CLAIM SUMMARY / DETERMINATION FORM

Date	:	4/21/2010
Claim Number	:	N08057-069
Claimant	:	Zito Fleeting, LLC
Type of Claimant	:	Corporate
Type of Claim	:	Loss of Profits and Earning Capacity
Claim Manager	:	Alyssa Lombardi
Amount Requested	:	$76,173.05

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 and the resulting spill response, coordinated by the Federal On-Scene Coordinator (FOSC) and the Unified Command, resulted in a closure of the river to vessel traffic initially. As the clean-up progressed, the FOSC had the river reopened, but traffic had to be managed around ongoing response efforts for a period of time.

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

Zito Fleeting, LLC (Zito) has submitted a claim into the National Pollution Funds Center (NPFC) for economic damages (loss of profits) sustained as a result of the DM 932 oil spill. Zito is in the business of storing and staging barges and barge tows for others at their three fleeting areas on the Mississippi river. Zito earns income in storing the barges and in using it's tugboats to move assemble and break-up larger barge tows. The facilities are located at; Mile Marker (MM) 105,; at MM 103; and at MM 95. Each fleet serves mostly local docks and waterways. MM 95 is the Algiers Barge Fleeting area, and it serves the East/West canals and the lower Mississippi docks, while the other locations service the upper docks. Because the Algiers Fleet was in such close proximity to the DM 932 oil spill (MM 98.9), when it occurred, all revenue generating activity was stopped at this fleeting area. Zito claims that this drop in activity did not result in an increase in in later or delayed business; rather, the vessel traffic was lost and never regained.[2] Most barge owners who would normally use Zito's services at the Algiers Barge Fleeting area held their barges at their own facilities and found alternative means to transport their goods.[3]

As a direct result of the oil spill, Zito is claiming a loss of fleeting revenue in the amount of $11,649.00, a loss of boat revenue for the tug, M/V Connie Z, in the amount of $58,894.80 and

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[1] See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

[2] See Daily Barge Counts for 7/23 through 8/13 for MM105 for 2005, 2006 and 2007, submitted to the NPFC via email by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito, dated 3/30/2010 and See Daily Barge Counts for 7/23 through 8/13 for MM103 for 2005, 2006 and 2007, submitted to the NPFC via email by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito, dated 3/31/2010

[3] See Conference Call Recap, as edited by Mr. C. Gordon Starling, counsel for Zito, submitted to the NPFC via email by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito, dated 3/15/2010

additional expenses for use of the assist boat, M/V Shane C, in the amount of $5,629.25. Zito's total combined claim amounts to $76,173.03.[4]

IV. APPLICABLE LAW

Claims may be presented first to the Fund if the President or his delegated representative has advertised or notified claimants that the Fund is accepting claims resulting from an oil discharge. 33 U.S.C. §2713(b)(1)(A).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:
"(a) Uses generally
The Fund shall be available to the President for –
(4) [T]he payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages; . . .
(b) Defense to liability for Fund

The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of the claimant."

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §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 U.S.C. §2712(h)(2).

In any case in which the President has paid an amount from the OSLTF for any removal costs or damages specified under 33 U.S.C. §2712(a), no other claim may be paid from the Fund for the same removal costs or damages. 33 U.S.C. §2712(i).

Congress directed the President to promulgate regulations "for the presentation, filing, processing, settlement, and adjudication of claims…" 33 U.S.C. §2713(e). Those regulations are found at 33 CFR Part 136.

Under 33 CFR 136.105(a) and 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:

"[T]he 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 preparation of the claim." 33 CFR 136.105(e)(8).

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[4] According to Zito's published rate schedule, this claimed total could amount to $222,134.65. However, while the Algiers Fleet is open to the public, Ingram Barges accounts for the majority of Zito's business. For this reason, Zito has calculated their claim based on the Ingram contracted rates, rates that are lower than the public rates. See Ingram Rate Sheet, Zito Exhibit C-8 and Zito Claim Response letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

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 loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of 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 and B of 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 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)

If a third party claimant or an 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 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; any 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).

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

V. DETERMINATION OF LOSS:

A. *Overview:*

1. FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports under Federal Project Number N08057.

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. 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.
4. 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.
5. The claim was submitted on time.
6. The claimant seeks $76,173.05 in loss of profits, as a consequence of the claimed lost revenue and additional expenses incurred.
7. The claimant asserts that, if not for the oil spill, Zito would not have incurred the loss of profits and additional expenses, as stated in Section A, Sub-point 6 above.
8. Presentment of costs to the RP was made by Zito, 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.
9. 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. At the time of the spill, many vessels were detained and most river operations ceased. 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.[5]

C. *Loss of Fleeting Revenue*

Zito's claimed lost fleeting revenue stems from the fact that their Algiers Barge Fleeting area was closed from July 23, 2008 at 03:30 hours and saw a loss of profit (due to historical averages for all three fleeting areas) until at least August 13, 2008. However, Zito was able to continue to earn profit at the Algiers fleeting area from July 23 through July 30, 2008, as there was no movement of barges from the area. Once the barges in this fleeting area were cleared to leave, however, Zito experienced a loss of profits for the time period between July 31 and August 12, 2008. Zito calculates this loss by establishing historical averages and applying the Ingram rates to the total number of projected barges lost.

Zito breaks down this loss as follows:

Historical Averages: Zito provided the NPFC with a calculation of daily barge counts by providing fleet pictures for 2005, 2006 and 2007:[6]

Date	**2005**	**2006**	**2007**	*(Year)*
7/23	24	47	20	*(No. of Barges in fleet)*
7/24	27	73	28	

[5] Polreps 1-21; documenting river closures and traffic management through August 18, 2008.
[6] See Fleet Pictures, Zito Exhibits A-11a-c, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010

7/25	32	66	27	
7/26	26	80	24	
7/27	20	50	42	
7/28	16	49	42	
7/29	20	57	42	
7/30	16	49	39	
7/31	23	54	37	
8/01	34	*	31	
8/02	27	44	37	
8/03	23	57	38	
8/04	20	64	30	
8/05	16	62	30	
8/06	25	68	29	
8/07	38	72	33	
8/08	36	63	24	
8/09	30	67	47	
8/10	24	69	62	
8/11	26	74	63	
8/12	25	73	58	
Totals:	528	1238	715	
Divided by 21*:	25.14	61.90	34.05	*(Average barges in fleeting area for the 21-day period, 7/23 through 8/12/2008)*

** The barge count for 8/01/2006 was not included with the claim submission; therefore, 2006 averages are taken out of a 20-day period.*

When adding up these three totals and then diving them by three, the historical average amounts to approximately 41 barges per day at the Algiers Barge Fleeting Area (25.14 + 61.90 + 34.05 = 121.09; 121.09/3 = 40.36, or 41 when rounded up).

Taking this Historical Average of 41, Zito takes the actuals from July 31 through August 12 in 2008 (as they continued to get paid from July 23 through July 30, 2008) in order to find the difference for each day and calculate the approximate loss:

Date	Barges in Fleet	Difference from Historical Average (41)
7/31	40	1
8/01	40	1
8/02	37	4
8/03	26	15
8/04	15	26
8/05	5	36
8/06	11	30
8/07	1	40
8/08	1	40
8/09	1	40
8/10	1	40
8/11	1	40
8/12	1	40

	Total Fleeting Loss:	**353**

Multiplied by $33.00 per barge[7]: $11,649.00

The total fleeting loss, then, is estimated to be approximately **$11,649.00** when applying the Ingram rates.

D. *Loss of Boat Revenue for the M/V Connie Z*

Zito is claiming a loss of boat revenue due to the closing of the Mississippi River and the fouling of the M/V Connie Z in the amount of $61,288.47 from July 23 through August 12, 2008. The Connie Z was required, under USCG regulations, to be manned and was usually in continual use moving barges in assembling and breaking up barge tows for Zito.[8] While the M/V Connie Z commenced operating as a trip boat on August 5, 2008, it still experienced a loss for the duration of the affected time period.[9]

Zito breaks down this loss as follows:

Historical Averages: Zito provided the NPFC with a calculation of daily ins/outs per day from 7/23 through 8/13/2008 in 2006 and 2007 for the M/V Connie Z:

Date	**2006**	**2007**	*(Year)*
7/23	53	21	*(No. of ins/outs)*
7/24	15	6	
7/25	18	9	
7/26	51	24	
7/27	3	7	
7/28	24	19	
7/29	29	29	
7/30	15	21	
7/31	33	9	
8/01	17	10	
8/02	27	22	
8/03	22	36	
8/04	27	19	
8/05	11	22	
8/06	27	7	
8/07	21	10	
8/08	3	22	
8/09	9	29	
8/10	29	33	
8/11	32	4	
8/12	63	16	
8/13	2	26	
Totals:	531	401	
Divided by 22:	24.14	18.23	

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[7] Ingram Rate, which includes the fuel surcharge. See Zito Claim Response letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

[8] See email from MST2 Brandi Sable to Ms. Alyssa Lombardi, NPFC, dated 4/20/2010.

[9] See Zito Claim Submission letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

Taking this Historical Average of 21.19, Zito calculates the approximate loss as such, based on the Ingram rate of $219.00 per move[10]:

21.19 (average moves per day) multiplied by 21 days (7/23 through 8/12/2008) equals 444.99, or approximately 445 total moves. Applying the Ingram Rate, $219.00 (which includes all fuel surcharges), to this, the total amount that Zito would have made for the Connie Z amounts to approximately $97,455.00 ($219.00 X 445 = $97,455.00). The actual income for the M/V Connie Z during this time period amounts to $36,166.53.[11] Therefore, subtracting the actual profit from the projected profit of $97,455.00, the total loss of earnings equals approximately **$61,288.47** ($97,455.00 - $36,166.53 = $61,288.47).

E. *Expenses Related to the Assist Boat, M/V Shane C*

Zito is claiming loss of profits due to the hiring of the M/V Shane C to do shifting and fleeting to clean barges and to move the cleaned barges to outbound tows on July 31, 2008, in the amount of $5,629.25. Shane C. Marine Towing, LLC (Shane Marine) charged Zito $275.00 per hour, with a contracted fuel surcharge of 78%.[12] Zito directed the Shane C from approximately 03:30 hours until 15:00 hours on 7/31/2008, for a total of 11.5 hours.[13] 11.5 hours at $275.00 per hour totals $3,162.50, to which the 78% fuel surcharge is applied. 78% of $3,162.50 equals $2,466.75. When combining the two totals, the total invoice for use of the Shane C equals **$5,629.25**.

F. *Analysis:*

Zito Fleeting, LLC submitted a claim with which they were able to demonstrate that they were indeed negatively impacted by the DM 932 oil spill. After researching and reviewing the claim, the NPFC has determined that all of Zito's claimed lost profits, when applying the Ingram Rate, are valid and compensable. Additionally, Zito was required to provide historic data and records for activity at it's other two fleeting areas to demonstrate no increase activity at those locations resulted from the reduced activity at the impacted facility.[14]

G. *Determination:*

The NPFC hereby determines that the OSLTF will pay **$76,173.05** as full compensation for the lost profits incurred by the Claimant as a result of the increased expenses incurred during the DM 932 oil spill and submitted to the NPFC under claim # N08057-069. All increased expenses claimed are for charges paid for by the Claimant without mitigating or offsetting increases in revenues for the voyage in question. The lost profits determined are 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: $76,173.05

[10] See Ingram Rate Sheet, Zito Exhibit C-8 and Zito Claim Response letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

[11] See Daily Boat Log for M/V Connie Z, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010 and Actual Income of Connie Z, Zito Exhibit C-9, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

[12] See Shane C. Marine Towing, LLC Invoice, Zito Exhibit A-7, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010 and Joseph C. Domino Inc. Marine Towing Rate Sheet, Zito Exhibit C-5, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

[13] See Shane C Domino Towing Daily Log, Zito Exhibit A-6, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010

[14] See Historical Averages documents for MM 105 and MM 103, sent vi email by Zito to Ms. Alyssa Lombardi, NPFC, dated 3/30/2010 and 4/06/2010, respectively

Claim Supervisor: ***Tom Morrison***

Date of Supervisor’s review:

Supervisor Action:

Supervisor Comments: