

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/16/2010
Claim Number	: N08057-033
Claimant	: MUR Shipping B.V.
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: ██████████
Amount Requested	: \$119,026.66

### **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 oil<sup>1</sup> were 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**

Murphy, Rogers, Sloss and Gambel (Murphy et al) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, MUR Shipping BV, Amsterdam (MUR). At the time of the collision, the M/V Siam Jade was being chartered by MUR<sup>2</sup> under a New York Produce Exchange Time Charter. At the time of the spill, the M/V Siam Jade was at Southwest Pass, with a scheduled intended berth at Global Plex Terminal at 0900 hours on July 24, 2008. The captain of the Siam Jade confirmed that the berth was vacant and ready to accept the vessel at this time; however, as a direct result of the oil spill, the vessel was unable to berth until July 28, 2008, at 1512 hours.<sup>3</sup>

The charter agreement between the two parties (MUR and Siam Jewels Maritime Limited (Siam Jewels)) was set at \$26,269.40 per day (although, according to the Hire Statement provided by MUR, they were charged \$26,663.44 per day<sup>4</sup>), including overtime, payable fifteen days in advance.<sup>5</sup> The M/V Siam Jade was delayed at Southwest Pass for a total of 4.1806 days. MUR is claiming a direct income loss of \$111,469.18 for this time period. Additionally, during these 4.1806 days, MUR claims the vessel consumed one metric ton of MDO fuel and one metric ton of IFO, increasing costs by \$7,557.48. When the income loss and increased bunker expenses are combined, MUR's claim totals \$119,026.66.

### **IV. APPLICABLE LAW**

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

<sup>2</sup> See Time Charter between Siam Jewels Maritime Limited and MUR, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>3</sup> See Statement of Facts, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>4</sup> See Hire Statement, dated July 15, 2008, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>5</sup> See Clause 75, "Hire Details," of the charter between MUR and Siam Jewels, submitted with the claim by Murphy et al for MUR to the NPFC on 6/04/2009

In general, claims for the removal costs or damages must first be presented to the RP per 33 USC 2713(a). If the RP denies the claim or does not settle the claim within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 USC 2713(c)

The uses of the OSTLF are described at 33 USC 2712(a). It provides in relevant part that:

“The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages.”

Damages include damages for loss of profits or earnings capacity as a result of loss or destruction or real or personal property or natural resources. 33 USC 2702(b)(E) Damages are further defined to include the costs of assessing the damages. 33 USC 2701(5)

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 USC 2717 (h)(2)

In any case in which the president has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages. 33 USC 2712 (i)

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 USC 2713 (e) Those regulations are found at 33 CFR part 136.

Under 33 CFR 136.105(a) & 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:

“the 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 the preparation of the claim.” 33 CFR 136.105(e)(8).”

With regard to claims for loss 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.*

Pursuant to the provisions of 33 CFR 136.231, claims for the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss or 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 & B or 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 or 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, comparable 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)

If a third party claimant or RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF, but the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for the 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, and 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)

## **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 claimant seeks \$119,026.66 in loss of profits, as a consequence of the M/V Siam Jade's additional time and fuel costs.
6. The claimant asserts that if not for the oil spill the voyage would not have resulted in additional time and fuel.
7. Presentment of costs to the RP was made by Murphy, Rogers, Sloss and Gambel, representatives for MUR Shipping BV, Amsterdam, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded denying responsibility for these costs.
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant to document what took place at the time of the incident.

### ***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 shipping in and out of the Mississippi River.<sup>6</sup> At the time of the spill, there were many large vessels in the area that were oiled due to

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<sup>6</sup> Polreps 1-18; documenting river closures and traffic management through 8 August 2008.

the DM 932 oil spill. The Siam Jade had to stay at Southwest Pass from the dirty zone awaiting USCG clearance to depart, which was granted on July 27, 2008.<sup>7</sup>

The Claimant provided a record of the incident by submitting a Timeline of River Closures and a Statement of Facts, which clearly demonstrates that the Mississippi River had closed and vessel traffic was redirected during the oil removal efforts.<sup>8</sup> Additionally, the USCG provided POLREPS to substantiate that the Mississippi River was either closed to vessel traffic or open to limited traffic during the response period.

**C. Vessel Delay Time:**

MUR is claiming that the oil spill directly caused them loss of profits because the Siam Jade was sitting idle and the voyage was increased by 4.1806 days. The Siam Jade was delayed as follows:

From 7/23/2008 @ 16:40 hours until 7/27/2008 @ 21:00 hours

The total stoppage time equals 100.33 hours (6020 minutes), or approximately 4.1806 days.<sup>9</sup>

Per the terms of the charter agreement between MUR and Siam Jewels, MUR continued to be charged the hire rate of \$26,663.44 per day for the 4.1806 days they were detained due to the oil spill. \$26,663.44 per day multiplied by 4.1806 days of delay equals a claimed \$111,469.18 in loss of revenue due to the oil spill.<sup>10</sup>

**D. Increased Bunkers**

The documented delay resulted in an increase in the consumption of bunkers. In their claim submission, MUR shows the breakdown of the amount of bunkers consumed during the idle period:<sup>11</sup>

Times and Dates:	MDO
7/23/2008 @ 16:40 hours	58.4 mts
7/27/2008 @ 21:00 hours	52.8 mts
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	5.6 mts

Total:

*The top number represents the amount of oil (in tons) that were read at the time of the stoppage, subtracting the amount of oil read at the time that the Siam Jade resumed operations to find the difference.*

At a cost of \$1349.55/mt for the MDO, the additional bunkers consumed amount to \$7,557.48 (\$1349.55/mt X 5.60 = \$7557.48).<sup>12</sup>

<sup>7</sup> See Statement of Facts submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>8</sup> See Timeline of River Closure and Statement of Facts, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>9</sup> See Statement of Facts, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>10</sup> See Hire Statement, dated July 15, 2008, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>11</sup> See Vessel Logs, submitted by Murphy et al for MUR to the NPFC on 3/11/2010, and email from Ms. [REDACTED] to Ms. [REDACTED], NPFC, dated 3/11/2010

<sup>12</sup> See Bominflot Fuel Invoice, Bominflot Bunker Delivery Receipt submitted by Murphy et al for MUR to the NPFC on 3/11/2010, and email from Ms. [REDACTED] to Ms. [REDACTED], NPFC, dated 3/11/2010

**E. Analysis:**

MUR submitted a claim with which they were able to demonstrate that the vessel they chartered was indeed negatively impacted and delayed by the DM 932 oil spill. However, simply because a vessel is delayed, it does not always translate into a loss of profit claim under OPA, as is the case here.

The time-charter between Siam Jewels and MUR states that MUR will pay a daily rate of hire of \$26,269.40 per day (although, according to the Hire Statement provided by MUR, they were charged \$26,663.44 per day<sup>13</sup>), including overtime, payable fifteen days in advance.<sup>14</sup> MUR claims that, because they paid a daily rate, in advance, to fulfill their obligation to Siam Jewels, they are entitled to be reimbursed for the 100.33 hours they were delayed. Their reasoning is that, by paying this hire rate during the delay, MUR lost profits. The NPFC finds that this conclusion is incorrect. While it is true that the voyage did fall behind schedule by 100.33 hours, it did not affect MUR's bottom line. The claimant has not met their burden to demonstrate that, but for the oil spill, they would not have had the charter costs and that, ultimately, the charter costs and/or the days of delay affected the company's bottom line. The M/V Siam Jade was under charter to MUR for a period of 18-24 months. MUR paid the hire rate fifteen days in advance regardless of whether or not the vessel was used. MUR also shows, in their own "Voyage Charter Recap," that they had already budgeted for 2.5 spare days. Additionally, MUR had a freight rate charter between both Barton Mines Company, LLC and Shyvers Savoy Shipping Limited to deliver garnet sand in bulk and titanium slag (respectively). MUR has not shown proof that either of these two companies penalized them for the delay in the receipt of their shipment, nor does MUR show any proof that Siam Jewels charged any demurrage either. As MUR's revenue remained the same, and the long-term time charter remained the same, the delay itself did reduce the projected profit.

MUR does prove, through documentation provided the NPFC, that they also incurred \$7,557.48 of increased bunker costs as a direct result of the oil spill. These costs (as explained in sub-point D above) did detract from MUR's projected profit, and, therefore, are valid and compensable for that voyage.

**F. Determination:**

The NPFC hereby determines that the OSLTF will pay **\$7,557.48** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-033. All costs claimed are for charges paid for by the Claimant for damages as that term is defined in OPA and, are compensable damages, payable by the OSLTF as presented by the Claimant.

**VI. DETERMINED AMOUNT: \$7,557.48**

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

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<sup>13</sup> See Hire Statement, dated July 15, 2008, submitted by Murphy et al for MUR to the NPFC on 6/04/2009

<sup>14</sup> See Clause 75, "Hire Details," of the charter between MUR and Siam Jewels, submitted with the claim by Murphy et al for MUR to the NPFC on 6/04/2009