CLAIM SUMMARY / DETERMINATION FORM

Date	:	10/29/2009
Claim Number	:	N08057-045
Claimant	:	Energy Shipping S.p.A.
Type of Claimant	:	Corporate (US)
Type of Claim	:	Loss of Profits and Earning Capacity
Claim Manager	:	[redacted]
Amount Requested	:	$343,646.27

I. Background:

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision with M/T TINTOMARA and discharged oil into the Mississippi River, a navigable waterway of the United States.

II. Responsible Party

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a responsible party (RP) under the Oil Pollution Act (OPA).

III. Claimant

Energy Shipping S.p.A. (Claimant) chartered the vessel CARGO ENDURANCE to load cargo at the IMT facility in Myrtle Grove, Louisiana near Mile Marker 57 on the Mississippi River.

IV. Claim Description

Energy Shipping S.p.A. seeks $343,646.27 in alleged lost profits as a direct consequence of the July 23, 2008, Tank Barge DM 932 oil-spill incident. On this date, the Claimant was operating the M/V CARGO ENDURANCE under a one-trip charter contract with Atlas Trading and Shipping, the vessel's owner. At the time of the incident, the vessel was en route to load cargo in Myrtle Grove, Louisiana on the Mississippi River. The Claimant states that its chartered vessel was delayed when the U.S. Coast Guard closed 100 miles of the Mississippi River from New Orleans to the Gulf of Mexico for the period from July 23 through July 28, 2008. During this time frame, the Claimant alleged that the M/V CARGO ENDURANCE was delayed at the Southwest Pass Fairway Anchorage for 5.193 days beginning at 08:22 on July 23, 2008, when the vessel tendered its Notice of Readiness, through 13:00 on July 28, 2008, when the vessel weighed anchor to head upriver. The Claimant seeks to recoup its economic losses as a direct result of the delay as additional expenses in the form of demurrage expenses of $311,583.33, $19,777.48 in additional fuel expenses, $11,152.86 in additional pilotage, $1,062.60 in additional launch services and $70.00 in additional agency fees. Overall, the Claimant asserts that the delay caused by the oil-spill incident required the Claimant to pay extra expenses it would not have paid had it not been delayed in port. Thus, the additional expenses resulted in reduced profits for the charterer.

The Claimant submitted the claim to the RP on January 19, 2009, as indicated on the Oil Spill Liability Trust Fund Claim Letter and copy of letter sent to the RP, both received by the National Pollution Funds Center (NPFC) on July 17, 2009. The RP had not settled with the Claimant as of the date of submission of the claim to the NPFC, which was more than the required 90-day statutory time period for the RP to settle the claim. On July 21, 2009, the NPFC notified the RP that Claimant submitted a claim The RP notified the NPFC that a declaratory judgment action had been filed in the United States District Court for the Eastern District of Louisiana against Energy Shipping.[1] The Claimant did not file a counter claim to this action. On September 2, 2009, the court stayed the declaration action and administratively closed the case under further order of the court as to any remaining defendants. [2]

V. 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)(A)-(E).

The provisions of 33 CFR 136.231-136.235 provide the details for claims for loss of profits or impairment of earning capacity due the injury, destruction of, or loss of real or personal property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. 33 CFR 136.231(a).

To substantiate a claim for lost profits or impairment of earning capacity, 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

[1] See Nicoletti Hornig & Sweeney letter to the NPFC dated August 20, 2009.
[2] See United States District Court, Eastern District of Louisiana order dated September 2, 2009.

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.

VI. DETERMINATION OF LOSS:

The tank barge DM 932 oil-spill incident and response disrupted shipping in and out of the Mississippi River. On July 23, 2008, the Captain of the Port New Orleans (COPT) issued a Marine Safety Bulletin establishing a Safety Zone on the Lower Mississippi River from the Southwest Pass Buoy to Mile Marker 98. The NPFC reviewed the Coast Guard Pollution Reports (POLREPS) which clearly state that vessels transiting the Safety Zone were delayed from July 23, 2008 until well after July 28, 2008. POLREP eight, issued on July 28, 2008, stated that the Safety Zone from Mile Marker 97 through mile marker 60 would be maintained for the indefinite future to ensure integrity of boom systems and safety of pollution-response workers. The Maritime Transportation System Recovery Unit (MTSRU) coordinated vessel movements during the oil-spill response based on immediate facility operational impact and potential future economic impact.[3]

As mentioned above, the Claimant seeks $343,646.27 for demurrage, pilotage costs, launch services, fuel costs, and agency fees. The claimant was unable to mitigate these losses through alternative employment or business because the charter was for a single trip to pick up cargo in Myrtle Grove up the Mississippi River and deliver it to its destination. Since the river was closed, the vessel was delayed in this single purpose voyage. The claimed costs are discussed below.

1. Additional Charter Hire

A. **Claim**: Claimant states that it incurred 5.193 days of total additional time waiting to enter the Mississippi River due to closure of the river by Captain of the Port order.

[3] See POLREP 7 paragraph 3.E.4

Claimant's charter-agreement rate-of-hire cost is $60,000.00 a day.[4] The Claimant calculated the "demurrage loss," the liquidated costs due to the delay as: $60,000.00 x 5.193 = $311,583.33.[5] The NPFC recognizes that this was a charter obligation requiring the Claimant to pay when the vessel was delayed as the direct result of this oil-spill incident.

B. **Documentation**: Claimant provided a Port Log and Statement of Facts, which were signed by the Master of the M/V CARGO ENDURANCE and the General Maritime Transportation Services, as port agents. The Notice of Readiness (NOR) was issued at 0822 on July 23, 2008. The logs show that the vessel was navigating upriver on July 23, 2008 at 1355 hours when, due to the oil spill incident, the Coast Guard ordered the pilot to return the vessel to the Southwest Pass Fairway Anchorage. The logs further indicate that the charter vessel was idle until July 28, 2008, at approximately 1300 when the vessel heaved anchors and departed Southwest Pass Fairway Anchorage. At approximately 16:09 the vessel resumed its northbound transit. The logs do not document the time on July 28, 2008, when this vessel reached the turnaround location on its second transit (i.e. that point in the Mississippi River where the vessel had received CG orders on its first transit to turn around). The Claimant also provided a Charter Hire Statement from the vessel owner, Atlas Trading and Shipping, from July 20, 2008 through August 28, 2008. This statement shows that payment was made at the $60,000.00 day rate without any credits for the delays.

C. **NPFC Findings**: The NPFC finds that the vessel time delay started on July 23, 2008 at 1355 instead of 0822 when the NOR was tendered as claimed, because the vessel delay began when the Coast Guard ordered the vessel to turn around and proceed to Southwest Pass Fairway Anchorage. The logs do not document the precise moment the vessel reached the original "turnaround" point in the Mississippi River on its second transit. However, to make the Claimant whole, the NPFC estimated that the vessel returned to this same point at approximately 19:09 on July 28, 2008.[6] This more accurately represents the end of the delay period versus the Claimant's representation that the "demurrage" ended at 1300 when the vessel weighed anchor and began its transit without further delay.

Accordingly, the delay from July 23, 2008 at 1355 until July 28, 2008 at about 19:09 equals 5.2181 days. To calculate the "extra charter hire" due to the oil-spill incident delay, the 5.2181 days is multiplied by the $60,000.00 a day charter rate for a total of $313,086.00, which is slightly higher than the claimed amount.

The NPFC finds that this "additional charter hire" amount due to the tank barge DM 932 oil spill incident delay is compensable as a reduction in profit of the voyage with

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[4] See Claimant Charter Clause 61

[5] Actually, it equals $311,580.00. The difference is likely attributable to rounding.

[6] The NPFC estimated that on the second transit the vessel reached the point where it had been ordered to turn around about 3 hours after changing pilots passing Pilottown, since it was about 3 hours past this point on the first transit when it received the CG orders to turn around.

fixed revenue. Further, the Charter Hire Statement from vessel owner reflects that the Claimant did not receive credit for the delays caused by the oil spill incident.

2. **Additional Fuel Costs**

A. **Claim**: Claimant states that it incurred extra marine diesel oil (MDO) fuel costs due to the closure of the Mississippi River by the Captain of the Port order as the direct result of the DM 932 oil-spill incident. The additional fuel costs represent the MDO consumed by the M/V CARGO ENDURANCE from the time it received orders to return to the Southwest Pass Fairway Anchorage through the period the vessel remained at anchorage until July 30, 2008 at 1300. All bunkers are paid for by the Claimant according to the Charter in place with the vessel's owner.[7] Total extra fuel consumed due to the delay was 15.2 metric tons at a claimed cost of $19,777.48 as detailed below.

B. **Documentation**: Claimant provided a Port Log and Statement of Facts that were signed by the Master of the M/V CARGO ENDURANCE and the port agent. They also provided a Doubleight, Ltd. bunkering invoice dated August 13, 2008, which provides bunker costs per metric ton (pmt) and a lump-sum barging cost. The table below shows the claimed additional bunker consumption:

SW Pass	**MDO**
Arrive SW Pass	
23 Jul 08 0822	92.8
Weigh Anchor	
28 Jul 08 1240	77.6
Consumed	**15.2**
Total Additional Bunkers	**15.2**
Unit Price PMT	$1,282.00
Delivery Charge PMT	$19.15
Total Cost PMT	**$1,301.15**
Total Cost of Additional Bunkers Consumed	**$19,777.48**

C. **NPFC Findings**: The NPFC finds the fuel consumption number to be a reasonable representation of the fuel spent during the M/V CARGO ENDURANCE delay of its upriver trip as the result of this oil-spill incident, and is supported by the Port Log / Statement of Facts. However, the NPFC questions the barging cost, which is a lump-sum cost. In this particular case, the Claimant would have had to pay the barging cost no matter how much bunkers it required. Because this cost has not been linked to the

[7] See Claimant Charter clause 51

delay caused by this incident, this barging cost is denied. The NPFC recalculation of the bunker cost is as follows:

Total Additional Bunkers Consumed Due to the Delay	**15.2**
Unit Price PMT	$1,282.00
Delivery Charge PMT	N/A
Total Cost PMT	**$1,282.00**
Total Cost of Additional Bunkers Consumed	**$19,486.40**

The NPFC finds the total extra bunkers consumed due to the delay were 15.2 metric tons of MDO. The NPFC finds the total compensable additional bunker costs to be $19,486.40. This increased consumption was the result of the DM 932 oil-spill incident and the consequent river closure by the Coast Guard Captain of the Port.

3. **Additional Pilotage Costs**

A. **Claim**: Claimant states that there were additional Associated Branch Pilots' and Crescent River Port Pilots' Association charges because of the delay to the vessel as the result of the DM 932 oil-spill incident and the river closure.

Total extra pilotage costs claimed due to the vessel delay are $11,152.86. They include Associated Branch Pilots inbound on July 23 for $2,021.64 and outbound for $2,025.30; and Crescent River Pilots inbound on July 23 for $3,552.96 and outbound for $3,552.96.

B. **Documentation**: Claimant provided invoices from the Associated Branch Pilots and the Crescent River Port Pilots' Association showing that it had to pay for the upriver transit twice and the extra downriver transit when it was ordered to return to the Southwest Pass Fairway Anchorage. These invoices provide total costs incurred for the vessel being piloted downriver after the vessel was ordered to return to the Southwest Pass Fairway Anchorage and back upriver for the second transit necessitated by the river closure. The Claimant requested only the amounts for the first transit up and downriver on July 23, 2008.

C. **NPFC Findings**: Only the costs incurred because of the oil spill incident are compensable. The NPFC finds that the charges paid by the Claimant for the delay resulting from the tank barge DM 932 oil-spill incident constitute a reduction of Claimant's profit for the charter of this vessel. The NPFC finds all pilotage costs incurred for the first roundtrip transit on July 23, 2008, necessitated by the river closure to be compensable in the amount claimed, because the first transit was interrupted by the tank barge DM 932 oil-spill incident, necessitating a second transit. The Claimant will be made whole by reimbursing it for the unnecessary partial transit. The Claimant normally would only have to pay for one complete roundtrip transit, not a partial roundtrip transit plus a complete roundtrip transit. Therefore, since the Claimant should only be responsible for one complete roundtrip transit, the Fund will reimburse it for the $11,152.86 extra expense of the partial river transit as the result of the delay due to this incident.

4. **Additional Launch Services Expenses**

A. **Claim**: Claimant states that it incurred $1,062.60 in launch service expenses for the river pilots due to the closure of the river by Captain of the Port order. This amount represents the expenses paid to get the pilots to and from the ship during the partial transit of the ship on July 23, when the ship was forced to return to the Southwest Pass Fairway Anchorage.

B. **Documentation**: Claimant provided invoices and launch service tickets from Delta Launch Services, LLC demonstrating that the services were for transporting the pilots to the vessel over one partial roundtrip transit on July 23 and the subsequent transit on July 28. The Claimant requested only the amounts for transporting pilots to the vessel for the first transit up and downriver on July 23, 2008, which are $531.30 for the upriver transit and $531.30 for the downriver transit.

C. **NPFC Findings**: Only the costs incurred because of the spill are compensable. The NPFC finds that the charges paid by the Claimant for the partial transit are extra expenses caused by the spill, which reduced the Claimant's profit. Because this expense is contingent on the pilotage, and the pilotage for the first partial transit was found to be compensable, the related launch services are also compensable. The NPFC finds all launch services costs incurred for the first roundtrip transit on July 23, 2008, necessitated by the river closure due to this incident are compensable in the amount claimed. Accordingly, the NPFC will reimburse the Claimant for the $1,062.60 which amounted to the extra expense and thus lost profits resulting from the partial river transit incurred by the Claimant on July 23, 2008, as the result of this incident.

5. Additional New Orleans Board of Trade Expenses

A. **Claim:** Claimant states that it spent an additional $70.00 in fees paid to the New Orleans Board of Trade. According to the Claimant, the New Orleans Board of Trade keeps records of vessel ETAs, actual arrivals, schedules, load/discharge ports etc. and works with local agents to provide this information. The Claimant was forced to pay this fee twice since it had to travel up the river to New Orleans twice.

B. **Documentation:** The Claimant provided a copy of the two New Orleans Board of Trade invoices for the two upriver transits. These invoices correspond to the two dates of the vessel's upriver transits.

C. **NPFC Findings:** Only the costs incurred because of the spill are compensable. The NPFC finds that the Board of Trade charges paid by the Claimant are extra expenses incurred for the partial transit that resulted from the oil-spill incident. The NPFC finds the Claimant should be reimbursed $70 for the additional New Orleans Board of Trade expense.

Conclusion:

The NPFC finds that the Claimant suffered economic losses as additional expenses directly caused by the tank barge DM 932 oil-spill incident. The expenses in this claim represent increased expenses for this type of voyage with fixed revenues. The additional expenses incurred by Claimant's vessel, the M/V CARGO ENDURANCE, without a commensurate increase in revenue translate into a net loss of profits to Claimant. Therefore, additional charter hire expenses of $313,086.00, $19,486.40 in additional fuel expenses, $11,152.86 in additional pilotage, $1,062.60 in additional launch services and $70.00 in additional agency fees are compensable to Claimant under OPA as lost profits.

AMOUNT: $344,857.86

RECOMMENDATION:

The claimant should be paid it proven loss of profit in the amount of $344,857.86, which it lost in the form of additional expenses that reduced its profits on the voyage.

Claim Supervisor: [redacted]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: