

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/07/2009
Claim Number	: P05005-151
Claimant	: The Marwide Shipping Company, LTD
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity (Reconsideration)
Claim Manager	: [REDACTED]
Amount Requested	: \$248,352.84

### **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 Marwide Shipping Company, Ltd. (Marwide) is the owner of the M/V MAKRA which it time-chartered to STX Pan Ocean Co. Ltd. (STX), under a charter party executed on September 2, 2004. The vessel was operating under this time charter and unloading cargo at the Camden Marine Terminal at the time of the oil spill.

**Claim Description:** The claimant alleges that, as a result of the ATHOS I oil spill, the MAKRA was delayed 8.878472 days in departing the Delaware River on its next voyage. Marwide claims that it lost expected revenue due from STX and paid fuel costs for this period because the charterer took the vessel off-hire for the duration. The NPFC initially denied this claim on July 25, 2008. On August 28, 2008, the NPFC received the claimant's written request for reconsideration.

**Related Claim:** The NPFC previously paid the charterer, STX, for its losses related to the oil spill. The NPFC found that the vessel was, in fact, delayed by the spill for 8.878472 days.<sup>1</sup>

**MAKRA Facts:** November 26, 2004-December 9, 2004 - Delaware River port call  
The MAKRA arrived in the Delaware Bay at 1830 on November 26, 2004 and docked in port at Camden, NJ after 0100 on November 27, 2004, not long after the ATHOS I spill occurred, affecting the area where the vessel was docked. The vessel remained docked in Camden while it discharged its cargo of steel through 1810 on November 30, 2004, when it would have been ready to leave port. (See MAKRA deck logs). At that time, the Coast Guard had ordered that all

<sup>1</sup> See claim number P05005-045.

vessels be inspected and cleaned before being allowed to leave port. On November 30, the USCG vessel evaluation team inspected the vessel and determined that decontamination was necessary. (See Barwil Statement of Facts/Port Log for Camden, email correspondence between STX and Barwil, and generally USCG Sitreps). The Coast Guard maintained a list of all vessels delayed by the spill. The MAKRA appeared on the list. As evidenced by the Coast Guard's Vessel Inspection/Decontamination Priority List and Vessel Decon List, the vessel was cleaned on December 4, 2004 at which time it was cleared to sail. However, the master observed that oil still clung to the hull and needed further cleaning. After the vessel's Protection and Indemnity Surveyor photographed the hull and presented the pictures to the USCG, the CG agreed that further cleaning was necessary, rescinded its clearance decision and returned the vessel to the decontamination list. The vessel was cleaned again on December 8<sup>th</sup>. The vessel was not completely and satisfactorily cleaned until 1435 on December 9, 2004 (See Barwil Statement of Facts for Camden). The vessel left port at 1515 on the same day.

## **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 lost profits and that those lost profits resulted from the oil spill. For example, increased expenses incurred by the claimant caused by the oil spill which reduced the profits that would have otherwise been earned by the claimant would be compensable as lost profits.

#### **A. Vessel Delay:**

The ATHOS I oil discharge disrupted shipping in and out of the Delaware River. At the time of the spill, there were many large vessels in the area that were oiled. (See CG decontamination list). Because of the oil spill the MAKRA's hull was contaminated and the USCG FOSC required it to be cleaned before leaving the area. (See Vessel Inspection/Decontamination Priority List). The MAKRA had to wait for its turn to be cleaned. Upon completion of the first cleaning, the vessel remained contaminated and had to wait for a second decontamination, further delaying the vessel.

The MAKRA had planned on leaving port when it completed discharging its cargo at 1810 on November 30, 2004, but was delayed by the oil spill, the resulting river closures, the oiling of the hull and the two hull cleanings, and finally left port at 1515 on December 9. (See Barwil Statement of Facts/Port Log, deck log, and CG decontamination list.). The record shows that the vessel was delayed in Camden for a total of 213.0833 hours or 8.878472 days between November 30 (after it completed discharging cargo and was ready to leave) and December 9, 2004 (when the second hull cleaning was complete). (See deck log and Barwil Statement of Facts/Port Log).

## **B. Lost Revenue**

The claimant seeks \$240,606.59 in alleged lost charter payments for the 8.878472 days the MAKRA was placed off-hire under the terms of the Charter Party. STX operated the vessel under a time charter it entered with Marwide, who owned the vessel. Under the charter, STX utilized the vessel to transport other parties' dry cargo to various ports in the United States. Clause 4 of the time charter party provides the rate of hire at \$27,100 per day. This amount was payable for all days the vessel was on hire, and was suspended if the vessel were to go off hire. STX had originally submitted its claim to the NPFC including the lost hire payment amount for the delay period because it had to pay Marwide under the charter while it did not have beneficial use of the vessel. After disputing the whether any payments were due for the delay period, Marwide and STX entered into an agreement on December 15, 2005, to take the vessel "off-hire" for the 8.878472 days the vessel was delayed in the Delaware River by the ATHOS I spill. The settlement agreement specifically identifies the events at Camden in December 2004 as the cause for the return of charter revenue to STX. STX subsequently withdrew the portion of its claim seeking the charter payment. None of the amounts claimed for lost revenue in Marwide's claim were paid to STX in its claim. After STX withdrew its claim for money owed to Marwide, Marwide then submitted its claim for the lost revenue.

The NPFC recognizes that a net business loss accrued between the owner and charterer during the delay period. STX had deducted the amount of payments attributed to the delay period from its twelfth installment payment to Marwide and deposited it in an escrow account. (See Settlement Agreement dated December 15, 2005). The sum of \$250,000.00 was returned to STX as settlement of the dispute over the charter payments during the events at Camden. Had STX not received the money back, the NPFC would have paid this as a loss to STX. However, since the money was returned to STX, the NPFC finds that the net business loss still existed and it does not matter who carried the loss for it to be paid. In this case, the loss was shifted to Marwide who did not receive the benefit of revenue under the charter during the delay period as it would have if the spill had not delayed the vessel.

Clause 15 of the Charter Party provides the general conditions for taking the vessel off hire. The the claimant argues that Clauses 48 and 49 apply to their situation and the time off hire. Clause 48 (*Deviation/Put back*) provides conditions for suspending the charter payments for lost time caused by matters of the ship or crew. Clause 49 (*Seizure, Arrest*) provides for suspension of charter payments when the vessel is held up by any authority or legal process. Since the vessel was held in port to comply with the Coast Guard order for cleaning and the CG is obviously any authority, the conditions of Clause 49 have been satisfied and the vessel was rightly taken off hire.

The basic issue is whether Marwide received fewer profits than it would have if the spill had not occurred. The evidence supports such a finding. Marwide would have earned continuous charter payments during the period of the charter including the time the vessel was in Camden under normal circumstances. It is the spill that caused the vessel to be off hire. Taking the vessel off hire prevented Marwide from receiving revenue from STX during those 8.878 days - time and

money which Marwide could not recover. Marwide has shown that it received less revenue than it would have if the spill had not occurred and should be reimbursed for those losses.

### **C. Port Expenses**

The claimant seeks and the NPFC previously offered \$7,746.25 for fuel oil and diesel oil consumed while the vessel was in port during the oil spill. The time charter party between Marwide and STX assigned voyage and port expenses to each party. Clause 2 states that the charterer shall pay for all fuel, except as otherwise agreed, and port charges while the vessel is on hire. However, the fuel expenses shift to the owners when the vessel is off hire. (See clause 15 of the charter agreement). Since we found that the vessel was delayed for 8.878472 days, we find that the vessel did burn additional bunkers and diesel while in port. The amount is evidenced by the MAKRA Statement of Account dated December 17, 2004. This is a cost for which the owner would not have been responsible had the spill not occurred. Because the vessel was off-hire for that period and the costs of fuel were deducted from the owner's account at the end of the charter, the owner's profit on the charter was reduced by the amount paid for fuel. Therefore, the claimant is entitled to the \$7,746.25 spent on bunkers while the vessel was off-hire in port during the ATHOS I oil spill.

### **D. Conclusion**

The claimant should be paid the full amount of its claim including the lost charter revenue and increased port expenses totaling \$248,352.84.

**DETERMINED AMOUNT: \$248,352.84**

Claim Supervisor: Thomas S. [REDACTED]

Date of Supervisor's Review: 7/8/09

Supervisor Action: Allowed

Supervisor's Comments: