CLAIM SUMMARY / DETERMINATION FORM

Date	:	4/21/2010
Claim Number	:	N08057-041
Claimant	:	Weeks Marine, Inc.
Type of Claimant	:	Corporate
Type of Claim	:	Loss of Profits
Claim Manager	:	[redacted]
Amount Requested	:	$20,711.60

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 of oil[1] were released into the Mississippi River. As a result of this of this incident, oil released and river currents caused a vast geographical area to be impacted by oil. The resulting spill response, which included the booming of extensive portions of the river and was coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic. The United States Coast Guard (USCG) implemented a safety zone between mile markers 97 and 60 on the Mississippi River and restricted vessel traffic to a safe speed outside of this area as well.

II. Responsible Party

American Commercial Lines LLC (ACL) 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

Mouledoux, Bland, LeGrand & Brackett (MBLB) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Weeks Marine, Inc. (Weeks). At the time of the incident Weeks had ongoing operations in the affected geographic area. One of Weeks' vessels, the Dredge Tom James, was performing dredging operations for the Unites States Army Corps of Engineers' (USACE) Plaquemines Parish Pass A'Loutre Sediment Mining Project.[2] As a consequence of the spill, the USACE chose to discontinue operations because they worried the materials being excavated from the site contained oil.

Weeks competed for-- and was awarded-- the USACE contract for the Plaquemines Parish Pass A'Loutre Sediment Mining Project. Under this contract, Weeks was to excavate materials dumped by hopper dredges and pump the materials via pipeline to an upland marsh restoration site.[3] The USACE discontinued the project after the spill on July 29, 2008 due to environmental concerns.[4] Weeks had originally been contracted out to pump a quantity of 4,000,000 cubic

[1] See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008
[2] See USACE Contract No. W912P-8-C-0039, submitted with the claim by Weeks Marine on 6/29/2009
[3] See USACE Contract No. W912P-8-C-0039, submitted with the claim by Weeks Marine on 6/29/2009
[4] See emails between USACE and Weeks Marine, submitted with the claim by Weeks Marine on 6/29/2009

yards, but had only dredged approximately 3,704,120 cubic yards when the project was discontinued.[5]

On June 29, 2009, Weeks Marine, Inc. submitted a damages claim to the National Pollution Funds Center (NPFC), in the amount of $20,711.60. This claim is for lost profits based on the USACE contract in place at the time of the oil spill, from July 23, 2008 through July 28, 2008.

IV. APPLICABLE LAW

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

[5] See USACE Contract No. W912P-8-C-0039 and Daily Dredge Report for July 29, 2008, submitted with the claim by Weeks Marine on 6/29/2009

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 $20,711.60 in loss of profits, as a consequence of the M/V Dredge Tom James being unable to finish out its contract.
6. The claimant asserts that if not for the oil spill, the contract would have been completed in full.
7. Presentment of costs to the RP was made by Weeks, 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 activities in and out of the Mississippi River.[6] Weeks calculates, based on the contract awarded by the USACE, that their total loss of revenue is $20,711.60.

The documentation shows costs and profits, which can be broken down as follows:

Quantity contracted out by USACE:	4,000,000 cubic yards
Unit price per cubic yard:	$1.95
Total contract amount (estimate):	$7,800,000.00
Estimated cost per cubic yard:	$1.88[7]
Total estimated cost of dredging:	$7,520,000.00
Gross margin per cubic yard:	$0.07
Total estimated profits:	$280,000.00
Total actual cubic yards dredged:	3,704,120 cubic yards
Total amount rewarded before river closure:	$259,288.40
Gross margin (unrealized):	$ 20,711.60

A total of **$20,711.60** in profits remained unrealized by Weeks because operations had shut down.

C. *Analysis:*

The Claims Manager confirmed that the claimant was, in fact, rewarded the W912P-8-C-0039 Plaquemines Parish, Pass A'Loutre Sediment Mining Project contract from the USACE to dredge 4,000,000 cubic yards, but were unable to finish as a direct result of the DM 932.[8] Because of the spill, and the fact that the USACE was concerned that the materials being

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[6] Polreps 1-18; documenting river closures and traffic management through 8 August 2008.

[7] Cost based on Weeks Cost Summary Information submitted to the USACE on 3/11.2008, submitted to the NPFC via email from Mr. [redacted] to Ms. [redacted] NPFC, on 1/06/2010

[8] See claim submission documents, submitted with the claim by Weeks Marine on 6/29/2009, the USACE Contractors Quality Control Report for 7/29/2008, signed by Mr. [redacted], submitted by Mr. [redacted], USACE, to the NPFC on 3/26/2010 and the signed affidavit from Mr. [redacted], sent via email from Mr. [redacted] to Ms. [redacted], on 4/21/2010

excavated contained oil, the contract was discontinued 295,880 cubic yards short. As shown above, 295,880 cubic yards multiplied by the gross margin per cubic yard totals $20,711.60.

On that basis, the Claims Manager hereby determines that the claimant incurred **$20,711.60** of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim # N08057-041. The claimant states that all costs claimed are for damages incurred by the claimant for this incident beginning on July 29, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

D. ***Determined Amount:***

The NPFC hereby determines that the OSLTF will pay **$20,711.60** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-041. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

VI. DETERMINED AMOUNT: $20,711.60

Claim Supervisor: [redacted]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: