CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/5/2009
Claim Number	: P05005-137
Claimant	: Logan Generating Company LP
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [redacted]
Amount Requested	: $85,910.79

I. BACKGROUND:

Oil Spill Incident: On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I struck a submerged anchor as it approached the CITGO Asphalt Refining Company terminal at Paulsboro, New Jersey. The anchor punctured the hull and caused the release of Venezuelan crude oil into the Delaware River. The FOSC issued a Notice of Federal Interest designating the vessel's owner, Frescati Shipping Company Limited, as the Responsible Party (RP). The RP denied all claims under the Oil Pollution Act of 1990 (OPA). The NPFC advertised for claims relating to the oil spill, so claimants do not have to submit claims to the RP prior to submitting them to the National Pollution Funds Center (NPFC).

Claimant: The claimant operates a coal-fueled, 218 megawatt (MW) cogeneration facility on the Delaware River. The power plant provides electricity to Atlantic City Electric (ACE)[1] – and provides steam to Ferro Corp. Uncommitted capacity and energy beyond ACE's requirements are made available in the regional wholesale market. The facility is 9.9 miles downriver from the location of the incident.

Claim Description: The claimant alleges that the ATHOS I oil spill forced it to reduce its power production resulting in reduced revenues from ACE for a brief period due to the oil in the river. The claimant also alleges that the oil in the river forced it to stop transferring steam to Ferro for a limited period as well. The claimant bases its claim for loss of profits on these two alleged disruptions to its business.

Related Claims: The NPFC received one package of claimed costs. They were broken down into property damage and lost profits, with added assessment costs. The NPFC recognized that a portion of the claimed lost profits were more appropriately characterized as removal costs. Therefore, the NPFC divided the claims into three separate claims as follow: 1) P05005-137-Lost Profits, 2) P05005-138-Property Damage, and 3) P05005-154-Removal Costs.

II. 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.

[1] At the time of the incident, Atlantic City Electric was named Connectiv. Therefore, the names may be interchanged within this determination.

"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”.

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Compensable damage types are natural resource damages, damage to real or personal property, loss of subsistence use of natural resources, lost government revenues, lost profits or impairment of earning capacity, and increased costs of public services. See 33 U.S.C. 2702(b)(2). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

The provisions of 33 CFR 136.231-136.235 provide the details for claims for profits and earning capacity. To substantiate a claim for lost profits, a claimant is required to 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)

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

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, 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).

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident.

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).

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

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).

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.

III. DETERMINATION OF LOSS:

General Information Regarding Claimant's Business:

According to the claimant, full load capacity provided to Atlantic City Electric under a power purchase agreement (PPA)[2] is 200.5 MWH. (I was unable to locate the 200.5 MWH in the PPA, but found evidence of it in Claimant's exhibit 15 data printouts). The revenues for the power production are based on a contract rate within the PPA and differ when the plant is producing power at full load and at lower production levels. Any excess power produced above the full load to ACE is sold on the regional energy wholesale market (PJM) under a power sales agreement (PSA)[3] with ACE. The PSA revenue is based on market prices per MWH less a contracted fee. The claimant's production of electricity produces steam as a by-product. Logan sells this excess steam to nearby Ferro Corporation for its use under a Steam Sales Agreement.[4] The steam revenue is also based on a contract rate.

The claimant draws water from the river to use as cooling water. The claimant states that its power plant equipment could potentially be damaged by oil in the cooling water.

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[2] The PPA is included in the claim documentation.
[3] The PSA is included in the claim documentation.
[4] The Steam Sales Agreement is included in the claim documentation.

Relevant Timeline:

1. **11/27/04 1420hrs -** notified Ferro Corp. to go on own steam due to oil spill (See Operations Supervisor log pg. 159)
2. **11/27/04 1805hrs –** Ferro on own steam ((See Operations Supervisor log pg. 160)
3. **11/27/04** - boom set up around Logan's pier (See Operations Supervisor log pg. p.160).
4. **11/28/04 2045hrs** – Ferro takes steam until after 0600hrs on 11/29/04 (See unit dispatch tracking log and Operations Supervisor log)
5. **11/28/04 2230hrs -** Oil observed around Logan's pier outside of boom (See Operations Supervisor log pg. 161).
6. **11/29/04 0015hrs** – Oil observed inside boom (See Operations Supervisor log pg. 161)
7. **11/29/04 0050hrs** – Raw water pumps shut down. (See Operations Supervisor log pg. 162)
8. **11/29/04 0425hrs** – De-rate order #52098 (See unit dispatch tracking log)
9. **11/29/04** – Work on installing mitigation system of pumping cooling water from rainwater/wastewater run-off basins.
10. **11/29/04 2256hrs** – achieved load at 53MW (See unit dispatch tracking log)
11. **11/30/04 0105hrs** – achieved load at 100MW (See unit dispatch tracking log)
12. **11/30/04 0137hrs** – achieved load at 53MW (See unit dispatch tracking log)
13. **11/30/04 0414hrs** – achieved load at 100MW (See unit dispatch tracking log)
14. **11/30/04 0810hrs** – achieved full load at 211MW (See unit dispatch tracking log and Operations Supervisor log pg. 163)
15. **11/30/04 0936hrs** – Ferro taking steam (See Operations Supervisor log pg. 163)

Causation:

The evidence shows that the Athos I oil reached the claimant's facility, which is less than ten miles downriver from the incident location well within the area affected by the oil spill. The claimant's records show that the presence of oil around its pier and raw water intake forced the claimant to shut down its raw water intake pump, which then forced the claimant to reduce power production because it did not have sufficient cooling water to run at full capacity. The claimant also had to stop steam transfer to Ferro for a short period of time. Full production and steam transfer were disrupted until a mitigation system could be put into place. (See Operations Supervisor's log).

Because of the risk of getting oil in its cooling water system, it was reasonable for the claimant to shutdown the water intake until a satisfactory substitute system could be put into action. The claimant only took one day to implement its backup system. Because the oil spill forced the cooling water intake shutdown, which forced the claimant to produce reduced power and stop its steam transfer, the claimant lost revenue for the capacity and steam differentials it would have earned had it been able to run at full capacity as requested by Connectiv at 0425hrs on November 29, 2004. Therefore, the oil spill caused the claimant a loss of revenue, which translates into a lost profit as discussed below.

Lost Profit Valuation:

The claimant's records and business were reviewed and analyzed by an unbiased certified forensic accounting firm, RGL-Forensic Accountants and Consultants (RGL). RGL used the timeline above to calculate the lost profits. The loss period for power sales began at 0425 on November 29th and continued through 0800 on November 30th. This was the period where Logan could not run its plant at full capacity since it lacked sufficient cooling water because of the oil in the river near its intake. RGL calculated the projected power production during this period and multiplied it by the applicable PPA contractual rates. RGL deducted actual revenue received to arrive at net revenue. During projected periods of full capacity power production, RGL also calculated the normally expected PSA excess power and multiplied this by the PJM real-time price and subtracted out ACE's fee. The loss period for steam revenue ran from 1805hrs on November 27th until steam transfer restarted briefly late on November 28th and continued through the morning of the 29th when steam transfer was again stopped until 0936hrs on November 30th. For steam revenue, RGL calculated projected steam revenue under normal conditions and subtracted any actual revenue earned during the loss period.

The lost revenue calculation is shown in RGL's spreadsheets labeled "Schedule1" through "Schedule 6." The lost PPA revenue is projected to be $65,209.00. The lost PSA revenue is projected to be $14,716.00. And the lost steam revenue is projected to be $819.00 for total lost revenues of $80,744.00. Once RGL calculated all the projected revenues above, it then deducted saved variable expenses. RGL reviewed the claimant's GAAP Income Statement for the year of 2004 up to November 30, 2004. This review recognized that claimant's non-continuing expenses amount to 79.58% of its total revenue. 79.58% of the projected revenue equals $64,256.00. Deducting the expenses results in net lost profits to Logan of $16,488.00. This is the compensable amount of lost profits.

Assessment Costs:

The claimant seeks a total of $69,422.79 in alleged assessment costs. The costs represent the billed invoices of three separate entities working under the name "Claims Assessment Group" or CAG[5] and are discussed below.

> RGL's billed costs of $18,240.70 are payable because it is evident that they are comprised of the costs of actually assessing the claimant's lost profits (i.e. calculating the value of the loss).
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> LTCI's billed costs of $4,421.86 are denied because they have not been shown to be costs of damage assessment, but rather appear to be primary contractor costs, business relationship preparation costs, administration costs and claim preparation costs. There is no evidence that these costs were for actual assessment/valuation done for claimant's lost profits.

[5] The CAG is made up of RGL – Forensic Accountants and Consultants (RGL), Lighthouse Technical Consultants (LTCI), and PCCI Marine and Environmental Engineering (PCCI).

PCCI's billed costs of $41,120.88 are denied because they are not costs of assessing the claimant's lost profits. They appear to be claim preparation and/or related to property damage and/or removal costs claim presentation. Unallocated costs of $5,639.35 were added as a percentage of the total invoiced costs by each entity. These costs are not detailed in the invoice and there is no basis for their payment. They must be denied.

The claimant was given the opportunity to allocate assessment costs across the three claims. The claimant did not do so. Therefore, we were forced to determine which costs are related to lost profits damage assessment. The rest of the costs alleged to be assessment costs are either not damage assessment costs, or are related to removal costs where no damage assessment is available or related to alleged property damages that are being denied and, therefore, are not compensable. The total payable assessment costs are $18,240.70.

Total Lost Profits plus compensable assessment costs equals $34,728.70.

IV. AMOUNT: $34,728.70

V. RECOMMENDATION:

The Fund should pay the claimant $16,488.00 for its lost profits and $18,240.70 for its costs of assessing those lost profits. The total amount is $34,728.70.

Claim Supervisor: [redacted]
Date of Supervisor's review:
Supervisor Action:
Supervisor's Comments: