

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 9/01/2010
Claim Number	: N08057-070
Claimant	: Kandilousa Special Maritime Enterprise
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: <u>Alyssa Lombardi</u>
Amount Requested	: \$58,515.23

### **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<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**

Chaffe McCall, L.L.P. (Chaffe) submitted a claim into the National Pollution Funds Center (NPFCC) for its client, Kandilousa Special Maritime Enterprise (Kandilousa), owners of the M/V Kandilousa. At the time of the collision, the M/V Kandilousa was under charter to Litasco S.A. Geneva (Litasco)<sup>2</sup> (with another charter secured with ST Shipping & Transport Pte. Ltd. (ST Shipping and Transport) to commence upon completion of the Litasco charter.<sup>3</sup>). The M/V Kandilousa arrived at the Mississippi River on July 21, 2008 to discharge cargoes of crude oil at various terminals. The first stop was at Port Allen Dock in Baton Rouge (Mississippi River Mile Marker (MM) 228.9), finishing by 1854 hours on July 23, 2008. After awaiting berth, the M/V Kandilousa continued its discharge sequence at the Motiva Norco Refinery (MM126), completing operations for this charter at 1824 hours on July 25, 2008. After proceeding to the Bonne Carre Anchorage (MM129) to replenish bunkers, the M/V Kandilousa was ready by 0645 hours on July 26, 2008 to commence its next voyage.<sup>4</sup> However, because of continued vessel-movement restrictions, the M/V Kandilousa was delayed in sailing until 0630 hours on July 28, 2008. Kandilousa, therefore, claims a total delay of 1 day, 23 hours and 45 minutes, or 1.99 days.

The claimant states that the M/V Kandilousa was taken off-hire during this delay period and, in order to determine the estimated loss of profits, Kandilousa applied the demurrage rate of

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

<sup>2</sup> See Tanker Voyage Charter between Litasco and Kandilousa, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

<sup>3</sup> See Tanker Voyage Charter between ST Shipping and Transport and Kandilousa, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

<sup>4</sup> See Port Logs and Statement of Facts, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

\$26,500.00 (less the 1.25% address commission<sup>5</sup>) from the ST Shipping and Transport charter.<sup>6</sup> Applying this rate to the 1.99 days, Kandilousa calculates a direct income loss of \$51,738.23 for this time period. However, the documentation provided supports a sum of \$52,075.81, which will be the amount used when considering this claim.

During these 1.99 days, Kandilousa also claims an additional 10.04 metric tons of MDO fuel, increasing the claim by \$6,777.00. When the projected income loss and increased bunkers are combined, Kandilousa's claim totals \$58,852.81.

#### **IV. APPLICABLE LAW**

Claims for the removal costs or damages must first be presented to the RP per 33 USC 2713(a). If the RP denies all liability for 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)(4). 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 impairment of earnings capacity as a result of loss or destruction of real or personal property or natural resources. 33 USC 2702(b)(2)(E) 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 2712 (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 under this act against the Fund...”<sup>33</sup> 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.

With regard to claims for loss of 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.*

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<sup>5</sup> See “Eletson Commission Clause,” in the Incorporated Clauses section of the Tanker Voyage Charter between ST Shipping and Transport and Kandilousa, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

<sup>6</sup> See Section I of the Tanker Voyage Charter between ST Shipping and Transport and Kandilousa, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

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 is able to establish an entitlement to lost profits or impairment of earning capacity, 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 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 \$58,852.81 in loss of profits, resulting from the discharge of oil into the Mississippi River on July 23, 2008.
6. The claimant asserts that, if not for the oil spill, the M/V Kandilousa would not have incurred a delay or required additional bunkers.
7. Chaffee, on behalf of its client, presented the claim to the RP prior to submitting the claim the NPFC. The RP denied the claim. Upon receipt of this claim the NPFC notified the RP of the claim. The RP responded by denying 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 released significant amounts of oil into and caused 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>7</sup>

The Claimant provided a record of the incident by submitting Port Logs/Statement of Facts for the Litasco charter, which demonstrates that the Mississippi River had closed and vessel traffic was delayed and 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:**

Kandilousa claims that the oil spill directly caused them loss of profits because the M/V Kandilousa was sitting idle, causing Kandilousa a loss of earning capacity for 1.99 days. Kandilousa breaks down this delay as follows:

From 7/26/2008 @ 0645 hours until 7/28/2008 @ 0630 hours

The total stoppage time: 1 day, 23 hours and 45 minutes, or approximately 1.99 days.<sup>9</sup>

Per the terms of the agreement between Kandilousa and ST Shipping and Trading, Kandilousa alleges that it would have charged ST Shipping and Trading a demurrage rate of \$26,500.00 a day, less the 1.25% address commission per the Eletson Commission Clause, for the 1.99 days the M/V Kandilousa was detained due to the oil spill. Multiplying \$26,500.00 by 1.99 days = \$52,735.00. Applying the commission clause of \$1.25% brings this total down \$659.19 to the approximate claimed loss of **\$52,075.81**.

**D. Increased Bunkers**

Kandilousa claims that the delay resulted in an increase in the consumption of bunkers. Kandilousa shows the approximate breakdown of the amount of bunkers consumed during the idle periods:<sup>10</sup>

<u>Date</u>	<u>Time</u>	<u>IFO</u>
7/26/2008	0000 Hours 2400 Hours	5.42 mt
7/27/2008	0000 Hours 2400 Hours	4.79 mt
7/28/2008	0000 Hours 2400 Hours	5.04 mt

<sup>7</sup> Polreps 1-18; documenting river closures and traffic management through 8 August 2008

<sup>8</sup> See Port Logs and Statement of Facts, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

<sup>9</sup> See Port Logs and Statement of Facts, submitted with the claim by Chaffe for Kandilousa on 2/17/2010

<sup>10</sup> See "Additional Bunkers Consumed" in the supplemental documents cover letter, submitted to the NPFC by Mr. **Dan Tadros**, Chaffe-McCall, on 7/07/2010

**Total:**

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**10.04 mt**

The M/V Kandilousa was delayed for the entirety of July 27, 2008. Thus, 4.79 metric tons of IFO is attributable to fuel burned on this day that the vessel was delayed a full 24-hour period.

However, and as **Chaffe** shows, the M/V Kandilousa was not delayed for the entirety of both July 26 and July 28, 2008. As the crew of this vessel recorded fuel measurements at midnight each night, some estimation is required for these two days. Kandilousa was delayed approximately 17.25 of the 24 hours on July 26, 2008. With an average fuel consumption of 0.2259 mt/hour (5.42 mt/ 24 hours = 0.2259 mt/hr), the approximate amount of IFO bunkers consumed would be 3.89 mt (0.2259 mt/hr X 17.25 hours = 3.89 mt). Additionally, the M/V Kandilousa was delayed approximately 6.5 of the 24 hours on July 28, 2008. With an average fuel consumption of 0.21 mt/hour (5.04 mt/24 hours = 0.21mt/hr), the approximate amount of IFO bunkers consumed would be 1.36 mt (0.21 mt/hr X 6.5 hours = 1.36 mt). When combining the three totals (3.89 mt + 4.79 mt + 1.36 mt), the amount of additional IFO consumed approximates to 10.04 mt.

At a cost of \$675.00/mt, the additional IFO consumed amounts to **\$6,777.00** (\$675.00/mt X 10.04 mt = \$6,777.00).<sup>11</sup>

#### **E. Analysis:**

**Chaffe** submitted a claim for its client, Kandilousa, asserting that the M/V Kandilousa was negatively impacted and delayed by the DM 932 oil spill. In this case, the M/V Kandilousa had scheduled a second charter, the ST Shipping and Trading charter, while the vessel was fulfilling the terms of the first charter, Litasco. It is unclear from the submitted documentation when the Litasco charter was completed. It is also unclear when the Kandilousa was available to initiate the ST Shipping and Trading charter. The ST Shipping and Trading charter provides that the laycan<sup>12</sup> was narrowed to a four-day window by 1200 hours NYT Monday, July 28, 2008. No documentation was submitted to establish that the second charter commenced under the laycan terms of that charter or whether there was a delay. The documentation does indicate that agreed to revenues were achieved on both voyages. It does not appear from the evidence that any party was invoiced for or paid any demurrage or penalty as a result of the delay.

In summary, Claimant has not provided sufficient or specific documentation to establish that the Kandilousa suffered a loss of profits or impairment of earning capacity resulting from the discharge of oil from the DM 932 and closure of the Mississippi River in July 2008. Both the Litasco and ST Shipping and Trading charters were completed, earning Kandilousa its projected revenues for each. However, per the terms of the Litasco Charter, the increased consumption of bunkers equaled a direct loss of profit to Kandilousa, as it had no way to recover those costs. In other words, given the charter, an increase in bunkers is at the owner's expense. Therefore, the added costs of \$6,770.00, as discussed in sub-point D above, are valid and compensable under OPA.

#### **F. Determination:**

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<sup>11</sup> See Bominflot Fuel Invoice, submitted to the NPFC by Mr. **Dan Tadros**, **Chaffe-McCall**, on 7/07/2010

<sup>12</sup> Laycan is a ship chartering term which stands for *laydays commencement and cancelling*; specifies the earliest date on which *laytime* can commence and the latest date, after which the *charterer* can opt to cancel the *charterparty* (Maritime Dictionary, found at: m-i-link.com)

The NPFC hereby determines that the OSLTF will pay **\$6,777.00** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-070. 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: \$6,777.00**

Claim Supervisor: **Thomas S. Morrison**

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: