

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/19/2009
Claim Number	: P05005-143
Claimant	: James J. Golden DBA Golden Point Marina
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: ██████████
Amount Requested	: \$50,751.00

### **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). After it paid for costs exceeding its limit of liability, the RP denied all claims under the Oil Pollution Act of 1990 (OPA). Since the RP denied all claims after exceeding its limit of liability and the NPFC advertised for claims relating to the oil spill claimants do not have to submit claims to the RP prior to submitting them to the National Pollution Funds Center (NPFC).

***Claimant:*** The claimant is the owner of the Golden Point Marina, which is located Front and Jansen Avenues in Essington, Pennsylvania. At the time of the spill, the claimant's marina was in a dilapidated condition and the owner was preparing it to undergo a major renovation.

***Claim Description:*** The claimant alleges that, as a result of the ATHOS I oil spill and the subsequent cleaning and repair of the marina, the marina lost slip rentals from 2005 through 2008, which resulted in lost profits to his business. The claimant submitted a companion claim for property damage (P05005-144).

### **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.

"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).

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 to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

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.

### **III. DETERMINATION OF LOSS:**

To receive payment from the Fund for lost profits a claimant must prove that it actually lost profits and that those lost profits resulted from the oil spill. Some of the evidence required to establish lost profits includes income tax returns, financial statements, and similar documents. By letter dated December 6, 2007, the NPFC requested documentation supporting the lost profits claim including executed slip rental agreements, financial documents showing slip rental revenue and expenses, tax returns and evidence that slip rentals were lost due to the spill. To date, the claimant has not provided any of this type documentation. The claimant has only provided a listing of slip rentals for 2008 with rental rates, and slip rental rates for 2005 and 2006. The submission is nothing more than unsupported assertions.

Golden Point alleges that it lost profits over the four years it took to renovate its marina. It alleges that the entire period of four years and the resulting delay in revenue for those four years was a result of the oil spill. However, the NPFC finds that the claimant has not demonstrated facts to support these allegations.

The problem for the claimant is that it has not shown that the marina would have been open for business during this period even if the spill had not occurred. The claimant also has not shown that the oil spill delayed its opening or even that customers were lost. The claimant has not provided financial or historical records or any other documentation of comparative figures.

The evidence shows that the marina would not have been ready for business during the potential loss period anyway. The claimant obtained a U.S. Army Corps of Engineers permit to renovate and maintain its marina. The permit was dated October 12, 2005, which was the earliest date the claimant could begin the renovation. This means that the renovation should not have started yet at the time of the oil spill and cleanup activities. The active cleanup of the Delaware River Shoreline ended around June 21, 2005. (See SITREP-POL 42) The evidence supports the conclusion that the renovation would not have been complete in time for the 2005 boating season anyway. However, according to Coast Guard records, the marina cleanup, specifically the claimant's marina decontamination, was complete no later than May 7, 2005. (See Shoreline Sign-Off Inspection Form stating that cleanup endpoint criteria were met for the area. Claimant's marina was specifically listed as observed on 5/7/05.) The claimant stated in his revised claim details attached to his May 9, 2008 letter that dock repairs took four years because of lack of funds. In our view, this lack of funding may have caused the further delays not the oil spill. Lack of funds for a renovation is an intervening cause that would break any potential causal link to the oil spill. The renovation went beyond 2005 and the marina would not have been ready for business even if the spill had not occurred. It is also important to note that the marina only had five finger docks at the time of the spill, but the claimant is seeking lost profits for the expanded marina with significantly more new finger docks that had not been installed yet.

Additionally, the claimant did not prove property damage in its property damage claim P05005-144. The fact that the claimant did not prove the property damage also weighs against him in this lost profits claim. The basis for the claim of lost profits is that the damage repair allegedly took four years causing him to lose profits over those four years, after which the marina became fully operational. The marina would not have been ready to open until late 2005 at the earliest even if the spill had not occurred.

As for evidence of lost slip rentals, the claimant never provided any proof that it lost customers. There are no notices of cancellation and no evidence that customers who would have rented slips did not because of the oil spill. Other marinas along the river in the spill zone opened for business during the spring of 2005 for boating season.

The preponderance of evidence leads to the conclusion that the claimant's marina has not demonstrated lost profits due to the oil spill because it would not have been ready to open in 2005 even if the spill had not occurred. The claimant has not met his burden of proving that he lost profits for 2005, much less over a four year period. Therefore, the NPFC finds that the claimant has not proven that the oil spill caused any lost profits and this claim must be denied.

**AMOUNT: \$0.00**

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: