CLAIM SUMMARY / DETERMINATION FORM

Date	:	7/21/2010
Claim Number	:	N08057-073
Claimant	:	Atlas Trading and Shipping
Type of Claimant	:	Corporate
Type of Claim	:	Loss of Profits and Earning Capacity
Claim Manager	:	Alyssa Lombardi
Amount Requested	:	$205,588.33

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[1] 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) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Atlas Trading and Shipping, Ltd. (Atlas). At the time of the collision, The M/T Falcon Traveler—owned by Newbrook Shipping (Newbrook)-- was time-chartered by Atlas to move cargo at the Cargill Westwego Grain Elevator (Cargill Westwego), located at Mississippi River Mile Marker (MM) 103. Arriving at the Mississippi River on July 18, 2008, the Falcon Traveler applied for berthing space at Cargill Westwego at 1420 hours on July 19, 2008 and moved to General Anchorage (GA) (MM 89.5) to wait for the availability of its loading berth.

Due to the DM 932 oil spill in the early morning of July 23, 2008, the USCG immediately restricted vessel movements on the Mississippi River and, as a result, the M/V Falcon Traveler was unable to move to its intended berth when it became available at 2100 hours on July 23, 2008. In fact, the vessel was made to stay at GA until 1130 hours on July 26, 2008, when it was authorized to shift to a decontamination area for hull cleaning. Ultimately, this cleaning lasted until 0840 hours on July 27, 2008, when the M/V Falcon Traveler was allowed to depart for Cargill Westwego. Atlas, therefore, claims a total delay of 3 days, 11 hours and 40 minutes, or 3.486 days.

Because the M/V Falcon Traveler sat idle and was not able to move its cargo, Atlas claims a loss of profits and earning capacity equivalent to the cost of maintaining the vessel during this delay period. Atlas calculates that, as the daily hire rate was $40,100.00[2] (less the 3.75% address commission[3]) per day, applying this amount to the 3.486 days of delay constitutes a direct loss of profits in the amount of of $134,550.81. However, the claims manager calculates this claimed loss, based on the

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

[2] See Line 51 in the Voyage Time Charter between Newberg and Atlas, submitted with the claim by Chaffe for Atlas on 3/10/2010

[3] See Line 175 in the Voyage Time Charter between Newberg and Atlas, submitted with the claim by Chaffe for Kandilousa on 3/10/2010

documentation provided, to instead be $134,546.53, and, therefore, this amount will be used when considering the claim.

Additionally, Claimant seeks $61,799.06 on the basis that the M/V Falcon Traveler was forced to repeat its U.S. Department of Agriculture hold inspections because of the delay. Finally, Claimant seeks $9,238.16, costs associated with additional bunkers consumed during the delay. When combining the totals, Atlas full claim for loss of profits and earning capacity equals $ 205,583.75.

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; . . .

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).

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.

<u>V. DETERMINATION OF LOSS:</u>

A. *Overview:*

1. 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.
2. 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.
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 $205,588.33 in loss of profits, as a consequence of the discharge of oil into the Mississippi River and the M/T Falcon Traveler's additional time and dispatch expenses resulting from the discharge.
6. The claimant asserts that if not for the oil spill the voyage would not have resulted in additional time, fuel and dispatch fees.
7. Presentment of costs to the RP was made by Chaffe McCall L.L.P., representatives for Atlas, prior to the submission of the claim to the NPFC. The RP failed to settle the claim within 90 days. The NPFC notified the RP of the claim submitted to the OSLTF and forwarded the costs to the RP. The RP denied the claim..
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant to support the claim. .

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.[4] . The M/V Falcon Traveler was detained at General Anchorage, awaiting USCG clearance to depart, which was granted on July 27, 2008.[5]

The Claimant provided a record of the incident by submitting Voyage Documents and "Statement of Facts," which demonstrate that the Mississippi River had closed and vessel traffic was redirected and/or restricted during the oil removal efforts.[6] 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.[7]

C. ***Vessel Delay Time:***

Atlas claims that the oil spill directly caused them loss of profits because the M/V Falcon Traveler was sitting idle, increasing its voyage by 3.486 days. M/V Falcon Traveler was stopped as follows:[8]

7/23/2008 @ 2100 hours until 7/27/2008 @ 0840 hours

The total stoppage time claimed by Atlas: 3 days, 11 hours and 40 minutes, or approximately 3.486 days.

Per the terms of the charter agreement between Atlas and Newbrook, Newbrook charged a daily hire rate of $40,100.00 per day. $40,100.00 x 3.486 = $ 139,788.60. Applying the address commission of 3.75% takes this down to a total of **$134,546.53** ($139,788.60 - $5242.07 = $134,546.53) in freight damages due to the oil spill.[9]

D. ***Increased Bunkers***

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[4] See Lines 51 and 175 in the Voyage Time Charter between Newberg and Atlas, submitted with the claim by Chaffe for Atlas on 3/10/2010
[5] See Statement of Facts, submitted with the claim by Chaffe for Atlas to the NPFC on 3/10/2010
[6] See Statement of Facts, submitted with the claim by Chaffe for Atlas to the NPFC on 3/10/2010
[7] Polreps 1-18; documenting river closures and traffic management through August 8, 2008
[8] See Statement of Facts, submitted with the claim by Chaffe for Atlas to the NPFC on 3/10/2010
[9] See Lines 51 and 175 in the Voyage Time Charter between Newberg and Atlas, submitted with the claim by Chaffe for Atlas on 3/10/2010

Atlas asserts that the delay resulted in an increase in the consumption of bunkers. In their claim submission, Atlas shows the breakdown of the amount of bunkers consumed during the idle period (From initial arrival at GA to Cargill Westwego):[10]

Times and Dates:	Costs:	IFO	MDO
From 2100 Hours on 7/23/2008 to 0840 Hours on 7/27/2008		$8052.92	$976.08
	Total Additional Fuel Costs:	**$9,029.00**	

E. ***Additional CVE***

Atlas claims additional CVE in the amount of **$209.16**.[11]

F. ***Additional Dispatch Costs***

Atlas is claiming additional costs due to double dispatch fees:[12]

Despatch at Loading	Rate/Day	Total
3.08 days (3 days, 1 hour, 57 min)	$20,500.00	$61,779.06

G. ***Analysis:***

Atlas was able to demonstrate that the M/V Falcon Traveler was negatively impacted and delayed by the DM 932 oil spill. Atlas shows a correct delay period of 3.486 days between 2100 hours on 7/23/2008 until anchors up at 0840 on 7/27/2008. According to the Time Charter Party agreement between Atlas and Newbrook,[13] Newbrook continued to charge Atlas, and Atlas was required to pay, $40,100.00 per day (pro rata) during the duration of the delay. Because the time charter between Atlas and Newbrook was a one-time charter, relatively short in duration (45-50 days), this delay of 3.486 did negatively impact Atlas's profits because, although they were paid for the cargo delivered, the additional $134,546.53 due to Newbrook reduced Atlas' profits because, as the expenses increased, the projected profits decreased.

Atlas claims additional dispatch expenses in the amount of $61,799.06. However, they have not provided an explanation for these costs—or even a clear understanding of where they come from. Both the Time Sheet and the Cargill invoice provided with the claim[14] state the loss of $61,799.06 is a result of a daily dispatch rate of $20, 050.00 for 3 days, 1 hour and 57 minutes (On the other hand, Atlas, in their claim submission, claims this $61,799.06-loss is due to having to repeat USDA hold inspections.[15] Because Atlas has not met their burden to prove the origin of these costs and how they were caused by the oil incident in the Mississippi River, they are denied.

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[10] See Claim Summary sheet, submitted with the claim by Chaffe for Atlas on 3/10/2010
[11] *Ibid.*
[12] See Cargill Dispatch Invoice # 6422, submitted with the claim by Chaffe for Atlas to the NPFC on 3/10/2010
[13] See Rider Clause 61 in the Voyage Time Charter between Newberg and Atlas, submitted with the claim by Chaffe for Atlas on 3/10/2010
[14] See Cargill Invoice # 6422 and Atlas Time Sheet, both submitted with the claim by Chaffe for Atlas on 3/10/2010
[15] See Claim Submission letter from Mr. Dan Tadros, dated February 23, 2010, submitted with the claim by Chaffe for Atlas on 3/10/2010

Additionally, Atlas has not proven, through the preponderance of the evidence, that they did incur $9,238.16 in additional fuel costs and CVE. The cost explanation summary sheet submitted is not sufficient and the claimant has failed to provide the documentation requested by the NPFC. Therefore, these costs are denied.

H. *Determination:*

The NPFC hereby determines that the OSLTF will pay **$134,546.53** as full compensation for the lost profits incurred by the Claimant as a result of the increased expenses incurred during the voyage charter of the FALCON TRAVELER and submitted to the NPFC under claim # N08057-073. 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: $134,546.53

Claim Supervisor: ***Tom Morrison***

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: