. The total claimed amount is \$1,357,228.93.

APPLICABLE LAW:

The Oil Pollution Act of 1990 provides that each responsible party for a vessel or facility from which oil is discharged, or which poses a threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive zone is liable for removal costs and damages. 33 U.S.C. § 2702(a).

Damage include damages equal to the loss of profits or impairment of earning capacity, due to the injury, destruction of, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

The Fund shall be available to the President for the payment of uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. U.S.C. § 2712(a)(4).

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.

With certain exceptions 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 the claim was presented, 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).

Damage claims to the Fund 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).

With regard to claims for loss of 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.*

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 additional information depending on the removal costs or type of damage.

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)

The compensable amount payable from the Fund 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).

DETERMINATION

The NPFC reviewed all documentation submitted by Claimant.

Findings of Fact:

- A. In accordance with 33 U.S.C. § 2712(h)(2) and 33CFR § 136.101(a)(1) the claim was submitted within the three year period of limitations for loss of profits under OPA.
- B. In accordance with 33 CFR § 136.103(a) the claimant presented its claim to the Responsible Party. The claim requesting \$1,179,317.53 was submitted to the RP by letter dated January 16, 2009. The claim was not paid. NPFC notified the RP of the initial claim for \$1,267,897.26¹ to the Fund. The RP objected to the Fund's payment of the claim via letter dated August 21, 2009 on the grounds that the vessel was not physically oiled by the discharge.
- C. In accordance with 33 CFR 136.105(e)(10) copies of written communications and substance of verbal communications, between claimant and Responsible Party with the date claim was presented and the date that the claim was denied have been provided.
- D. In accordance with 33 CFR § 136.105(b) claimant demanded a sum certain.
- E. In accordance with 33 CFR § 136.105(e)(12), claimant certified no suit has been filed in court for the claimed loss of profits.
- F. In accordance with 33 CFR § 136.111(a)(2) claimant asserts that the oil spill delay is not an insured peril and it has not submitted a claim to its insurer.

Vessel Timeline

BP chartered the TORM ESTRID from LR1 Management K/S as agent to owner A/S D/S TORM (TORM) under a BP VOY 4 voyage charterparty that was executed on July 17, 2008.²

¹ The claim amount has been amended to \$1,357,228.93 via letter dated May 2, 2013.

² All dates are in 2008.

After the oil discharge occurred on July 23, the CG closed the Lower Mississippi River. The vessel was delivered to BP under the charter on July 25 when it reached the Mississippi River. At 1600, the vessel was at the Southwest Pass when the Master of the TORM ESTRID tendered the Notice of Readiness (NOR) for the Magellan loading terminal in Marrero, Louisiana. The vessel then remained at the Southwest Pass until the CG allowed it to move upriver at 1445 on July 28. By 2335 on July 28 the vessel anchored and was unable to reach the dock because other vessels delayed by the spill occupied the berthing. On July 29, the CG closed the river and did not reopen it until 2054 on July 30. However, the TORM ESTRID still could not immediately access the dock due to a vessel with mechanical problems at the berth. Finally, at 1325 on July 31, TORM ESTRID began berthing at Magellan. Cargo loading operations ended at 0830 on August 1, at which time the Master tendered the NOR for Gretna's IMTT Terminal. The vessel now awaited berthing at Gretna because the barges carrying its product were delayed upriver by the oil spill. At 1350 on August 5, the vessel berthed at Gretna and commenced loading. The cargo loading operations ended at 1100 on August 6, allowing the Master to tender the NOR for the St. Rose IMTT Terminal the same time. The vessel then shifted and berthed at St. Rose at 1200 hours on August 6. This final cargo loading operation was complete at 2205 on August 7 and hoses off at 0015 on August 8. Shortly afterward at 0030 on August 8, the vessel left the terminal and headed to the discharge port in Bonaire where the charter was complete on August 15.

Demurrage Claim Analysis

BP seeks reimbursement of demurrage it paid to TORM for extra laytime on the voyage charter of the TORM ESTRID. BP alleges that this demurrage paid is a loss of profits to BP. BP provided proof that it paid demurrage under the charter party at a rate of \$32,000 per day totaling \$336,913.06 (after deducting commission) for laytime beyond the 72 hours of laytime allowed under the charter party. The amount was reportedly negotiated down from TORM's claim for demurrage totaling \$381,943.06. The laytime and demurrage calculation statement produced by Claimant shows demurrage time of 10.65 days times \$32,000 per day equaling \$341,088.89 less \$4,263.61 of commission for a demurrage total of \$336,825.28. We could not determine why the Claimant's demurrage statement total and the claimed total differ. The Claimant based its demurrage claim on laytime beyond allowed laytime.

NPFC analyzed the vessel's charter voyage beginning with the vessel's delivery at the Mississippi River Southwest Pass and ending after the discharge of cargo and redelivery of the vessel in Bonaire. The analysis is detailed in the attached spreadsheet. The NPFC analysis focused on the TORM ESTRID's vessel delays and its cargo delays due to the oil spill and river closures rather than laytime. NPFC's analysis resulted in calculated delays totaling 205.4 hours or 8.56 days. NPFC applied the \$32,000/day demurrage rate to this delay total and deducted the 1.25% commission in the same fashion BP did. NPFC arrived at a total of **\$270,443.29** for demurrage paid by BP to TORM for oil spill delays. NPFC finds this amount to be compensable as lost profits resulting from the OPA-incident and the remaining \$66,469.77 is denied.

Cargo Price Degradation Claim Analysis

BP seeks compensation for profits it alleges it lost due to the delayed timing of cargo loading. The price at which BP sold the cargo to Petromar was tied to and dependent on the dates of loading. BP alleges that it lost profits totaling \$1,020,315.87 for the "cargo price degradation"

that resulted when the vessel was unable to load on the originally expected dates. Claimant alleges that on the three loads, it received a price increase on one load and price decreases on the other two loads for an overall reduction in profits on the sales prices of the voyage cargo.

Expected loading dates

BP originally expected and planned for the TORM ESTRID to load at the three Mississippi River terminals at Marrero, Gretna and St. Rose on three consecutive days based on the 72 hours of allowed laytime.³ The loading would begin between July 25 and 27 during the laycan.⁴ The vessel actually arrived at the Southwest Pass and tendered the NOR on July 25. Therefore, had the spill not occurred, the vessel would likely have started loading on July 25, 26 or 27. The Claimant alleges that the Bills of Lading (BOL) would have been issued on July 27, 28, and 29. These would have been the BOL dates upon which the prices would be calculated using the formulae in the purchase and sales contracts. Claimant provided an explanation and information to show that their estimates of the originally expected BOL dates were probable had the spill not occurred.⁵ The information describes how long it generally takes the vessel to sail from the Southwest Pass Anchorage, transit upriver, and complete the offload cargo, at which time the BOL would be issued.

Actual loading dates

Due to the oil spill and river closures, the vessel's loading schedule became altered. The vessel could not get to the first terminal until July 31, though it would have berthed on July 30 except that a vessel at the dock experienced mechanical problems and could not leave. Loading was complete on August 1 and the Bill of Lading was issued that date. But for the mechanical problems it appears that loading might have been complete on July 31, which would have caused the Bill of Lading one day earlier. However, it is too speculative to assume the vessel would have completed loading on July 31, so we must accept the date of the actual Bill of Lading.

The loading at the second and third terminals were delayed even further. The cargo for the second two terminals was supplied by Shell Trading (US) Company (Shell). Due to the oil spill and river closures, the product was delayed upriver. The barges could not get out of their fleeting area until July 28.⁶ The barges were then not able to get to the IMTT facility until August 3, and blending at the terminal was complete on August 4.⁷ The TORM ESTRID waited and finally received orders to the berth on August 5. Loading was complete on August 6, and the BOL was issued this date. The vessel immediately shifted to the St. Rose terminal and completed loading on August 7, with hoses off at 0015 on August 8. The BOL was dated August 7. So, the evidence indicates that the oil spill and river closures due to the spill caused the loading dates for the vessel to be pushed back several days and broke up the consecutive-day loading schedule.

³ See Charter Party fixture dated July 17, 2008.

⁴ See Charter Party fixture dated July 17, 2008.

⁵ See Fowler Rodriguez letter dated May 2, 2013 and the attached RSSA email dated May 1, 2013.

⁶ See [REDACTED] Affidavit.

⁷ See [REDACTED] Affidavit.

Cargo Price Analysis

The transactions at issue are the purchase and sale of the oil cargo destined for Petromar in Bonaire. BP entered into a contract with Petromar for the sale of high sulfur fuel oil. The sale price was variable depending on the dates the Bills of Lading were issued as detailed below. To obtain the product, BP entered into a purchase contract with Northville Product Services (Northville) on July 17, 2008.⁸ The purchase price to BP was variable depending on the dates the Bills of Lading were issued, also detailed below. The cost for the vessel charter was fixed prior to the voyage (Extra demurrage is a separate issue discussed above.). Therefore, except for demurrage expenses that increased, the voyage expenses were constant. According to the Petromar contract, the sale price payable by Petromar was not set until the oil was loaded and the BOLs issued. The following excerpt explains how the sales prices were set.

"The price shall be equal to the arithmetic average of the mean quotes for NO.6 3%S under the heading WATERBORNE US GULF COAST as published in Platts Oilgram U.S. Marketscan plus a premium of [REDACTED] US dollars per US barrel.

The applicable quotations shall be those published 1 days prior to the BILL OF LADING date, on the BILL OF LADING date, and the 1 quotes published immediately after the BILL OF LADING date of the shipment in question.

If the BILL OF LADING is a Saturday or a non publication day other than a Sunday or Monday then the applicable quotations shall be the 2 quotations published immediately before the BILL OF LADING and the 1 quotations immediately after.

If the BILL OF LADING is a Sunday or Monday non publication day then the applicable quotations shall be the 1 quotations published immediately before the BILL OF LADING, and the 2 quotations immediately after."

According to the Northville contract the following excerpt details how the purchase price was set, also dependent on the BOL issue dates.

"Based on Platts Oilgram US Gulf Coast Waterborne mean quotations for resid 3% averaged for the three (3) days around bill of lading, i.e., the day before, the day of and the day after, [sic] plus a differential of USD [REDACTED] per barrel.

Split weekend clause to apply (IE, If bill of lading or any pricing date falls on a Saturday or Non-Monday holiday, then preceding pricing date to apply. If bill of lading or any pricing date falls on a Sunday or Monday holiday, then following price date to apply."

Both provisions for pricing use the same formula for determining the average price of the product, and both provisions set the price based on the BOL dates. Given the terms for pricing, both the product purchase contract and the product sale contract have the same average-per-barrel base price. Therefore, because both the purchase and sale contracts use the same basis and

⁸ Northville Product Services LP contract ref [REDACTED]

dates for setting the average product price, the only difference is the premium/differential (hereafter premium) applied to the average product price. The Northville contract provides for a premium of [REDACTED] per barrel. BP's sale contract with Petromar provides for a premium of [REDACTED] per barrel. Since both contracts use the same formula and BOL dates to calculate price, the dates of loading and thus the average per barrel price cancel each other out and become irrelevant to profits on cargo price. The difference between the premiums of \$2.75 per barrel becomes the profit margin, so the profit does not change unless the premiums change. The profit margin remains \$2.75 no matter when the cargo is loaded. Therefore, BP's profit on the cargo does not change even though the loading dates may change, causing the base price to fluctuate. NPFC demonstrates this fact in the table below.

		Average Price per barrel			Load Price with Contract Premium		
		Marrero	Gretna	St. Rose	Marrero	Gretna	St. Rose
Northville Contract	Expected Date	\$ 101.70	\$ 101.70	\$ 102.63	[REDACTED]		
Petromar Contract	Expected Date	\$ 101.70	\$ 101.70	\$ 102.63	[REDACTED]		
Premium Margin					\$ 2.75	\$ 2.75	\$ 2.75
Northville Contract	Actual Date	\$ 104.78	\$ 99.35	\$ 96.95	[REDACTED]		
Petromar Contract	Actual Date	\$ 104.78	\$ 99.35	\$ 96.95	[REDACTED]		
Premium Margin					\$ 2.75	\$ 2.75	\$ 2.75
					58038 bbls	83012 bbls	177953 bbls
Original Dates ⁹	Contract Profit	bbls X premium margin			[REDACTED]		
Actual Dates ¹⁰	Contract Profit	bbls X premium margin			[REDACTED]		
Difference					\$ 0.00	\$ 0.00	\$ 0.00

In addition, according to the evidence, BP's purchase price paid to Northville included a premium of [REDACTED] rather than the [REDACTED] contemplated in the contract.¹¹ This represents a discount of the contract purchase price to BP. BP provided no evidence or explanation for this discount. Such a discount amounts to a profit increase of an additional \$1.82 per barrel to the Claimant on the cargo.

The Claimant states that it lost profits of \$1,020,315.87 on the cargo price. However, given the overall purchase price for the three loads of \$37,289,245.53¹² and the overall sales price for the three loads of \$38,902,317.57,¹³ the Claimant actually received a profit of \$1,613,072.03. The evidence demonstrates that Claimant did not realize a loss on this cargo. Therefore, the claim for losses due to price degradation is denied.

⁹ Expected dates without spill. See Expected loading dates discussion.

¹⁰ Dates after spill delay. See Actual loading dates discussion.

¹¹ See Northville Product Services, LP Price Set Confirmation dated 08/19/08.

¹² See Northville Product Services, LP Price Set Confirmation dated 08/19/08.

¹³ See BP invoices to Petromar #s 90122237, 90122236, 90122235

Conclusion

The Claimant has demonstrated some OPA-compensable lost profits. The NPFC finds that the Claimant should be compensated for lost profits due to extra demurrage paid in the amount of \$270,443.29, leaving a denied amount for demurrage of \$66,469.77. The NPFC denies the claim for lost profits due to cargo price degradation in the amount claimed of \$1,020,315.87. The total OPA-compensable amount for lost profits is \$270,443.29.

AMOUNT: \$270,443.29

Claim Supervisor:

Date of Supervisor's review: 6/28/2013

Supervisor Action: *Approved*

Supervisor's Comments: