CLAIM SUMMARY / DETERMINATION FORM

Date	:	7/13/2010
Claim Number	:	N08057-075
Claimant	:	Zegluga Polska Shipping, Ltd.
Type of Claimant	:	Corporate
Type of Claim	:	Loss of Profits and Earning Capacity
Claim Manager	:	Alyssa Lombardi
Amount Requested	:	$62,088.66

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.C., Inc. (Chaffe) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Zegluga Polska S.A. (Zegluga Polska) (which is managed by Polska Zegluga Morska). At the time of the collision, the M/V Kopalnia Borynia was under a North American Grain (Norgrain) form charter party to Archer Daniels Americas, Inc. (Archer Daniels).[2] The M/V Kopalnia Borynia arrived at the Mississippi River on July 19, 2008, and anchored at General Anchorage (Mississippi River Mile Marker (MM) 91) to await the availability of its loading berth. On July 22, 2008, the vessel moved to Kenner Bend Anchorage (Kenner Bend) (MM114.7) in order to be closer to its intended berth, ADM Grain Elevator (MM120.6) once it became available.

At 1745 hours on July 24, 2008, the M/V Kopalnia Borynia proceeded to MM120.6 to begin loading operations, which were complete by 0620 hours on July 25, 2008. At this point in time, the Zegluga Polska claims the M/V Kopalnia Borynia was ready to get underway to the next leg of its voyage; however, due to vessel traffic restrictions put in place after the oil spill, the M/V Kopalnia Borynia was forced to return to Kenner Bend. The vessel sat idle at Kenner Bend from 0900 hours on July 25, 2008 through 1810 hours on July 27, 2008, when it was directed by the USCG to the Bootheville Anchorage (MM12.5) to have its hull cleaned. The M/V Kopalnia Borynia was again delayed from 0115 hours until 0905 hours on July 28, 2008, when hull-cleaning was complete and it began the rest of its voyage. In total, Zegluga Polska is claiming a total delay time of 2 days, 17 hours, or 2.70833 days.

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

[2] See Norgrain Charter Party between Zegluga Polska and Archer Daniels, dated 11/28/2008, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010

Because the M/V Kopalnia Borynia's movement was restricted during this delay period, and in order to determine the estimated loss of profits, Zegluga Polska has applied the demurrage rate of $18,000.00 as owed them under the Norgrain charter.[3] Applying this rate to the 2.70833 days, Zegluga Polska calculates a direct income loss of approximately $48,750.00 for this time period. Additionally, during these 2.70833 days, Zegluga Polska claims an additional 7.216 metric tons (mt) of IFO fuel and 2.0 mt of MDO fuel, increasing costs by $6,195.38, as well as $7,143.28 in additional pilot and tug expenses. When the projected income loss, increased bunkers and additional pilots and tugs are combined, Zegluga Polska's claim totals $62,088.66.

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

[3] See Demurrage, Line 181-185 of the Norgrain Charter between Archer Daniels and Zegluga Polska, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010

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 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)

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

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 $62,088.66in loss of profits, as a consequence of the M/V Kopalnia Borynia's additional time, fuel, and costs.
6. The claimant asserts that if not for the oil spill the voyage would not have resulted in additional time and fuel.
7. Presentment of costs to the RP was made by Chaffe, representatives for Zegluga Polska, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded 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 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] At the time of the spill, there were many large vessels in the area that were oiled due to the DM 932 oil spill. The M/V Kopalnia Borynia had to stay in port upriver from the dirty zone, and then, later at a decontamination area, awaiting USCG clearance to depart, which was granted on July 28, 2008.

The Claimant provided a record of the incident by submitting Port Logs/Statement of Facts, which clearly demonstrate that the Mississippi River had closed and vessel traffic was redirected during the oil removal efforts.[5] 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:***

Zegluga Polska is claiming that the oil spill directly caused them loss of profits because the M/V Kopalnia Borynia was sitting idle during the river closure and while it waited to be decontaminated, increasing its voyage by 2.70833 days. The M/V Kopalnia Borynia was delayed as follows:

From 7/25/2008 @ 0900 hours until 7/27/2008 @ 1810 hours
From 7/28/2008 @ 0115 hours until 7/28/2008 @ 0905 hours

The total stoppage time was 2 days, 17 hours, or approximately 2.70833 days.[6]

Per the terms of the Norgrain charter party agreement between Archer Daniels and Zegluga Polska,[7] demurrage was set at a rate of $18,000.00 a day for the 2.70833 days they were detained due to the oil spill. Multiplying the $18,000.00 daily rate by 2.70833 days of delay equals approximately **$48,750.00** in loss of revenue due to the demurrage.

D. ***Increased Bunkers***

Zegluga Polska claims that the delay resulted in an increase in the consumption of bunkers and show the approximate breakdown of the amount of bunkers consumed during the idle periods:[8]

Date	Time	IFO	MDO
7/25/2008	0000 Hours	370.9	66.5
	2400 Hours	-369.7	-65.0

[4] Polreps 1-18; documenting river closures and traffic management through 8 August 2008.
[5] See Claim submission forms, submitted by Chaffe McCall, L.L.C. to the NPFC on 3/17/2010
[6] See Port Logs, submitted with the claim by Chaffe McCall, L.L.C. to the NPFC on 3/17/2010
[7] See Lines 181-185 of the Norgrain Charter between Archer Daniels and Zegluga Polska, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010
[8] See Voyage Logs, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

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		1.2 mt	1.5 mt
7/26/2008	0000 Hours	369.70	65.0
	2400 Hours	-368.25	-64.2
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		1.45 mt	1.8 mt
7/27/2008	0000 Hours	368.25	64.20
	2400 Hours	-363.80	-63.85
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		4.45 mt	0.35 mt
7/28/2008	0000 Hours	363.8	63.85
	2400 Hours	-354.4	-63.10
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		9.4 mt	0.75 mt
	Total:	**16.5 mt**	**4.4 mt**

The top number represents the amount of oil (in tons) that were read at 0000 hours each day, subtracting the amount of oil read at 2400 hours that same day to find the difference.

The M/V Kopalnia Borynia was delayed for the entirety of July 26, 2008. Thus, 1.45 mt of IFO is attributable to fuel burned on days in which the vessel was delayed a full 24-hour period. However, the M/V Kopalnia Borynia was not delayed for the entirety of July 25, July 27, and July 28, 2008. As the crew of this vessel recorded fuel measurements at midnight each night, some estimation is required for these three days. Zegluga Polska was delayed approximately 15 of the 24 hours on July 25, 2008. With an average fuel consumption of 0.05 mt/hour (1.2 mt/ 24 hours = 0.05 mt/hr), the approximate amount of IFO bunkers consumed would be 0.75 mt (0.05 mt/hr X 15 hours = 0.75 mt). The M/V Kopalnia Borynia was delayed approximately 18 of the 24 hours on July 27, 2008. With an average fuel consumption of 0.185 mt/hour (4.45 mt/24 hours = 0.185 mt/hr), the approximate amount of IFO bunkers consumed would be 3.33 mt (0.185 mt/hr X 18 hours = 3.33 mt). Additionally, the M/V Kopalnia Borynia was delayed approximately 8 of the 24 hours on July 28, 2008. With an average fuel consumption of 0.392 mt/hour (9.4 mt/24 hours = 0.392 mt/hr), the approximate amount of IFO bunkers consumed would be 3.136 mt (0.392 mt/hr X 8 hours = 3.136 mt). When combining the three totals (0.75 mt + 3.33 mt + 3.136 mt), the amount of additional IFO consumed approximates to 7.216 mt.

At a cost of $625.00/mt, the additional IFO consumed amounts to $4,510.00 ($625.00/mt X 7.216 mt = $4,510.00).[9]

The 1.8 mt MDO is attributable to fuel burned on this day in which the vessel was delayed a full 24-hour period, as the M/V Kopalnia Borynia was delayed for the entirety of July 26, 2008. As it was not delayed for the entirety of July 25, July 27 and July 28, 2008, the same approximation calculation as used above to find IFO is applied here in finding the MDO consumed. The M/V Kopalnia Borynia was delayed approximately 15 of the 24 hours on July 25, 2008. With an average fuel consumption of 0.063 mt/hour (1.5 mt/24 hours = 0.063 mt/hr), the approximate amount of MDO bunkers consumed would be 0.945 mt (0.063 mt/hr X 15 hours = 0.945 mt).

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[9] See Hess Corporation Fuel Invoice, submitted to the NPFC by Mr. Allen Davis, Chaffe-McCall, via email on 6/25/2010

The M/V Kopalnia Borynia was delayed approximately 18 of the 24 hours on July 27, 2008. With an average fuel consumption of 0.015 mt/hour (0.35 mt/24 hours = 0.015 mt/hr), the approximate amount of MDO bunkers consumed would be 0.27 mt (0.015 mt/hr X 18 hours = 0.27 mt). Lastly, the M/V Kopalnia Borynia was delayed approximately 8 of the 24 hours on July 27, 2008. With an average fuel consumption of 0.031 mt/hour (0.75 mt/24 hours = 0.031 mt/hr), the approximate amount of MDO bunkers consumed would be 0.248 mt (0.031 mt/hr X 8 hours = 0.248 mt). When combining the totals (0.945 mt + 0.27 mt + 0.248 mt), the amount of additional MDO consumed approximates to 1.463 mt. While Zegluga Polska estimates a total of 2.0 mt of MDO, the NPFC will only consider 1.463 mt as compensable costs.

At a cost of $1152.00/mt, the additional MDO consumed amounts to **$1685.38** ($1152.00/mt X 1.463mt = $1685.38).

The total amount of additional bunkers (IFO and MDO) consumed as a direct result of the oil spill equals approximately **$6,195.38**.

E. *Additional Costs*

Zegluga Polska is claiming additional costs due to increased pilot and tug fees.

Pilots:

Increased pilotage fees can be broken down in the following way:[10]

7/25/2008:

Shifting:		$729.41
Transportation:		$144.28
Communications:		$5.57
	Total:	$1286.99

7/27/2008:

Transportation:		$144.28
	Total:	$144.28

7/28/2008:

Transportation:		$183.00
Boat Service:		$373.64
	Total:	$556.64

7/28/2008:

[10] See Crescent Towing and Salvage Co. Inc. invoices, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010

Transportation:	$183.00
Boat Service:	$373.64
Standing By:	$515.52
Total:	$1072.16
Total Claimed Loss in Additional Pilots:	**$3060.07**

Tugs:

Increased tug fees can be broken down into the following categories:[11]

Service	Quantity/Hours	Unit Price	Total
Assist vessel out of anchorage	1 hour	$3600.00	$3600.00
Gross Registered Tons	8893		$234.00
Fuel Surcharge			$1648.62
		Total:	$5482.62
		Discount:	($1399.41)
		Total Additional Tugs Expenses:	**$4083.21**

F. ***Analysis:***

Chaffe submitted a claim for their client, Zegluga Polska, in which they were able to demonstrate that the M/V Kopalnia Borynia was indeed negatively impacted and delayed by the DM 932 oil spill. However, simply because a vessel is delayed does not always translate into a loss of profit claim under OPA, as is the case here.

While it is clear the M/V Kopalnia Borynia was off-hire, Zegluga Polska has not met their burden of proof that these 2.70833 days affected their revenue or income for 2008 as Zegluga Polska owns the M/V Kopalnia Borynia—regardless if it is chartered or not. Zegluga Polska claims that, because of the delay, they incurred a reduction in charter hire in the amount of $18,000.00 per day (pro rata). They reason that, if the charterer had caused the delay, Zegluga Polska would have been able to collect demurrage to offset the additional costs and expenses.[12] Zegluga Polska also states that, if the delay was caused by a third-party vessel's negligence, then they would have had adequate remedy at law to recover costs.

Zegluga Polska's claim is flawed in that they are trying to apply these same arguments to the delay caused by the DM 932 oil spill. Polsteam Shipping Co. Ltd. (Polsteam (Owners of the M/V Kopalnia Borynia)) entered into a Norgrain form charter by which Polsteam was to receive a lump sum freight of $635,000.00 from Archer Daniels Midland Shipping Company for the voyage.[13] Zegluga Polska received the original agreed-upon payment for this charter—the delay did not affect it. Any demurrage or compensation for additional time that would have been earned would be considered extra income but for the oil spill. No demurrage, then, is not lost revenue.

[11] See New Orleans-Baton Rouge Steamship Pilots Association and Crescent Towing and Salvage Co. Inc. invoice, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010

[12] See Tadros letter to Ms. Alyssa Lombardi, NPFC, sent via email and dated 6/25/2010

[13] See Clause 49 "Grain" of the Norgrain Charter between Cargill and Zegluga Polska, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010

The claimant quotes the views of Mr. Robert L. Dunn in *Recovery of Damages for Lost Profits* (6th ed. 2005).[14] While both Mr. Dunn and the claimant are correct in stating that a "reasonable certainty" that profits were lost is necessary. What is not understood here is that the claimant still has the obligation under OPA to show that profits were, in fact, lost. While Zegluga Polska has shown (in providing its Time Sheets for the M/V Kopalnia Borynia[15]) that they were extremely busy during FY 2008, they have not shown where profit was lost. No voyages were canceled as a direct result of this oil spill and, as Zegluga Polska was under a Norgrain charter for these voyages, the preponderance of the evidence has not shown that income was lost, either. In fact, by providing the Time Sheets, Zegluga Polska shows that the required sequence of seven to ten consecutive charters for the M/V Kopalnia Borynia[16] was fulfilled in spite of this delay.

Zegluga Polska does prove, through documentation provided the NPFC, that they did incur damages in the amount of **$13,338.66** for increased bunkers, pilots and tugs as a direct result of the oil spill. These added costs (as explained in sub-points D and E above) are valid and compensable.

G. *Determination:*

The NPFC hereby determines that the OSLTF will pay **$13,338.66** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-075. 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: $13,338.66

Claim Supervisor: ***Thomas S. Morrison***

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments:

[14] See Tadros letter to Ms. Alyssa Lombardi, NPFC, sent via email and dated 6/25/2010
[15] See Time Sheets, sent via email by Chaffe for Zegluga Polska on 6/25/2010
[16] See Lines 17-18 of the Norgrain Charter between Cargill and Zegluga Polska, submitted with the claim by Chaffe for Zegluga Polska on 3/17/2010